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VOLUME XLIV

THE ENGLISH REPORTS

COMMON PLEAS

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THE ENGLISH REPORTS

VOLUME CXLIV

COMMON PLEAS

XXII

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COMMON BENCH REPORTS. New Series. CASES
ARGUED and DETERMINED in the COURT of
COMMON PLEAS, and in the EXCHEQUER
CHAMBER, in Trinity and Michaelmas Terms
and Vacations, 1864. By JOHN SCOTT, Esq., of
the Inner Temple, Barrister-at-Law. Vol. XVII.
London, 1865.

[1] CASES ARGUED AND DETERMINED IN THE COURT OF COMMON PLEAS, IN
TRINITY TERM & VACATION, IN THE TWENTY-SEVENTH YEAR OF THE REIGN
OF VICTORIA.

The Judges who usually sat in banco in the term were,—Erle, C. J., Williams, J.,
Willes, J., and Byles, J.; and, in the vacation, Williams, J., Willes, J., Byles, J., and
Keating, J.

RONNEBERG AND OTHERS *v.* THE FALKLAND ISLANDS COMPANY. May 26th, 1864.

[S. C. 34 L. J. C. P. 34; 10 L. T. 530; 10 Jur. N. S. 940; 12 W. R. 914.]

Gunpowder was shipped for Valparaiso on board a vessel chartered on a voyage to
that port, with liberty to touch and stay at the Falkland Islands. On the arrival
of the vessel at Port Stanley, where the captain had goods to unload for the defen-
dants, it was found that by the regulations of the port it would be necessary to
land and store the powder before the vessel could enter the harbour. To avoid the
inconvenience and expense of this, the captain accepted the offer of the agent of
the defendants of the use of a vessel belonging to them, called the "Fairy," in
which to place the powder during his stay at Port Stanley. The defendants' agent
afterwards requiring the "Fairy" for another purpose, without the consent of the
captain transhipped the powder to a half-decked vessel called the "Lily," which the
jury found to be an unsafe and improper vessel for the purpose. Whilst the "Lily"
was anchored outside the harbour, a storm arose and she was sunk, and the powder
lost.—Held, that the defendants were responsible for the value, for that they were
either trespassers in removing the powder without the captain's consent, or bailees
who had been guilty of want of reasonable care.—On the arrival of the ship at
Valparaiso, the consignees of the powder demanded it from the captain, and, not
obtaining it, took proceedings against the ship, which the captain unsuccessfully
resisted, being ultimately compelled to pay the consignees the value of the powder
and the costs:—Held, that the owners of the ship could not claim these costs from
the defendants, they not being a necessary consequence of their wrongful act.

The first count of the declaration stated that the plaintiffs intrusted to the defen-
dants, and the defendants received from the plaintiffs, certain goods, to wit, four
hundred kegs of gunpowder, to be by the defend-[2]-ants safely and securely kept and
stowed in a certain ship of the defendants called the "Fairy," upon certain terms then
agreed upon between the plaintiffs and the defendants: Averment, that, before action
brought, all things had happened and all times had elapsed necessary to entitle the

plaintiffs to the performance by the defendants of the terms of the said bailment, and to sue the defendants for the breaches thereof thereafter mentioned: Breach, that the defendants did not safely or securely keep or store the said gunpowder, agreeably to the terms of the said bailment, but therein made default; and that the defendants, further disregarding their duty under the said bailment, while they had the said gunpowder in their care, wrongfully and without the knowledge or consent of the plaintiffs, removed the said gunpowder from the said ship "Fairy," and placed the same in another and different vessel, and by reason thereof the said gunpowder became wholly lost to the plaintiffs.

The second count stated that the plaintiffs intrusted and delivered to the defendants certain gunpowder, to be taken care of by the defendants for the plaintiffs, upon certain terms agreed upon between the plaintiffs and the defendants in that behalf, and amongst others, upon the terms that the defendants should use due and proper care and diligence in the premises: Averment that, although all things had happened and all times had elapsed necessary to entitle the plaintiffs to sue the defendants for the breach of duty thereafter mentioned: Breach, that the defendants did not use due and proper care or diligence in the premises, but conducted themselves so contrary to the said terms, and so carelessly and negligently and improperly therein, that the said gunpowder was wholly lost: and the plaintiffs said that, by reason of the said several premises, the plaintiffs had been entirely de[3]-prived of the said goods, and had incurred and become liable to pay, and had paid, large sums of money by way of damage to the owners of the said goods, *and were compelled to pay the said parties their costs of obtaining the said damages, and had thereby incurred heavy costs themselves in and about defending themselves from the claim of the said parties*, and by means of the premises the plaintiffs had been and were otherwise damaged.

The declaration also contained counts for money paid, interest, and money found due upon accounts stated.

The defendants traversed the several allegations in the first and second counts of the declaration, and to the common counts pleaded a set off for the use of a certain warehouse and store, and for money paid, &c. Issue thereon.

The cause was tried before Erle, C. J., at the sittings in London after last Hilary term. The facts which appeared in evidence were as follows:—The plaintiffs were the owners of a vessel called the "Johanna Ohiffa," which in March, 1862, was chartered by Messrs. Smith & Gregory, merchants in London, for a voyage to Valparaiso, with liberty to touch at Port Stanley, in the Falkland Islands, with a general cargo, amongst which were four hundred kegs of gunpowder consigned to Messrs. Allsop, at Valparaiso. The ship sailed on the 25th of April, 1862, and arrived at Port Stanley on the 25th of July. Having powder on board, the vessel was not permitted, according to the regulations of the port, to proceed to the ordinary landing place for the purpose of landing some goods which she had for the defendants; and, as it would be expensive to warehouse the powder, the captain accepted the offer of the defendants' agent, Lane, to lend him a vessel of theirs called the "Fairy," a decked vessel [4] of small burthen, in which the powder might be stowed and left outside the harbour. Whilst the "Johanna Ohiffa" was in the harbour unloading the goods consigned to the defendants, Lane, having occasion to use the "Fairy" for another purpose, without the consent of the captain, removed the powder from her into a half decked boat (also belonging to the defendants) called the "Lily," and, a gale coming on, the "Lily," with the powder on board, sank. Some of the powder was got up, but in a damaged state and the captain refused to take it on board.

On the arrival of the "Johanna Ohiffa" at Valparaiso, the consignees of the powder, Messrs. Allsop, not finding the powder on board, instituted proceedings in the Chancery there, and arrested the ship. The captain appeared, and judgment was pronounced against him, and he was compelled to raise the amount (312l.) incurring expenses to the extent of 99l. 12s. for costs and commission. The proceedings in the Spanish court were put in.

On the part of the defendants, it was submitted that they were not bailees, but that the powder never ceased to be in the possession or under the control of the captain of the "Johanna Ohiffa"; and that, assuming they were bailees, the captain was not justified in offering any resistance to the proceedings against him at Valparaiso at the suit of the consignees, and that the defendants at all events could not be charged with the expenses of those proceedings.

His Lordship left it to the jury to say whether or not the "Lily" was a proper vessel in which to store the powder, and whether the captain of the "Johanna Ohiffa" had consented to its removal from the "Fairy"; and he intimated an opinion that the plaintiffs might be entitled to recover the costs incurred at Valparaiso, if the jury should think that the captain, in doing as [5] he did, acted as a prudent and reasonable man would have acted under the circumstances.

The jury found that the "Lily" was not a safe and proper vessel, and that the captain knew of the removal of the powder, but did not assent to it.

A verdict was taken for the plaintiffs for 40*l.* 12*s.*, leave being reserved to the defendants to reduce the same by the amount of the costs incurred at Valparaiso.

Karslake, Q. C., in Easter Term, moved accordingly. He submitted that the captain, having no defence, ought at once to have acquiesced in the demand of Messrs. Allsop: and he further contended that the defendants were not bailees and therefore not responsible in any degree for the safe keeping of the powder; that the captain was an assenting party to the transhipment of the powder to the "Fairy": that there was no engagement on the part of the defendants or their agent that that vessel should continue for an indefinite time to be the warehouse for the powder; and that its removal to the "Lily" was done with the knowledge, if not with the actual sanction, of the captain of the "Johanna Ohiffa," he standing by and knowing that it was put there. [Erle, C. J. The captain grumbled; and the jury found that he did not assent to its removal. Byles, J. It was removed at the instance and for the benefit of the defendants.] They never had possession of it as bailees.

WILLIAMS, J. As to the first part of the motion, viz. to reduce the damages by the amount of the expenses incurred at Valparaiso in respect of the non-delivery of the powder, we think the rule should be granted. With respect to the second part,—which in reality amounts to this, that my Lord should have told the [6] jury that the fact of the captain having stood by and done nothing whilst the powder was removed from the "Fairy" to the half-decked vessel, the "Lily," and having taken no active steps to get it placed elsewhere, afforded an answer to the plaintiffs' claim. I apprehend the learned judge would have been quite wrong if he had told the jury anything of the kind. The powder, it seems, was put on board the "Fairy" (which was not an unsafe or improper vessel for the purpose) with the captain's consent. If any accident had happened to it whilst there, without any default on the part of the defendants, probably there could have been no recourse against them either by the captain or by his owners. But the case is altogether altered when the defendants' agent, without the captain's consent, removed the powder from the "Fairy" to a half-decked vessel, where it must necessarily be exposed to increased peril. One of two things must result from such conduct,—either it was such a breach of the bailment as amounted to a trespass, taking the goods to a place to which the owners or the person representing them did not consent to their being taken,—or, at the election of the defendants, they must be taken to have retained the character of bailees (subject to the obligation of reasonable care), and the jury have found that they did not take reasonable care of the goods. In either view, therefore, they are liable; and, the goods having been lost, their value *prima facie* is the measure of damages to be recovered. As to the captain's standing by, I apprehend that amounts to nothing, unless it can be construed into an acquiescence on his part in what was being done. That, however, the jury negatived. As to standing by, of itself, otherwise than as operating by way of consent, I apprehend there is no such doctrine known to the law. There will therefore be no rule on this.

[7] BYLES, J. I am of the same opinion. If the question had been as to the deposit of the powder on board the "Fairy," there might have been some difficulty: it might have been said that the "Fairy" was lent to the captain as a place of deposit for it. But, when it was removed from the "Fairy" to the "Lily" without the consent of the captain of the "Johanna Ohiffa," it may be that such removal amounted to a trespass; but, at the very least, it amounted to a converting of themselves by the defendants into bailees. In any event, therefore, they were under the obligation of taking reasonable care of the powder. They did not do this; for, they put it in a vessel which was manifestly unsafe. They are, therefore, clearly liable at all events to the extent of the value of the powder.

The rest of the court concurring, the rule was granted for a reduction of the damages.

Lush, Q. C., and Sir G. Honyman, now shewed cause. Whether or not the costs incurred at Valparaiso were reasonably incurred, was a question for the jury, and it was left to them. Had Lane, the agent or superintendent of the defendants' establishment at Port Stanley, admitted their liability at once, the captain would not have defended the proceedings in the Spanish court. Their denial of liability induced him to incur the costs, and consequently they are responsible for them. [Willes, J. The loss of the gunpowder was the result of a bare wrong. How can the wrong-doers be responsible for the non-delivery of the powder according to contract?] It is submitted that this falls within the principle of the cases where costs which have been reasonably incurred are recoverable [Erle, C. J. Is there any instance of the recovery of consequential damages beyond the value of the goods?] Special [8] damage may be recovered in trover. The ground upon which the plaintiffs rest their claim here is that the captain was induced by the conduct of the defendants' agent to take the course he did. [Williams, J. The question is, whether the defendants sanctioned the defence? No defence in truth was made. There was a mere seizure of the vessel, and the expenses in question were incurred in obtaining her release. It may be conceded that the plaintiffs would have no right to inflame their demand by the costs of an unrighteous defence to a righteous claim. [Erle, C. J. Could a vessel be seized in this country for the non-delivery of cargo pursuant to bills of lading? C. Pollock. Dr. Lushington has recently so decided. Williams, J. Suppose the captain on his arrival in this country had been arrested on a *capias*,—probably he might have charged the wrongdoers with the costs of the arrest: but, could he have recovered the costs of the declaration and subsequent proceedings? Byles, J. That would be a different case. An Englishman is bound to know the law of his own country, but not that of a foreign country.] *Tindall v. Bell*, 11 M. & W. 228, is an authority to shew that the proper question for the jury in a case of this sort is, whether the course pursued by the plaintiff was such as a prudent and reasonable man would under the circumstances pursue. That was the question which was left here. *Broom v. Hall*, 7 C. B. (N. S.) 503, is a distinct authority in favour of the plaintiff. There, A., a broker, contracted with B. for the purchase (on behalf of C.) of certain goods. C. refusing to accept the goods, B. sued A. for the breach of contract. C. had notice of the proceedings, but repudiated his liability, and A. defended the action unsuccessfully. In an action by A. against C. for the damages and costs paid and incurred by him in the first action, C. paid into court [9] enough to cover the damages only, and it was left to the jury to say whether A., in defending the former action, had pursued the course which a prudent and reasonable man would have done in his own case. The jury having found for the plaintiff, it was held that A. was entitled to recover the costs. *Tindall v. Bell* applies the same doctrine to an action of tort. The degree of liability of a party is not to be altered by varying the form of action.

Karslake, Q. C., and C. Pollock, in support of the rule. The damages must be limited to the value of the gunpowder. The captain entered into a contract to convey and deliver four hundred casks of powder at Valparaiso. Arriving there without it, the captain was sued for the breach of contract: and, instead of submitting to the claim, he set up a defence which was held to be unjustifiable. No fraud or deceit was practised upon him by the defendants or their agent, so as to justify him in charging them with the burthen of his defence. There is no case or dictum to warrant the suggestion of Parke, B., in *Tindall v. Bell*, that the liability of the defendant in such a case is to depend upon the opinion of the jury as to whether or not it was reasonable under the circumstances to defend. [Williams, J. Suppose the action had been for unliquidated damages, and the plaintiffs' demand was exorbitant,—would it not be a proper question for the jury whether or not it was reasonable to resist it?] That would be a very different case from this. This was like defending a money demand. As between the consignees and the captain of the "*Johanna Ohiffa*," the latter had parted with the gunpowder the moment he consented to its being put on board the "*Fairy*." [Erle, C. J. If the captain had landed the powder at Port Stanley and put it in a warehouse there, and it had been [10] destroyed by lightning,—the act of God,—I take it the captain would have been liable to the consignees, even though by the charterparty he had a right to touch and stay at the Falkland Islands.] Clearly so. *Tindall v. Bell* was a case of collision. The salvors claimed 150*l*. The owners paid 20*l*. into court, and the salvors recovered 45*l*. more: and the court of Exchequer held that the award of the Admiralty court was the measure of what the owners

should have paid, and therefore they had defended with a want of due care and skill. There are only two classes of cases where such costs as these can be recovered. One is, where the same question would be tried in the action which is defended, and the party on whose behalf it is defended has notice. In *Mayne on Damages*, p. 29, it is said: There are several cases in which it appears to have been laid down as a general rule that, where goods are sold with a warranty by A. to B., and B. resells with a similar warranty to C., who sues and recovers against him for breach of warranty, B. may recover against A. not only the costs and damages he had to pay C. in the former action, but also his own costs incurred in defending it: *Lewis v. Peake*, 7 Taunt. 152; *Mainwaring v. Brandon*, 8 Taunt. 202; *Pennell v. Woodburn*, 7 C. & P. 117. But it has been pointed out by Parke, B. (in *Walker v. Hatton*, 10 M. & W. 255), that *Lewis v. Peake* was decided on the ground that the plaintiff was not aware at the time he sold the horse (a) that the warranty was not complied with. Accordingly, where the plaintiff had purchased a horse of the defendant with a warranty of soundness, and sold it with a like warranty to J. S., and, the horse turning out unsound, J. S. brought an action against him, which he defended, and failed: [11] the jury having found that the plaintiff ought to have discovered that it was unsound, at the time he sold it to J. S., it was held that he was not entitled to recover as specific damages the costs incurred by him in defending the former action: *Wrightup v. Chamberlain*, 7 Scott, 598. The other class of cases is, where there has been an express request to the plaintiff to defend the former action. As to this Mr. Mayne says, p. 30: "Of course, in all such cases as those above mentioned, the defendant in the second action will be liable for the costs of the first, if he had advised or sanctioned a defence being set up, because, by directing a defence, he has admitted that there were reasonable grounds for defending: *Williams v. Burrell*, 1 C. B. 402; *Howes v. Martin*, 1 Esp. N. P. C. 162. And it would seem that slight evidence upon this point may warrant a jury in finding that the defence was sanctioned. A. sued B. in an action in which B. would have a remedy over against C.: B. gave notice to C. of the nature of the action, and called on him to come in and defend it. This C. refused to do, but did not forbid a defence being taken. B. suffered judgment by default, and put A. to the proof of his claim at the writ of inquiry. It was held that there was evidence to go to the jury that C. had sanctioned the defence, and, the jury having included these costs in the damages in the action by B. against C., the court refused a new trial: *Blyth v. Smith*, 5 M. & G. 406, 6 Scott, N. R. 360. In no case can the costs of defending an action be recovered, when that action is brought, not merely for the wrongful act of the defendant in the second action, but also for some wrongful act of the original defendant himself." As to any advice that Lane may have chosen to give the captain on the subject, he was not the agent of the defendants for that purpose. The simple question is, did a state of facts exist which would justify [12] the captain as a man of ordinary care and experience in defending himself against the proceedings at Valparaiso, when he by parting with the possession of the gunpowder as he did had been guilty of a breach of his contract. The obligation the captain was under to tranship or to land the powder before he could enter the harbour of Port Stanley, has nothing to do with his liability upon his contract to the consignees at Valparaiso.

ERLE, C. J. I am of opinion that this rule ought to be made absolute to reduce the verdict by the amount of the costs of the litigation which took place at Valparaiso. The facts are these:—The ship "*Johanna Ohiffa*" having sailed with a general cargo under a charterparty on a voyage to Valparaiso, with liberty to touch and stay at the Falkland Islands, arrived at Port Stanley with goods to be delivered to the defendants, the Falkland Islands Company: but, as she had gunpowder on board, consigned to Valparaiso, it was necessary according to the regulations of the port to land or tranship it before she could be allowed to enter the harbour. Accordingly, in order to save the expense of landing and warehousing the powder, the captain of the "*Johanna Ohiffa*" accepted the offer of a schooner named the "*Fairy*" as a place of temporary deposit for it, the "*Fairy*" being a safe and convenient vessel for that purpose. The company's agent wanting the "*Fairy*" for another purpose, without the consent of the captain of the "*Johanna Ohiffa*," removed the powder from her to the "*Lily*," a

(a) Williams, J., observed that he should have thought this should have been "at the time he defended the action."

half-decked vessel of smaller capacity, and an improper vessel for the purpose; and, a storm arising whilst the "Lily" was lying at anchor outside the harbour, she sank with the powder on board. The jury found that there was want of reasonable care on the part of the company in putting the [13] powder on board the "Lily." They, therefore, though gratuitous bailees, are liable for the value of the powder, and for any consequential damages which the owner of it might sustain by its loss there. But the captain went on his voyage to Valparaiso, telling the company's agent that he would hold them responsible to his owners for the value. On his arrival at Valparaiso, the consignees, Messrs. Allsop, demanded the gunpowder. Now, it seems to me to be perfectly clear that a master of a ship who has signed a bill of lading making goods deliverable at a given port, and has permitted them to be taken out at an intermediate place and lost, has no answer to make to the consignee when he demands them. The captain of the "Johanna Ohiffa," who knew his duty, must have been well aware of that. He, however, instead of admitting it, denied his liability. The ship was thereupon arrested, and a suit instituted in the proper court in Valparaiso, the abstract of the proceedings in which shewed that there had been considerable discussion and delay in coming to an adjudication. The captain was called upon by virtue of his contract to deliver the goods. His defence failed him. That defence was entirely distinct from any conduct on the part of the Falkland Islands Company or their agent. They were no parties to the contract between the captain and Messrs. Allsop, and were in no way responsible for that litigation. The costs thereby incurred were not damages arising from the destruction of the gunpowder, so as to call upon the wrongdoers to pay them. In *Tindall v. Bell*, 11 M. & W. 228, the action was brought against the wrongdoer, who was clearly liable for the salvage the plaintiff would have to pay to the salvors. The plaintiff thought fit to litigate with the salvors. They claimed 150*l.* He offered 20*l.*; and the court of Admiralty awarded them 65*l.* The court of Exchequer held that the plaintiff should [14] have rendered reasonable compensation, that the 20*l.* was not reasonable, but that the reasonable amount must be assumed to be the sum awarded by the court, and that the defendant was not liable for the costs of that litigation, because the plaintiff had not asked that the question whether or not they were reasonably incurred should be left to the jury. There, the damage claimed was clearly connected with the wrong. This is not so.

WILLIAMS, J. I am of the same opinion. The question is, whether the plaintiffs have given any evidence that their incurring the litigation they did at Valparaiso was a reasonably necessary consequence of the wrong done to them by the defendants. I am of opinion that they have not given such evidence. On the contrary, I think the costs incurred in a defence which was wholly untenable was a useless and wasteful expenditure of money, which the plaintiffs have no right to call upon the defendants to reimburse them for.

WILLES, J. I am of the same opinion. The damages which the plaintiffs were *prima facie* entitled to recover must be limited to the value of the goods lost through the defendants' wrongful act. The plaintiffs also claimed to be reimbursed for the costs they incurred at Valparaiso. In order to make out their right to recover these, they were bound to shew that they were the necessary consequence of the wrong, and that a reasonable person would have defended the suit there. To prove this, the plaintiffs put in an abstract of the proceedings in that suit, which resulted in their defeat. They did not shew that, in the opinion of lawyers there, the issue was a doubtful matter: and it certainly would not have been a doubtful matter here. Nor do they shew that there was any reasonable doubt as to the [15] amount for which they were liable to the consignees of the gunpowder. Nor do they shew that the captain was in any difficulty as to procuring the amount necessary to satisfy the just claim of the consignees, if that would have been material. Consistently with all that appeared, the value of the gunpowder was easily ascertainable: and there may have been nothing for the captain to do but to draw upon his owners and so get the money. All the costs, therefore, incurred at Valparaiso may have been unnecessary. I am unable to see any distinction between one part and the rest. I therefore think the claim for special damage has not been sustained in proof.

BYLES, J., concurred.

Rule absolute.

TURQUAND, Official Manager, &c., v. MOSS. May 28th, 1864.

Held,—upon the authority of *Ex parte Godden, In re Shettle*, 1 De Gex, Jones, & Smith, 260,—that, in the schedule of creditors assenting to or dissenting from a composition under the 192nd section of the Bankruptcy Act, 1861, filed in pursuance of the general order in bankruptcy of the 22nd of May, 1862, the names and the amount of the debts of all the creditors must appear, whether secured (wholly or in part) or unsecured.

This was an action for rent. The defendant pleaded, as to 60l., parcel, &c., a deed of composition under the 192nd section of the Bankruptcy Act, 1861 (24 & 25 Vict. c. 134); and, as to the residue, that, after the making and registration of the deed, the defendant had delivered up the lease. Issue thereon.

The cause was tried before Byles, J., at the sittings in London after last Hilary Term. It appeared that the defendant had executed a deed of composition under the 192nd section of the statute, which had been executed or assented to by sixteen out of the twenty-[16]-eight creditors whose names appeared in the account or list filed with the chief registrar pursuant to the practice of the Bankruptcy court (*a*). The aggregate of the debts contained in that list was 6344l. 0s. 10d., three-fourths of which would be 4758l. 0s. 7½d. The debts of the assenting creditors amounted to 4917l. 8s. 8d.: but there was a debt of 420l. due to one Attenborough, which was not inserted in the list, he being fully secured by a deposit of plate, wines, and other property, with a power of sale. The defendant had also given Attenborough his acceptance for 287l. The insertion of either of these amounts would have turned the scale.

It was submitted on the part of the plaintiff that the defendant had failed to prove that a majority in number representing three-fourths in value of his creditors had assented to or approved of the deed. On the other hand, it was insisted that, inasmuch as the administration and distribution of the insolvent's property under the deed was to be in all respects the same as if he had been adjudged bankrupt and his estate had been administered in bankruptcy, and as Atten-[17]-borough could not have proved in respect of his demand if the defendant had been adjudged bankrupt, it could not be necessary that it should appear in the list.

The learned judge ruled that all the debts, as well secured as unsecured, must be inserted in the list and taken into account; and he directed a verdict for the plaintiff (there being no evidence to support the second plea), reserving the defendant leave to move.

Digby Seymour, Q. C., accordingly, in Easter Term last, obtained a rule nisi to enter a verdict for the defendant on the ground that the composition deed was valid, notwithstanding the omission of Attenborough's name from the list of creditors. He referred to *Ex parte Morgan, In re Woolhouse*, 32 Law J., Bankruptcy, 15. [Byles, J., referred to *King v. Randall*, 14 C. B. (N. S.) 721, where it was held by this court that, in estimating the number and value of the assenting creditors to a deed under the 192nd section of the Bankruptcy Act, 1861, secured as well as unsecured creditors were to be taken into the account. Erle, C. J. If secured creditors are to count in ascertaining the numbers, why should they not in ascertaining the amount of assents? In none of the cases where the point has arisen was the creditor secured to the full amount.

A. Wills and F. M. White, on a former day in this term, shewed cause. The question depends upon the construction of the 192nd section of the 24 & 25 Vict.

(*a*) The printed form of this account (which is prescribed by the General Order in Bankruptcy of the 22nd of May, 1862,) has the following note at the head of it:—“This is to be an account, to the best of the debtor's knowledge, information, and belief, of all the debts of the debtor [in cases of partnership, all the debts of the partnership, and the separate debts of each partner, are to be given in separate lists] which shall respectively amount to 10l. and upwards, and including debts secured, and shewing the estimated value of any security.” In the list filed in this case were the names of two creditors who held security,—the debt of the one being 70l., and the estimated value of the security held by him (consisting of wines) being stated at 90l.; and the debt of the other being 300l., and the estimated value of the security (wines and pictures) being stated at 120l.

c. 134, which enacts that "every deed or other instrument made or entered into between a debtor and his creditors or any of them, or a trustee on their behalf, relating to the debts or liabilities of the debtor and his release therefrom, or the distribution, inspection, management, and winding up of his estate, or any of [18] such matters, shall be as valid and effectual and binding on all the creditors of such debtor as if they were parties to and had duly executed the same, provided the following conditions be observed,"—that is to say, amongst others,—“1. A majority in number representing three fourths in value of the creditors of such debtor whose debts shall respectively amount to 10l. and upwards, shall, before or after the execution thereof by the debtor, in writing assent to or approve of such deed or instrument,”—“5. Together with such deed or instrument there shall be delivered to the chief registrar an affidavit by the debtor or some person able to depose thereto, or a certificate by the trustee or trustees, that a majority in number, representing three-fourths in value of the creditors of the debtor whose debts amount to 10l. or upwards, have in writing assented to or approved of such deed or instrument, and also stating the amount in value of the property and credits of the debtor comprised in such deed.” In *Ex parte Godden, In re Shettle*, 32 Law J., Bankruptcy, 37, the Lords Justices, on appeal, held that the word “creditors” in this section comprises the secured as well as the unsecured creditors. “I think,” said Lord Justice Turner, “that this deed has not the assent of the necessary proportion in value of the creditors; for, according to the best opinion which I can form upon the subject, I think that, in reckoning the proportion of assenting creditors under this section, the debts due to secured as well as unsecured creditors must be taken into account: otherwise, creditors imperfectly secured would be left at the mercy of the unsecured creditors.” And in *King v. Randall*, 14 C. B. (N. S.) 721, Erle, C. J., intimates that *Ex parte Morgan* does not conflict with *Ex parte Godden*. The point is therefore *res judicata*, and can only be raised in a court of error.

[19] Digby Seymour, Q. C., and H. James, in support of the rule. Attenborough's debt being fully secured, and creditors under these deeds of arrangement having the same rights (s. 197) as creditors under a fiat in bankruptcy, he could not have proved, and therefore his debt need not be inserted in the list. In Shelford on Bankruptcy, 3rd edit. 563, it is said, that, “if a creditor of a bankrupt holds a security on part of the bankrupt's estate, he is not entitled to prove his debt under the commission, without giving up or realizing his security; for the principle of the bankrupt laws is that all creditors are to be put on an equal footing, and therefore, if a creditor chooses to prove under the commission, he must sell or surrender whatever property he holds belonging to the bankrupt: but, if he has a security on the estate of a third person, that principle does not apply: he is in that case entitled to prove for the whole amount of his debt, and also to realize the security, provided he does not altogether receive more than 20s. in the pound: *Ex parte Bennet*, 2 Atk. 527; *Ex parte Parr*, 1 Rose, B. C. 76; *Ex parte Goodwin*, 3 Madd. 375.” And the 197th section of the Bankruptcy Act, 1861, contains an enactment that, “except where the deed shall expressly provide otherwise, the court shall determine all questions arising under the deed according to the law and practice in bankruptcy, so far as they may be applicable, and shall have power to make and enforce all such orders as it would be authorized to do if the debtor in such deed had been adjudged bankrupt, and his estate were administered in bankruptcy.” *Ex parte Godden, In re Shettle*, 1 De Gex, Jones, & S. 260, 32 Law J., Bankruptcy, 37, was the case of an unsecured creditor. In *Ex parte Spier, In re Josephs*, 32 Law J., Bankruptcy, 62, 64, Lord Westbury, C., says: “Creditors under a deed of trust are put in the same position in [20] which creditors under a fiat are placed by the bankrupt law. Secured creditors, therefore, rank under the deed of trust for the amount remaining due after deduction of the value of their securities.” It was held in that case that, where the deed shewed a clear intention that the estate should be administered as in bankruptcy, the insertion therein of a particular power repugnant to its general tenor formed no objection to the validity of the deed, but might be rejected. [Willes, J. This court, in *Leigh v. Penelberg*, 15 C. B. (N. S.) 815, declined to act on that case, holding that the whole of the deed must be looked at.] Here the deed upon the face of it is good. What would Attenborough prove for? In *Ex parte Morgan, In re Woodhouse*, 1 De Gex, Jones, & S. 289, 32 Law J., Bankruptcy, 15, 20, Lord Westbury, C., says: “The 197th section causes the state of things under a trust-deed to be precisely the same if there had been a bankruptcy instead of a deed of composi-

tion. Therefore, creditors under a trust-deed are in eodem statu as creditors under a bankruptcy. But creditors under a bankruptcy cannot prove without allowing for the value of their securities, and creditors under trust-deeds are subject to the same objection." [Willes, J. If the goods were burnt, whose would be the loss?] If the goods were destroyed without any default on the part of the bailee, he would no longer be a creditor holding security. To hold that a secured creditor is to be inserted for the amount of his debt, secured as well as unsecured, will be highly inconvenient. Secured creditors would naturally be favourable to the debtor: they would have no interest in common with the general body of creditors; and yet it might be that their insertion might turn the scale. If Attenborough's name were placed among those of the dissentient creditors, there would still be the requisite three-fourths in number. [21] The amount of his debt is in reality nil. The judgment in *Ex parte Golden*, *In re Shettle*, it must be observed, was pronounced at a time when the decisions were conflicting. [Bytes, J. The words "number and value" are the same in s. 192 of the Bankruptcy Act, 1861, as in the 224th section of the 12 & 13 Vict. c. 106: but the words explaining the meaning of "value" in the last-mentioned section are not found in s. 192 (a).] "Value" means value to be estimated in the court of bankruptcy. There the value is the amount due after deducting what may be realized by the security. And this appears from the form of the schedule, which is part of the practice of the court. The creditor's voice and his influence ought to be regulated by the amount of his pecuniary interest in the result. A fully secured creditor has no value. Some light is thrown upon the question by s. 97 (b), which enacts that, "in the computation of debts for the purposes of any petition under this act, there shall be reckoned as debts,"—amongst others,—“sums due to creditors holding mortgages or other available securities or liens, after deducting the value of the property comprised in such mortgages, securities, or liens.” [Erle, C. J. *Ex parte Golden*, *In re Shettle*, seems to be a direct judgment to the point. We will look into the cases, and give our judgment to-morrow.]

Cur. adv. vult.

ERLE, C. J. In this case a verdict was found for the [22] plaintiff, subject to leave reserved to the defendant to enter the verdict for him if the court should be of opinion that the composition deed was executed by creditors to the required number and value. And that question depends upon whether or not the amount of debts owing to creditors holding security are to be taken into account. I am of opinion that the amount of secured debts must be taken into the account: and I come to that conclusion because I find in the case of *Ex parte Golden*, *In re Shettle*, 1 De Gex, Jones, & S. 260, 32 Law J., Bankruptcy, 37, upon appeal from a decision of Mr. Commissioner Holroyd, the Lords Justices pronounce a judgment expressly upon the point, and give their reasons, which are perfectly satisfactory to my mind. It is the ratio decidendi, and the decision of a court of high judicature. I am quite aware that there were two points raised in that case, and that either of them would afford ground for disposing of the case as it was disposed of. But the point is considered by the Lords Justices; and must therefore be looked upon as res judicata. We have referred to the report of the case in 1 De Gex, Jones, & Smith, 260, and there we find the ground of the decision made still more apparent. In *Ex parte Spyer*, *In re Josephs*, at page 318 of the same volume, where a discussion arose upon the validity of a deed under the same statute, observations are made by the Lord Chancellor and by one of the counsel arguing before him, which seem to tend to a different view of the law. But there was no adjudication of the point there, and no definite expression of opinion by Lord Westbury,—nothing, in short, which ought to weigh against the deliberate judgment of Lord Justice Knight Bruce and Lord Justice Turner in the former case. No doubt considerable light is thrown upon the Bankruptcy Act, 1861, by comparing it with the 12 & 13 [23] Vict. c. 106. Both contain analogous provisions as to deeds. There are several cases upon the subject in the 1st volume of De Gex, Jones, & Smith; and the material provisions of the two statutes are set out at

(a) "Provided always that every creditor shall be accounted a creditor in value in respect of such amount only as, upon an account fairly stated, after allowing the value of mortgaged property and other such available securities or liens from such trader, shall appear to be the balance due to him."

(b) Lord Justice Knight Bruce seems to have thought otherwise in *Ex parte Golden*, *In re Shettle*, 1 De Gex, Jones, & Smith, 270, 271.

pp. 230 et seq. The question now before us arises under the act of 1861, and could not have arisen in respect of a composition deed under the former act, for the 224th section of that act contains an express proviso that secured debts should not be taken into account. The statute of 1861 leaves out that proviso: and we must assume that the legislature intentionally omitted it. *Ex parte Godden, In re Shettle*, is a clear decision upon the point, and I am of opinion that our judgment must be in accordance with it.

WILLIAMS, J. I also am of opinion that we must decide this case upon the authority of the express judgment delivered by the Lords Justices in *Ex parte Godden, In re Shettle*, 1 De Gex, Jones, & Smith, 260. Although there was another ground upon which the judgment in that case proceeded, the very point now under consideration was argued, and a deliberate judgment was pronounced upon it. In *Ex parte Morgan, In re Woodhouse*, 1 De Gex, Jones, & Smith, 288, 32 Law J., Bankruptcy, 15, the Lord Chancellor expressed an opinion and decided the case apparently in a manner inconsistent with the decision of the Lords Justices in *Ex parte Godden, In re Shettle*. But *Ex parte Godden* was cited there, and the Lord Chancellor does not express any disapproval of it. In *Ex parte Spyer, In re Josephs*, the counsel for the respondent (see 1 De Gex, Jones, & Smith, 323) appear to have considered the position of the Lord Chancellor in *Ex parte Morgan* to have been different from the decision of the Lords Justices in *Ex parte Godden*. I conceive the latter to be a [24] decision upon the very point now before us, and therefore that we are governed by it.

WILLES, J. I am of the same opinion.

BYLES, J. I am also of opinion that we are entirely governed by the authority of the case decided by the Lords Justices, *Ex parte Godden, In re Shettle*, 1 De Gex, Jones, & Smith, 260, 32 Law J., Bankruptcy, 37. But for that decision, I must confess I should have felt inclined to adopt a different conclusion. The case of a creditor having a deposit of goods, with a power of sale, stands very much in the same position, I should have thought, as a case of set-off or of mutual credit.

Rule discharged.

A judge at Chambers having in the exercise of his discretion dispensed with bail on appeal on the ground that the question to be determined was a doubtful one, and had been decided by the court in deference to a single authority,—the Court refused to set aside his order.

June 3rd.—The defendant having appealed against this decision, Byles, J., made an order at Chambers under the 38th section of the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), that bail in error should be dispensed with. The affidavits upon which this order was obtained stated in substance as follows:—

“The issues of fact in this cause were tried at the sittings after last Hilary Term at Guildhall, before Byles, J., when a verdict was directed by the learned judge to be entered for the plaintiff, with liberty to the defendant to move to enter the verdict for him:

“The facts upon which such verdict was entered and leave reserved were these:—It appeared from the evidence of the defendant that he was indebted at the date of the registration of the deed of composition set forth in the pleadings to a Mr. Attenborough, for money lent, in a sum of upwards of 400l., but that [25] Mr. Attenborough held security of a larger value, and that the sum so due and secured to Mr. Attenborough had not been calculated in estimating the three fourths in value of the defendant's creditors required by the Bankruptcy Act, 1861, to assent to the said deed of composition. Thereupon it was contended by the plaintiff that the requisitions of the 192nd section of the Bankruptcy Act, 1861, had not been complied with, inasmuch as the sum lent by Mr. Attenborough constituted him a creditor, and the amount of his demand must be taken into consideration in calculating the amount of indebtedness of the defendant: and, if this were done, it would be found that three fourths in value of the defendant's creditors had not assented to the deed:

“It was, on the other hand, contended by the defendant that the sum borrowed of Mr. Attenborough could not be taken into consideration, inasmuch as he was fully secured, and the word ‘value’ in the 192nd section of the statute meant value after deduction of the value of the securities held by the creditor: and that if Mr. Attenborough's debt were taken into consideration, it could only be for the purpose of

estimating the number of creditors, and, notwithstanding the addition of his name, the majority had assented to the deed :

"In Easter Term last, the defendant obtained a rule nisi to enter the verdict for him, pursuant to the leave reserved, on the ground that the deed was valid, notwithstanding the omission of Attenborough's name from the list of creditors. The rule was argued on the 27th of May last, and the court took time to consider. On the 28th, the court delivered judgment and discharged the rule,—Mr Justice Byles intimating that he felt bound to follow the decision of the Lords Justices in *Ex parte Golden*, *In re Shuttle*, 1 De Gex, [26] Jones, & S. 260, 32 Law J., Bankruptcy, 37, otherwise he entertained a strong leaning towards the defendant's contention :

"The point raised is one of great moment to the public and to the legal profession, and the result is watched with much anxiety, as many deeds framed under the 192nd section of the Bankruptcy Act, 1861, have been registered upon the same basis in estimating the three fourths in value of the creditors as the deed now in question :

"The defendant desires to appeal against the said decision, not for the purpose of delaying the plaintiff, but solely with the bona fide intention of obtaining the decision of the court upon the point of law raised as above stated."

A. Wills now moved to rescind this order. He submitted that there was no ground for departing from the ordinary rule of practice in this case ; and that the case of *Bevan v. Whitmore*, 15 C. B. (N. S.) 412, upon the authority of which the order was made, was peculiar in its nature, and decided upon grounds which could have no application to a case of this sort. [Byles, J. I made the order because the court decided what was manifestly a very doubtful question, upon the authority of a judgment by which they felt themselves bound.]

ERLE, C. J. This was a matter entirely within the competency of the learned judge to decide. He, having tried the cause, the knowing all about it, has exercised his discretion, and I do not feel justified in interfering.

The rest of the court concurring,

Rule refused.

[27] NICOLL v. GREAVES. May 30th, 1864.

[S. C. 33 L. J. C. P. 259 ; 10 L. T. 531 ; 10 Jur. N. S. 919 ; 12 W. R. 961.]

A *huntsman* is a menial servant, and therefore the hiring of a huntsman, though in terms for a year, and upon conditions which can only be fully carried out by a service enuring for the full period of a year, is subject to the ordinary condition that it may be determined by either party at a month's notice.

This was an action for the alleged wrongful dismissal of a huntsman. The first count of the declaration stated an employment of the plaintiff by the defendant for a year as huntsman and first whip in kennel, at the wages of 100*l.*, with draft-hounds, coals, and bones, leave to keep a pig, two coats, two waistcoats, two pairs of breeches, two pairs of boots, one cap, one whip, and one pair of spurs, and alleged a wrongful dismissal before the end of the year. The second count alleged a hiring until determined by reasonable notice, and charged a dismissal without reasonable notice. The third count alleged a hiring until determined by a six months' notice, and charged a dismissal without such six months' notice. The fourth count alleged a hiring until determined by a three months' notice, and charged a dismissal without such three months' notice.

The defendant by his first and second pleas traversed the agreements and dismissals as alleged : and by his third plea (to the second count) alleged a determination of the hiring by a reasonable notice. Issue thereon.

The cause was tried before Williams, J., at the first sitting in Easter Term last. The facts were as follows :—In the month of February, 1863, the defendant, who was the master of the Old Berkshire fox-hounds, engaged the plaintiff as huntsman upon the terms contained in the following memorandum :—"100*l.* a year, draft-hounds, coals and bones, leave to keep a pig, two coats, two waistcoats, two pairs of breeches, two pairs of boots, one cap, one whip, one pair of spurs." The plaintiff entered on the service on the 7th of April, and remained therein until the 16th of October, when [28] he received a month's notice to quit. His salary was paid up to the 16th of November.

The contention on the part of the plaintiff was that a huntsman's position differed from that of a menial or domestic servant, and therefore that he was not liable to be dismissed at a month's notice. Several witnesses, who had had various engagements as whippers-in and huntsmen for periods varying from three to thirty years, were called for the purpose of establishing a custom for the hire of a huntsman for the "season." They all stated that they had always had their engagements terminated with the season, by notices varying from one to six months, and that they never knew of an instance of a huntsman being dismissed in the course of the season. Some of them stated that, though the season did not commence so early, it was usual for the hiring to take place in April, in order to give the huntsman an opportunity of becoming familiar with the hounds and the country to be hunted.

It was also proved that the plaintiff, whilst in the defendant's employ, occupied a cottage which formed part of his farm premises, and was distant about half a mile from his own residence, but not within the curtilage; that the advantages accruing to the huntsman from the draft hounds (the sale of useless or mismatched hounds) would be worth about 50*l.* a year, and that arising from the sale of the bones about 25*l.* more; and that the usual time of drafting was at the end of the season.

On the other hand, it was contended on the part of the defendant that a huntsman ranked with ordinary domestic or menial servants, and was subject to removal on the same terms. And several witnesses were called on his behalf, masters of hounds and others, who denied that there was any such custom as that at-[29]-tempted to be set up by the plaintiff, and stated that they had always dismissed their huntsmen at a month's notice.

The learned judge told the jury that, whether or not a huntsman was a menial servant, was a question of law; that there might be a custom by which the engagement was determinable only at the end of the season; but that, in his opinion, the evidence given did not go far enough to shew the existence of a custom either way. But he reserved leave to the defendant to move to enter a nonsuit if it should become necessary.

The jury,—affirming the custom set up by the plaintiff, to dismiss at a month's notice only at the end of the season,—returned a verdict for the plaintiff, damages 80*l.*

Overend, Q. C., accordingly, in Easter Term, obtained a rule nisi to enter a nonsuit, on the grounds that the plaintiff was a menial servant and liable to be dismissed on the usual month's notice, and that there was no evidence of any custom to take the case out of the ordinary rule as to menial servants; or for a new trial, on the ground that the verdict was against the weight of evidence, if the court should be of opinion that there was any evidence to go to the jury of the existence of a custom to dismiss huntsmen on any other notice than that received for menial servants. He referred to *Norlan v. Abell*, 2 C. M. & R. 54. There, the plaintiff agreed to enter the defendant's service as head-gardener, and to have the management and superintendence of the defendant's hot-houses, pineries, &c., at the wages of 100*l.* per annum. The plaintiff resided in a house belonging to the defendant, in his domain, but apart from the defendant's house. The plaintiff had the privilege of taking ap-[30]-prentices, and had taken two at 15*l.* per annum premium. The plaintiff remained with the defendant in the capacity above mentioned about four years, when the defendant gave him a month's warning. In an action for a quarter's wages,—the plaintiff claiming to be engaged on a yearly hiring,—it was held that he was a menial servant only, and only entitled to a month's warning.

Huddleston, Q. C., and Griffiths, now shewed cause. The question is, was this plaintiff a menial servant, or was he hired upon a contract for dismissal only at the end of the season. [Erle, C. J. Rather, if he was of the class of servants termed "menial," was the contract such as to take him out of the custom as to the dismissal of menial servants.] His position as huntsman was one of responsibility and trust; and the terms of his employment were such as to require an engagement more permanent than that of an ordinary domestic or menial servant. For the purpose of his acquiring the benefit of the drafting of the hounds, it was necessary that his services should be retained until the end of the season, until which time the drafting could not take place. Nor could he have the full benefit of the other stipulations in the agreement, if liable to summary dismissal. It is extremely difficult to define with accuracy what is a menial or domestic servant, who are placed by all the authorities in the same category. In *Norlan v. Abell*, 2 C. M. & R. 54, the head gardener, though hired at

a yearly salary and not resident in the house, was held to occupy the position of a menial servant. But, in *Todd v. Kerriek*, 8 Exch. 151, a governess engaged at a yearly salary, though residing in the house, was held not to be within the class of domestic or menial servants. "The point reserved," says Pollock, C. B., [31] "was, whether a governess is within the rule by which a menial or domestic servant may be discharged with a month's notice or a month's wages. We are of opinion that she is not. The position which she holds, the station she occupies in a family, and the manner in which such a person is usually treated in society, certainly place her in a very different situation from that which mere menial and domestic servants hold." In *Louth v. Drummond*, coram Parke, B., Kingston Spring Assizes, 1849, cited in *Smith's Master and Servant*, 2nd edit. 52, it was held that a "farm-bailiff" could not be got rid of on a month's notice. Looking at the whole circumstances and the nature of the contract, it is obvious that it was the intention of both parties that this should be a yearly hiring, subject to be determined by a six months' notice or a reasonable notice, ending with the end of the season. Much inconvenience and annoyance might arise if either party could put an end to such a contract in the midst of the season. There was abundant evidence to support this view. It was not to be expected that a usage or practice like this should be proved as completely as a custom of a particular trade in the city of London.

Overend, Q. C., and Le Breton, in support of the rule. This plaintiff was a menial servant, —part of the retinue of his master. A farm-labourer or a farm-bailiff, it seems, would not come within the category of menial or domestic servants. The head-gardener, though not living in the master's house, but in a cottage in the domain, has been held to be within that class, notwithstanding the hiring was surrounded by many special privileges which at first sight would appear inconsistent: *Noulan v. Ablett*, 2 C. M. & R. 54. Is there anything superior or less menial in the huntsman? A good gardener must be a person of a considerable amount of education. Lord Abinger in that case said: "I should have been inclined to have told the jury that the plaintiff was a menial servant; for, though he did not live in the defendant's house, or within the curtilage (*intra mœnia*), he lived in the grounds within the domain." In *Crocker v. Molnour*, 3 C. & P. 470, a servant being engaged for a year at 30 guineas and a suit of clothes, was provided with a livery suit on his entering the service: he was wrongfully turned away within the year: and it was held that he could not maintain trover for the clothes. "If," said Lord Tenterden, "the plaintiff was dismissed without reasonable cause, whereby he was prevented from becoming entitled to this suit of clothes, he has his action for that: but he cannot maintain an action of trover, because he has no property in the clothes till he has served a year." The case of the governess is of a totally different character. That of the huntsman is in no respect different from the gardener, the coachman, or the groom. The inconvenience suggested of such a contract as this being determinable at a month's notice in the middle of the season, would be no greater than the loss of a cook or a coachman in the middle of the London season would be to persons of a certain class. Besides, the head whip is always ready and competent to take the place of the huntsman, upon an emergency. The suggestion as to the special nature of the contract is answered by the case of *Johnson v. Blenkinsopp*, 5 Jurist, 870. There, by a written memorandum of agreement between the defendant and the plaintiff, the plaintiff was "to have 6s. a week, three bolls of wheat, to set potatoes for his family's use, to have a cow kept, house and firing, to keep the gardens and pleasure-grounds in clean and good order, to assist in the stables, and when required at hay and corn harvest, and to make [33] himself generally useful: to enter 12th May, 1838." The defendant had dismissed the plaintiff upon a month's warning. In an action brought by the plaintiff to recover a quarter's wages, as being a yearly servant, —it was held that he was a menial servant, and was therefore by the general rule of law entitled to a month's notice only; and that the memorandum of agreement contained nothing which shewed an intention in the parties to exclude that rule. [Erle, C. J. How is a "huntsman" classed in the Assessed-Tax Acts?] With household servants: see 52 G. 3, c. 93, Sched. C. No. 1. The 16 & 17 Vict. c. 90, Sched. C., contains a special provision as to gardeners. His duties, his habits, and his associates, all tend to place the huntsman in the category of menial servants. There was, properly speaking, no evidence given by the plaintiff at all of a custom. The utmost it amounted to was the assertion of isolated facts and personal experiences of the witnesses themselves. To constitute a custom, some

uniform practice universally received and acted upon with reference to the matter in hand must be shewn. None such was shewn. The witnesses called on the part of the defendant, on the other hand, distinctly proved a *right* to dismiss at a month's notice, though they admitted that for mutual convenience the engagement was generally carried on to the end of the season.

ERLE, C. J. I am of opinion that this rule must be made absolute to enter a nonsuit or a verdict, as the plaintiff may choose. The action is brought upon a contract for the hiring of the plaintiff in the capacity of huntsman: and it is clear that the contract was in terms for a year's service. The point to be determined is, whether or not the plaintiff falls within the class of servants commonly termed in the cases and in the [34] treatises on the subject of the relative rights and duties of masters and servants, menial or domestic: because the law is now firmly established that the hiring for a year of a person in that class is subject to the condition that either party may put an end to the relation at any time upon giving the other a month's notice or a month's wages. Does a huntsman, then, fall within the class of menial servants? It is well observed in the very excellent treatise on the Law of Master and Servant, by Mr. Manley Smith, p. 52, that "no general rule can be laid down as to who do and who do not come within the category of menial servants. Each case must depend upon its own circumstances." But it seems to me that the reason of the rule in these cases is that there are some contracts for services which bring the parties into such close proximity and frequency of intercourse, valuable if mutually agreeable, but intolerably annoying should it be otherwise—that it is highly desirable that either party should be at liberty to put an end to them if so minded. Where the service is of such a domestic nature as to require the servant to be frequently about his master's person, or, as in the case of the gardener, about his grounds, if any ill-feeling should arise between them, the constant presence of the servant would be a source of infinite irritation and annoyance to the master. The law and the reason of the law are mutual. The servant may have an exacting and dissatisfied master, constantly finding or imagining faults or shortcomings: in such a case, the sooner the servant can free himself from his disagreeable position the better for his comfort and happiness. It is therefore for the benefit of both that the contract which binds two incompatible tempers together should be easily determinable. Does the position of a huntsman differ in this respect from that of any other servant in [35] the establishment? He would have to be frequently in communication with the owner or master of the hounds: and, if so minded, might make the expensive luxury of keeping hounds a source of vexation rather than of enjoyment to their proprietor. It may also be that the master of the hounds may be a person of rough and uncourteous bearing, irritable about trifles, and dissatisfied with the best attempts to please: in such a case it would be just as much to the interest of the huntsman, if he has any self-respect, to be able to terminate at a month's notice a state of tyranny and oppression. For these reasons, it appears to me that a huntsman comes within the description of servants to which I have been referring. The legislature in the Assessed Tax Acts which have been cited, seem to have drawn the line between persons employed in a service of luxury, in respect of whom the master is taxable, and those of necessity, such as servants in trade and husbandry, in respect of whom he is not taxable. In the list of the former we find the huntsman. Take the two cases which have been decided, —*Noelton v. Abbott*, 2 C. M. & R. 54, in the Exchequer, and *Johnson v. Blenkinsopp*, 5 Jurist, 807, in the Queen's Bench. In the former, the head gardener was held to be a menial servant, though the terms of his hiring were general as to time, and subject to provisions which ordinarily would seem to be inconsistent with an abrupt termination of his service. Now, a servant filling the capacity of head gardener must be a man of considerable acquirements to enable him to perform his duties efficiently and properly. And although in that case he had a separate residence, he was still held to be a domestic servant: and very properly so, as I conceive, for the garden is as much a source of comfort and enjoyment as any part of a man's dwelling. So, in *Johnson v. Blenkinsopp*, the [36] plaintiff seems to have been hired as a superior sort of servant, and the contract, as in the former case, gave him many privileges and advantages not usually enjoyed by menial servants: and yet it was held that he might be dismissed at the ordinary month's notice. In each case the terms of the contract shewed that both parties hoped that the service would continue at least for a year, but still the court held that the con-

tract was subject to the ordinary condition. So here, although the plaintiff was to have the draft-hounds and other privileges and perquisites, yet, as he comes within the class of menial servants, all that must be taken subject to the condition which overrides all contracts for menial or domestic service, viz. that it shall be determinable at any time upon either party giving to the other a month's notice. Upon the evidence of the plaintiff in this case, I find nothing to shew that the contract was made upon the terms that this rule of law or implication of usage should be excluded. No doubt it was within the competency of the parties to the contract to engage for a year certain, or for a service dissoluble only upon a three or a six months' notice. Such a special contract would have overridden the general rule of law. But no such contract is to be found here; nor was any evidence given from which it could be inferred that a different usage prevailed with regard to huntsmen from that which governs the hiring of ordinary domestic servants. The notice given, therefore, was a sufficient notice to determine the engagement.

WILLIAMS, J. I am entirely of the same opinion. At the trial the question was treated by the plaintiff's counsel as one of law: and I dealt with it accordingly. I entirely agree with my Lord in the conclusion he has come to, and also in the reasons he has given. An [37] attempt was made on the part of the plaintiff to give evidence of a custom peculiar to huntsmen, assuming a huntsman to fall within the class of menial servants. But I told the jury I could discover no evidence upon which they could properly find such a custom. The utmost the evidence for the plaintiff amounted to, was the story of the individual experiences of his witnesses. There was nothing which could be considered as a legal foundation for any such custom. The real question to be decided was, whether the hiring of a huntsman was determinable at a month's notice. After maturely considering all the evidence that was given, I have come to the conclusion that the case of the huntsman must be governed by the general rule applicable to all other domestic servants.

WILLES, J., concurred.

BYLES, J. I am of the same opinion. Considerable difficulty, as it seems to me, is introduced by holding menial to be synonymous with domestic (*a*)¹ "Me-[38]nial" would seem to be derived from the same root as "menage" (*a*)², one of the retinue or attendance. The huntsman was always considered one of the retinue, even of the Princes of the Church in olden times (*b*). He goes out with his master, and wears his livery. An agricultural or farm labourer (*Lilley v. Elwin*, 11 Q. B. 742), a farm bailiff (*Louth v. Drummoud*, Kingston Spring Assizes, 1849), and a governess (*Todd v. Kerrick*, 8 Exch. 151), have been held not to come within the description of menial or domestic servants whose service may be put an end to by a month's notice. The contrary was held in the case of the head gardener, *Johnson v. Blenkinsopp*, 5 Jurist, 870; and that seems to be the dividing line. I do not think we shall be wrong in

(*a*)¹ Nothing very satisfactory is to be gathered from any of the Dictionaries which are usually referred to as authorities.

The word "domestic" is defined by Johnson to mean "belonging to the house," "inhabiting the house:" in Richardson, "of or appertaining to house or home:" and in Webster, "one who lives in the family of another, as a chaplain or secretary: also, a servant or hired labourer residing with a family."

"Menial" is said by Johnson to be derived from *meiny* or *maney*: *meisnir*, old French: and is thus defined—"Belonging to the retinue or train of servants;" "one of the train of servants:" and he refers to *Termes de la Ley*, p. 429, where it is said that "menials are those servants which live within their master's walls of his house: see the stat. of 2 H. 4, c. 21." Richardson defines menial to be "a company or retinue,—the company or collected number of a household or family." And Webster, as "belonging to the retinue or train of servants;" "a domestic servant."

A "servant" is defined by Johnson to be "one who attends another, and acts at his command:" by Richardson, as "one who does the bidding of a master:" and by Webster, as "a person that attends another for the purpose of performing menial offices for him."

(*a*)² In the *Dictionnaire de l'Académie Française*, "Menage" is described as "Gouvernement domestique, et tout ce qui concerne la dépense et l'entretien d'une famille."

(*b*) Erle, C. J., observed that a "huntsman" was formerly a part of the routine of the Temple.

holding that the case of the huntsman does not go beyond that. As to the supposed usage, there was no evidence to sustain it. And in truth the jury have only found that which was agreed on both sides, viz. that, in many cases, for convenience sake, the huntsman's engagement has been put an end to at the close of the season.

Rule absolute.

[39] NOTHARD v. PEPPER. May 30th, 1864.

[S. C. 10 L. T. 782; 10 Jur. N. S. 1077. Referred to, *The Little Litten*, 1870, L. R. 3 A. & E. 57. Followed, *The Henry Coon*, 1878, 3 P. D. 159. Discussed, *The Solway*, 1885, 10 P. D. 138.]

In an action for a collision, the examination of the captain of the plaintiff's ship, taken by the receiver of wrecks under the Merchant Shipping Act, 17 & 18 Vict. c. 104, s. 448, is not admissible for the defendant, under s. 449, for the purpose of proving the fact that the damage to the plaintiff's ship from the collision was on her starboard bow; such fact being offered for the purpose of shewing that the plaintiff's ship was in fault,—the question which ship caused the damage to the other not being a matter which the receiver had power under s. 448 to examine into.

This was an action for damage done to the plaintiff's ship by a collision with a vessel belonging to the defendant, through the negligence of the master and mariners. The cause was tried before Byles, J., at the sittings in London after last term.

There was conflicting evidence as to which vessel was in fault; and in the result the jury found a verdict for the plaintiff.

Upon the cross examination of the captain of the plaintiff's vessel, the defendant's counsel proposed to put in a statement which had been made by him upon oath before the receiver of wrecks at Grimsby, under the Merchant Shipping Act, 1854, 17 & 18 Vict. c. 104, s. 448 (made evidence by s. 449). This examination was offered, not only for the purpose of shewing that the captain's statement on that occasion was at variance with the evidence he was giving at the trial, but also as substantive evidence of one of the facts therein contained, viz. that the damage received by the plaintiff's vessel was on her starboard bow, which, as both vessels were going free, and therefore both bound to port, would shew that the plaintiff's vessel must have been in fault.

The learned judge, however, rejected the evidence, and the jury found a verdict for the plaintiff.

Brett, Q. C., in Easter Term last, obtained a rule nisi for a new trial on the ground of the improper rejection of evidence, and also that the verdict was against the weight of evidence. He referred to the 439th section of the statute, which empowers the board of trade to appoint receivers, and to the 448th and 449th sections, [40] the former of which provides for certain matters to be examined into before the receiver, and the latter of which makes such examination *prima facie* evidence of the matters therein contained. [Willes, J., referred to *Richardson v. Mellish*, 2 Bingh. 229, 9 J. B. Moore, 435, where books containing lists of passengers, deposited at the India House, pursuant to the 53 G. 3, c. 155, ss. 15, 16, were held to be admissible in evidence towards shewing the value of a voyage.]

Edward James, Q. C., and Warton shewed cause. The examination in question was offered not simply to contradict the plaintiff's captain, but as substantive evidence to shew that the negligence was on the part of the plaintiff's servants, and not on that of the defendant's servants. The question turns mainly upon the construction of the 448th and 449th sections of the 17 & 18 Vict. c. 104. Section 448 enacts that "any receiver, or, in his absence, any justice of the peace, shall, as soon as conveniently may be, examine upon oath any person belonging to any ship which may be or may have been in distress on the coasts of the united kingdom, or any other person who may be able to give any account thereof or of the cargo or stores thereof, as to the following matters, that is to say, —1. The name and description of the ship,—2. The name of the master and of the owners,—3. The names of the owners of the cargo,—4. The ports or places from and to which the ship was bound,—5. The occasion of the distress of the ship,—6. The services rendered,—7. Such other matters or circumstances relating to such ship, or to the cargo on board the same, as the receiver or justice thinks necessary: And such receiver or justice shall take the examination down in writing,

and shall make two copies of the same, of which he shall send one to the board of [41] trade and the other to the secretary of the committee for managing the affairs of Lloyd's in London, and such last-mentioned copy shall be placed by such secretary in some conspicuous situation for the inspection of persons desirous of examining the same: and, for the purposes of such examination, every receiver or justice as aforesaid shall have all the powers given by the first part of this act to inspectors appointed by the board of trade." And s. 449 enacts that "any examination so taken in writing as aforesaid, or a copy thereof, purporting to be certified under the hand of the receiver or justice before whom such examination was taken, shall be admitted in evidence in any court of justice, or before any person having by law or by consent of parties authority to hear, receive, and examine evidence, as *prima facie* proof of all matters contained in such written examination." These are, unquestionably, very extensive terms: but they must be subject to some reasonable limitation, -to the inquiry, for instance, into which the receiver is authorized to enter. The provisions in question, it is to be observed, are found in that part or division of the Merchant Shipping Act which relates exclusively to "wrecks, casualties, and salvage," and more especially to the duties of receivers in the institution of "inquiries into wrecks." In order to ascertain the intention of the legislature, it will be necessary to refer briefly to the whole of those provisions. The 432nd section, which commences this branch of the statute, enacts that, "In any of the cases following, that is to say,—whenever any ship is lost, abandoned, or materially damaged on or near the coasts of the united kingdom,—whenever any ship causes loss or material damage to any other ship on or near such coasts,—whenever by reason of any casualty happening to or on board of any ship on or near such coast loss of life [42] ensues,—whenever any such loss, abandonment, damage, or casualty happens elsewhere, and any competent witnesses thereof arrive or are found at any place in the united kingdom,—it shall be lawful for the inspecting officer of the coast-guard or the principal officer of customs residing at or near the place where such loss, abandonment, damage, or casualty occurred, if the same occurred on or near the coasts of the united kingdom, but, if elsewhere, at or near the place where such witnesses as aforesaid arrived or are found or can be conveniently examined, or for any other person appointed for the purpose by the board of trade, to make inquiry respecting such loss, abandonment, damage, or casualty: and he shall for that purpose have all the powers given by the first part of this act to inspectors appointed by the said board." Section 433 enacts that, "If it appears to such officer or person as aforesaid, either upon or without any such preliminary inquiry as aforesaid, that a formal investigation is requisite or expedient, or if the board of trade so directs, he shall apply to two justices or to a stipendiary magistrate to hear the case: and such justices or magistrate shall thereupon proceed to hear and try the same, and shall for that purpose, so far as relates to the summoning of parties, compelling the attendance of witnesses, and the regulation of the proceedings, have the same powers as if the same were a proceeding relating to an offence or cause of complaint upon which they or he have power to make a summary conviction or order, or as near thereto as circumstances permit: and it shall be the duty of such officer or person as aforesaid to superintend the management of the case, and to render such assistance to the said justices or magistrate as is in his power: and, upon the conclusion of the case, the said justices or magistrate shall send a report to the board of trade, [43] containing a full statement of the case and of their or his opinion thereon, accompanied by such report of or extracts from the evidence, and such observations (if any) as they or he may think fit." By s. 434, the board of trade are empowered to appoint a nautical assessor. Sections 435 and 436 provide for the mode of proceeding in places where there is a marine board, and for the costs of the investigation. By s. 438, the master or mate may be required to deliver his certificate to the justices, to be held by them until the close of the inquiry. Section 439 empowers the board of trade to appoint receivers of wrecks. The duties and powers of that officer in case of stranding or accident to any ship or boat are defined by ss. 441 and 442. The 441st section enacts that, "whenever any ship or boat is stranded or in distress at any place on the shore of the sea or of any tidal water within the limits of the united kingdom, the receiver of the district within which such place is situate shall, upon being made acquainted with such accident, forthwith proceed to such place, and, upon his arrival there, he shall take the command of all persons present, and assign such duties to each person, and issue such directions, as he may think fit, with a view to

the preservation of such ship or boat, and the lives of the persons belonging thereto, and the cargo and apparel thereof: but it shall not be lawful for such receiver to interfere between the master of such ship or boat and his crew in matters relating to the management thereof, unless he is requested so to do by such master." And the 442nd section enacts that "the receiver may, with a view to such preservation as aforesaid of the ship or boat, persons, cargo, and apparel, do the following things, that is to say,—1. Summon such number of men as he thinks necessary to assist him,—2. Require the master or other person having the charge of any ship or boat [44] near at hand to give such aid with his men, ship, or boats as may lie in his power,—3. Demand the use of any waggon, cart, or horses that may be near at hand: And any person refusing without reasonable cause to comply with any summons, requisition, or demand so made as aforesaid, shall for every such refusal incur a penalty not exceeding 100l." Section 443 provides for the delivery to the receiver of all articles washed on shore or lost or taken from any ship or boat. Then follow provisions for the suppression of plunder, the exercise by other persons in his absence of the powers vested in the receiver, &c.: and then come the provisions upon which this question turns. These, though general in terms, must be read with reference to the objects embraced by this portion of the statute. [Byles, J. Suppose the examination had recited a charterparty, could the charterparty have been kept back, and the examination made *prima facie* evidence of its contents?] It is submitted it could not. [Byles, J. The Indian Mandamus Act, 13 G. 3, c. 63, s. 44, contains no statement as to what shall be done with the evidence taken under the writ, but it is never read if the witness is here. So, this examination, I apprehend, would not dispense with calling the captain. But for the statute, the statements of the captain upon his examination before the receiver would amount to nothing more than admissions by a person who was not the agent of his owner for the purpose of making admissions. If this had been offered merely for the purpose of contradicting the captain, I should have admitted it. Brett, Q. C. The statute was not required to make it admissible for that purpose. Williams, J. If Mr. Brett's contention is right, the examination taken before the receiver would be admissible in a case of piracy or murder.] To make it admissible, the examination must relate to an inquiry which [45] it was competent to the receiver to enter upon, viz. wreck and salvage. The statement of the captain as to the part of the ship to which the damage was done was wholly irrelevant and beyond the competency of the receiver to inquire into. [Byles, J. There is no provision for the signature of the examination by the persons taking it.] None. The 450th and several subsequent sections down to s. 465, relate to the disposal of wrecks and the settlement of claims and disputes as to salvage, and payments to be made to the receiver. The fair conclusion to be deduced from all these provisions, is that s. 448 only relates to examinations by the receiver into claims and disputes concerning wreck or salvage: and that any examination which may be taken by him under that section is made *prima facie* evidence under s. 449, so far as it relates to wreck or salvage. [Byles, J. If the salvors were suing in this court, you admit that the examination taken under s. 448 would be evidence, so far as this objection is concerned?] Yes. The admissibility of the examination must necessarily be limited to some extent. The question is, to what extent it is to be limited. [Williams, J. There are somewhat similar provisions in the 26 G. 2, c. 19, s. 15, and 9 & 10 Viet. c. 99, s. 16, except as to making the examination admissible in evidence. Erle, C. J. The 465th section recognizes a distinction between admissibility generally and admissibility in a limited form (a).] The [46] legislature is there dealing with that which can only be required for that one court. The only thing for which the document is admissible is beyond the scope of these sections. If the generality of the terms of s. 449 be not restrained, this examination might be produced without calling the captain. That never could have been intended. [Willes, J. The 270th

(a) "Whenever any appeal is made in manner hereinbefore (to the court of Admiralty, s. 461) provided, the justices shall transmit to the proper officer of the court of appeal a copy on unstamped paper, certified under their hands to be a true copy, of the proceedings had before such justices, or their umpire, if any, and of the award so made by them or him, accompanied with their or his certificate in writing of the gross value of the article respecting which salvage is claimed: and such copy and certificate shall be admitted in the court of appeal as evidence in the cause."

section is material, as containing in the very same statute an express provision that the examination is not to be received where the party can be produced (*a*).] [47] That is found in a part of the statute which relates to "crimes committed on the high seas and abroad." [Williams, J. It is clear that there is a class of judicial inquiries under which the examinations under s. 448 would be admissible as *prima facie* proof. In the cases to which that section applies, it would be immaterial whether the party was alive or dead when the examination is used. Byles, J., referred to s. 285, which enacts that "all entries made in any official log-book as hereinbefore (ss. 282, 283) directed, shall be received in evidence in any proceeding in any court of justice, subject to all just exceptions."] The statute in question is an aggregation of a great number of earlier acts; and it is quite impossible to reconcile all its parts. [Erle, C. J. The official log-book is admissible *secundum subjectam materiam*: s. 282.] Sections 291 to 329 are comprised in part iv. of the statute, which bears the general heading "Safety and prevention of accidents." The 328th section, which refers to collisions, provides that, "in every case of collision in which it is practicable so to do, the master shall immediately after the occurrence cause a statement thereof and of the circumstances under [48] which the same occurred, to be entered in the official log-book (if any), such entry to be signed by the master, and also by the mate or one of the crew, and, in default, shall incur a penalty not exceeding 20l." Then, as to the other branch of the rule,—the cause was tried by a special jury, and there was evidence on both sides. [Erle, C. J. The learned judge reports to us that he was not satisfied with the verdict.] The question was one peculiarly for the jury; and their verdict ought not to be disturbed on light grounds.

Brett, Q. C., in support of his rule. The question as to the admissibility of these examinations is one of great importance. They are always admitted in collision suits in the Admiralty court. [Willes, J. The course of evidence in the Admiralty court differs from that of the courts of common law.] It is the common course now to examine witnesses *vivâ voce* in the Admiralty court. The log-book is not admitted, except against the vessel keeping it: but the statement made before the receiver is always admitted. The court is always anxious to get the earliest impressions of the persons who were on board at the time of the collision. The language of s. 449 is

(*a*) Section 270 enacts that, "whenever in the course of any legal proceedings instituted in any part of her Majesty's dominions before any judge or magistrate, or before any person authorized by law or by consent of parties to receive evidence, the testimony of any witness is required in relation to the subject-matter of such proceeding, then, upon due proof, if such proceeding is instituted in the united kingdom, that such witness cannot be found in that kingdom or, if in any British possession, that he cannot be found in the same possession, any deposition that such witness may have previously made on oath in relation to the same subject-matter before any justice or magistrate in Her Majesty's dominions, or any British consular officer elsewhere, shall be admissible in evidence, subject to the following restrictions, that is to say,—1. If such deposition was made in the united kingdom, it shall not be admissible in any proceeding instituted in the united kingdom,—2. If such a deposition was made in any British possession, it shall not be admissible in any proceeding instituted in the same British possession,—3. If the proceeding is criminal, it shall not be admissible, unless it was made in the presence of the person accused. Every deposition so made as aforesaid shall be authenticated by the signature of the judge, magistrate, or consular officer before whom the same is made; and such judge, magistrate, or consular officer shall, when the same is taken in a criminal matter, certify, if the fact is so, and (*sic*) that the accused was present at the taking thereof, but it shall not be necessary in any case to prove the signature or official character of the person appearing to have signed any such deposition; and in any criminal proceeding such certificate as aforesaid shall, unless the contrary is proved, be sufficient evidence of the accused having been present in manner thereby certified; but nothing herein contained shall affect any case in which depositions taken in any proceeding are rendered admissible in evidence by any act of parliament, or by any act or ordinance of the legislature of any colony, so far as regards such colony, or to interfere with the power of any colonial legislature to make such depositions admissible in evidence, or to interfere with the practice of any court in which depositions not authenticated as hereinbefore mentioned are admissible."

as general as may be: there is no pretence for saying that it is confined to wreck and salvage. The heading of this part of the statute shews that it applies to casualties which are neither wreck nor salvage. [Williams, J. "Casualties" means, casualties or accidents which result in loss of life. The provision in question, except as to that part which makes the examination admissible in evidence, is taken from the 16th section of the 9 & 10 Vict. c. 99, which applies only to wreck and salvage.] The evidence in question may be material in an action against underwriters. [Williams, J. If your argument be well founded, the examination would be evidence against [49] the captain or any of the crew upon an indictment for scuttling the ship.] There are no words to limit its admissibility to any particular court or as against any particular person. [Byles, J. It must be subject to all just exceptions.] Where the legislature have intended to limit the admissibility of a document, as in the case of the official log (s. 285), they have introduced the qualification, "subject to all just exceptions." Entries in the log were always evidence against the owner, being made by one who is his agent for the purpose. [Willes, J. If the captain were dead, it would be evidence for the owners.] The 465th section, which has been already referred to, is another instance of the limitation of the admissibility of a document in evidence in terms, where such was the intention. [Byles, J. It is impossible to give full effect to the words of s. 449. Abundant force may be given to these examinations without violating our rules of evidence.] Then, the verdict was clearly against the weight of evidence. [Byles, J. I think it is a case in which there ought to be a further inquiry. It will be better to say no more. Erle, C. J. We are all agreed as to that. Upon the question as to the admissibility of the examination for the purpose for which it was offered, we will take a little time for consideration.]

Cur. adv. vult.

ERLE, C. J. The question here is, whether, in an action for a collision, the examination of the captain of the plaintiff's ship, taken by the receiver of wrecks at Grimsby, under the 17 & 18 Vict. c. 104, s. 448, was admissible for the defendant, under s. 449, for the purpose of proving the fact that the damage to the plaintiff's ship from the collision was on her starboard bow; such fact being offered for the purpose of shew-[50]-ing that the plaintiff's ship was in fault. I think not, because the question which ship caused the damage to the other, was not a matter which the receiver had power to examine into under s. 448.

The jurisdiction here in question, "to examine," is given to the receiver, when any ship is or has been in distress on our coasts, in respect of seven matters, —1. The name and description of the ship. 2. The names of the master and owner, 3. The names of the owners of the cargo,—4. The ports or places from and to which the ship was bound, 5. The occasion of the distress of the ship,—6. The services rendered,—7.—Such other matters relating to the ship or cargo as the receiver thinks necessary.

The question whether the colliding part of the plaintiff's ship was the starboard or the port bow, appears to me irrelevant to each and all of these matters. An enactment altering the law as to evidence, and creating statutory evidence whereby the rights of parties may be defeated, must be construed strictly. The law of evidence, as it stands, is intended to maintain truth. Any alteration of that law for a particular purpose, is intended to maintain the truth in a better manner as far as that particular purpose is concerned, and no further; otherwise the alteration would have been carried further. The Merchant Shipping Act is a code of many laws relating to ships, and is divided into eight parts, and each part is subdivided into portions. Each part and portion is appropriated to a specified purpose. In several parts there are alterations of the law of evidence; and each alteration is adapted to the specific purpose of that portion where it occurs. For example, by s. 7, the seal of the board of trade is evidence of the making of all documents issued by the board of trade. This facilitates proof of the authenticity of the document. By s. 19, the inspect-[51]-ors may hold inquisitions, and report to the board of trade upon the matters therein specified. On these reports the board of trade may act in respect of matters under their superintendence. By s. 282, a provision is made against the loss of evidence from the evanescence of seafaring witnesses. Thereby the official log is required to contain, not only matters relating to the crew, but also every death, marriage, and birth on board, and every collision. And by s. 285 all entries in the official logbook shall be received in evidence in any court, saving all just exceptions. The admissibility of each of these entries must be regulated by the nature of the subject of the entry.

Part 8 contains the section now to be construed. By its title, it relates to wrecks, casualties, and salvage: and I gather from s. 432 that "casualties" here means casualties resulting in a death. Therefore, as far as the present question is concerned, the part may be taken to relate only to wrecks and salvage. This section in the first place contains a power in the inspecting officer to make inquiry, *inter alia*, whenever any ship causes damage to any other ship; and the result of this inquiry is to be sent in a report to the board of trade, and is not made admissible in evidence in any peculiar manner created by statute. Then follow the sections in question, 448 and 449, above mentioned.

It seems clear that section 448 did not authorize the receiver to inquire into the blame due to either party in a collision, because it had been before specifically provided for and assigned to the inspecting officer, as last mentioned. Under section 448, the inquiry by the receiver of wrecks into the seven matters above specified is for his guidance in performing the duties of his office connected with wreck. If that in-[52]-quiry is confined strictly to these seven matters in their relation to ship and cargo, the result thereof would not be likely to affect materially the rights of litigants by admissibility in all courts. It perpetuates *prima facie* evidence in relation to the identity of the ship and the voyage, and the occasion of distress. Under head 5, the receiver of wrecks may inquire into the cause of the distress: for instance, whether there is damage to the hull or the loss of a mast or of an anchor, and whether such damage was caused by stranding, or collision, or the like. But, for the purpose of the receiver of wrecks, the part of the ship where the damage was received is as immaterial as the quarter from which the wind was blowing at the time the damage was done.

I think his report is only evidence as to the matters into which it was his duty to inquire, and that the part of the hull supposed to be struck in the collision is not one of those matters.

Hearsay evidence is admissible for pedigree: but where the deceased parent told the child who were his father and mother, adding the place of his birth, the declaration was admissible only for the pedigree, not for the locality of the birth.

In the portion of Part 8 relating to salvage, provision is made for deciding on claims of salvage before justices of the peace by s. 461 and the following sections: and by s. 464 an appeal is given: and by s. 465 the justices may send a copy of the proceedings before them, and such copy is made evidence, but only for the court of appeal.

Upon this review of the statute, I think the rules of law relating to evidence are altered only for a specified purpose, and that the sections are drawn with great legal knowledge, confining each alteration to its own appropriate purpose: and, on this construction of [53] the act, the examination of the captain was not admissible as substantive evidence that in the collision the starboard bow of the plaintiff's ship was struck.

I do not advert to the other grounds of rejection: but, as this was the point made by the defendant's counsel, it suffices to decide it against him.

WILLIAMS, J. I am of the same opinion. I think the evidence was properly rejected on the ground that it was sought to use it for a purpose as to which it was no part of the duty of the receiver of wrecks to inquire. It was urged by Mr. Brett, in support of his contention, that the language of s. 449 is general and without restriction,—that "any examination so taken in writing as aforesaid (s. 448), or a copy thereof, purporting to be certified under the hand of the receiver or justice before whom such examination was taken, shall be admitted in evidence in any court of justice, or before any person having by law or by consent of parties authority to hear, receive, and examine evidence, as *prima facie* proof of all matters contained in such written examination." It is clear that these general words must be to some extent controlled: for, it never could have been intended to make matters spoken to by a witness otherwise than of his own knowledge,—mere hearsay,—admissible in evidence. It seems to me to be contrary to good sense and reason not to impose on the section the limit suggested by my Lord, viz. that such examination must relate to matters into which the receiver has by the statute and by the ordinary rules of law authority to inquire. The matter sought to be made evidence here is not such a one as the receiver had any power to inquire into. Having taken this view, it seems to me to be unnecessary to give any opinion whether, looking to the history of this part

of the statute, the true meaning of [54] the 449th section is not that the examination under s. 448 shall be admitted in evidence where the inquiry before the receiver is limited to an inquiry touching wreck and salvage.

WILLES, J. I am of the same opinion. It seems to me that the jurisdiction of the receiver under s. 448 is confined to an inquiry in cases of wreck and salvage into matters relating to the ship, her cargo and stores. That is expressly so stated in the introductory part of the section. He is to examine any person belonging to the ship, or any other person who may be able to give any account thereof, or of the cargo or stores thereof, touching the seven matters enumerated. His inquiry is to be limited, as one would have expected it would be, to an inquiry as to the ship and what belongs to her, which has been brought within his cognizance by reason of stress of weather. And that will appear still more clearly by a reference to s. 14, which provides that the board of trade may from time to time, whenever it seems expedient to them to do so, appoint a person as an inspector to report to them upon, amongst other things, the nature and causes of any accident or damages which any ship has sustained or caused, or is alleged to have sustained or caused. There, such an inquiry as it is suggested the receiver might enter into is expressly provided for by apt words,—words which leave no doubt that the 448th section was not intended to apply to the case of an inquiry as to who was in fault in the case of a collision which has caused the distress which brings the vessel under the cognizance of the receiver. I take it to be perfectly clear that the receiver has no right to inquire as to which party was in fault. It is true, the receiver may have jurisdiction to receive evidence of facts which may be relevant and material with reference to [55] the inquiry as to who was in fault: and that is the ground upon which Mr. Brett insisted with the greatest apparent justice upon the admissibility of the receiver's report as to the fact of the injury to the plaintiff's vessel having been inflicted on the starboard side. But a moment's consideration will shew that to hold that the examination is evidence because besides the inquiry as to the wreck it also is relevant to such a question as arises here, would be an unjust and almost absurd construction of the statute. The receiver has no jurisdiction to investigate the whole matter, including the question which party was in fault in a case of collision, and yet the examination is to be admitted "as *prima facie* proof of all matters contained therein." It must therefore be limited to matters which could legally be investigated before the receiver: and this is a matter which could not. We cannot impute to the legislature an intention to admit garbled evidence of a fact which was not properly a subject of inquiry before the receiver. This construction is consistent with the whole scope of the act of parliament. The 7th, 137th, 138th, 175th, 244th, 249th, 250th, 265th, 269th, 270th, 285th, 328th, and 526th are all sections relating to the admissibility of evidence; and they are limited to the admission of documents certified by official persons. When the legislature come to deal with other matters, the log, for instance, they introduce the limitation "subject to all just exceptions." And s. 270, which provides for the reception of depositions in evidence, only makes them admissible under safe-guards and restrictions which are not provided in the section now under consideration. To hold, therefore, that this examination was admissible for the purpose for which it was tendered, would be not only inconsistent with the ordinary rules of evidence, but also inconsistent with the whole scope and frame of the statute.

[56] BYLES, J. I agree with the rest of the court, that notwithstanding the general and comprehensive words of the section in question, there are limitations which must be implied. Agreeing as I do with the reasons given by the rest of the court, I do not hold myself precluded from considering, whenever the question may arise, whether there are not other limitations even within those. The result is that the rule will be made absolute only as for a verdict against evidence.

Rule absolute accordingly.

THE STEARINE KAARSEN FAEBRICK GONDA COMPANY v. HEINTZMANN AND ANOTHER.
June 13th, 1864.

1. The defendants being employed as agents for the plaintiffs (a foreign company) to negotiate sales of candles for them in this country, conveyed to them an order from one S for 2500 cases, to be delivered in London "free on board export ship: 2½ per

cent. discount against bill at three days' sight: goods, invoice, and draft for acceptance to be sent to us." The plaintiffs did not in terms accept this proposal, but wrote to the defendants on the 19th of June as follows,—"*Les informations sur S sont telles que nous ne pouvons lui livrer les 2500 caisses que contre connaissance. Si vous voulez, nous vous enverrons les connaissances, et vous ne les lui délivrerez que contre paiement.*" The defendants informed S. that the plaintiffs accepted the order on condition that he handed them (the defendants) a cheque in exchange for the bill of lading; and to this S. assented, provided he was allowed a discount of 3 per cent. instead of $2\frac{1}{2}$, to which the plaintiffs agreed. On the arrival of the goods in London, the defendants caused them to be transhipped on board a vessel called the "Laurel" (named by S.) bound for Melbourne, taking the mate's receipt in their own names. They afterwards tendered that document to S. and demanded payment, which he promised to make on the following Saturday. S., however, failed to pay according to his promise, and the "Laurel" sailed to Melbourne with the goods on board.—Under the instruction of the judge, the jury found that the meaning of the plaintiffs' letter of the 19th of June was, that the defendants were not to part with *the goods* out of their possession or control, until they had received the price thereof from S.:—Held, that the conduct of the defendants amounted to a breach of their contract with the plaintiffs; that there was no misdirection; and that the proper measure of damages was the value of the goods. —2. It is not competent to a witness who is called to *interpret* a foreign document, to give an opinion as to its *construction*: that is for the court.

This was an action against the defendants for an alleged breach of duty in their character of agents.

The declaration stated, in substance, that, in consideration that the plaintiffs would employ the de-[57]-fendants to sell and deliver certain goods to one Sichel, they the defendants promised not to deliver the said goods to him without payment of the price thereof: Breach, that they had so delivered them without payment, whereby the plaintiffs lost the goods.

Pleas,—first, a denial of the promise as alleged,—secondly, a denial of the delivery of the goods to Sichel as alleged. Issue thereon.

The cause was tried before Erle, C. J., at the sittings in London after last Hilary Term. It appeared that the plaintiffs, a company in Holland engaged in the manufacture of candles, were in the habit of sending goods to this country for shipment abroad, and that, since the year 1861, the defendants, Messrs. Heintzmann & Rochussen, had acted as their agents here.

One Sichel having proposed to purchase of the company through the defendants 2500 boxes of candles for shipment to Melbourne in two parcels "free on board export ship," at certain prices named, with $2\frac{1}{2}$ per cent. discount, the defendants communicated his offer to the plaintiffs in the following letter:—

"London, 1st June, 1863.

"De Stearine Kaarsen Fabriek Gonda.

"Below we hand you confirmation of the order of 2500 boxes, the half of which are to be shipped at your earliest convenience, the other half one month later.—

"1/6496. G. Sichel, 36 Old Broad Street.

"G. S. 11 and upwards, quality and label in every way as shipped under mark S. per Maaslings & Ornuist.

"1250 boxes 6. 16 oz. net. } at 8 $\frac{3}{4}$ d. per lb.

"1250 boxes 6. 13 oz. net. }

"Free o. b. export ship. $2\frac{1}{2}$ per cent. discount against bill at three days' sight.

"Two shipments of 625 boxes 16 oz. } one mo. apart.
625 „ 13 oz }

[58] "Goods, invoice, and draft for acceptance to be sent to us.

"HEINTZMANN & ROCHUSSEN."

Some correspondence then ensued between the company and Messrs. Heintzmann & Co. which contained nothing material: and on the 19th of June, the plaintiffs wrote to them as follows:—

"Les informations sur Gustave Sichel sont telles que nous ne pouvons lui livrer les 2500 caisses que contre connaissance. Si vous voulez, nous vous enverrons les connaissements, et vous ne les lui délivrerez que contre paiement."

Again, on the 27th of June, the plaintiffs wrote to Heintzmann & Co. as follows:—

"Nous sommes en état d'accorder des frets pour Melbourne à raison de 35s. in full par 40 pieds cubes Anglais. Si M. Sichel veut expédier ces bougies par Rotterdam à Melbourne moyennant le fret mentionné, nous voulons lui livrer les 2500 caisses au lieu de 8 $\frac{1}{2}$ p. par 16 onces, at 8 $\frac{1}{2}$ d. francs à bord du navire Hendrick Ido. Ambent, partant fin Juillet, de Rotterdam."

On the 29th, Heintzmann & Co. wrote to the plaintiffs as follows:—

"Répondant à votre estimée du 27, &c. M. G. Sichel demande ses bougies comme convenue ici, et pour paiement contre connaissance stipule un escompte extra de $\frac{1}{2}$ pour cent."

The goods were forwarded to London on board the "Finourd," with a bill of lading making them deliverable to Heintzmann & Rochussen or assigns, and a bill on Sichel for the amount payable at sight. On their arrival, on the 3rd of August, Heintzmann & Rochussen took the bill of lading and the draft to Sichel. The latter said he was only to pay against the mate's receipt, and he named the "Laurel" as the vessel into which the candles were to be transhipped [59] for Melbourne. The goods were accordingly put on board the "Laurel" on the 5th and 6th of August, and a mate's receipt for them obtained. Sichel made some objections to the quality of the candles; but ultimately he promised to pay for them on Saturday the 8th of August. He did not, however, perform his promise; and the "Laurel" sailed for Melbourne on the 8th, with the candles (uninsured) on board, no bill of lading having been signed for them.

On the part of the defendants it was submitted that there was no such contract as alleged, and no breach of such contract as proved. It was further contended that the contract being for a sale of goods "free on board" the export ship, the defendants were bound to ship them on board the "Laurel"; that the word "les," in the letter of instructions of the 19th of June referred to the "connaissements," which it was submitted meant the shipping documents, in this case the mate's receipt.

M. Delpierre, the Belgian consul, was called for the purpose of translating the letter above mentioned. He was asked to what the article "les" referred, and he said it was applicable to the "connaissements."

Upon its being objected on the part of the plaintiffs that it was not competent to the defendants to call a witness to explain the meaning of the document, the Lord Chief Justice rejected the evidence, observing that it was for the witness to translate the document, but that its construction was for the judge.

His lordship left the whole case to the jury, telling them that, in his opinion, "les" referred to the *goods*, and that there was some evidence of the promise alleged in the declaration, and of a breach thereof by the defendants.

The jury returned a verdict for the plaintiffs for the value of the goods 1000*l.* and upwards.

[60] The Hon G. Denman, Q. C., in Easter Term last, obtained a rule nisi for a new rule, on the ground that his Lordship misdirected the jury,—first, in leaving to them the construction of the letter of the 19th of June,—secondly, in telling the jury that the word "les" in that letter referred to the "goods" therein mentioned,—thirdly, in telling the jury that there was evidence of the promise alleged in the declaration,—fourthly, in telling the jury that there was evidence of the breach alleged,—fifthly, in allowing the jury without evidence to give a verdict for the full amount claimed. He also asked for a rule on the ground of the improper rejection of the evidence of M. Delpierre: referring to Taylor on Evidence, 3rd edit. § 1059, where it is said that, "if the language, whether as being foreign, obsolete, technical, local, or provincial, is either not understood by the court, or is capable of bearing two or more interpretations,—the testimony of persons skilled in deciphering writings, or who understand the language in which the instrument is written, or the antient, technical, local, or provincial meaning of the terms employed, is admissible to interpret the characters, or to translate the instrument, or to testify the proper meaning of particular expressions." [Byles, J. This was an attempt to give evidence of *construction* under

the guise of a translation. Erle, C. J. In *The Duchess di Sora v. Phillips*, 33 Law J., Ch. 129, it was held by the House of Lords that, in the construction of a foreign document in the English courts, the judge or court must obtain, first, a translation of the document, secondly, an explanation of any terms of art used in it, thirdly, information on any special law, and, fourthly, on any particular rule of construction of a foreign state affecting it: and it is the duty of the English court with such light to construe the document (a)¹.]

[61] Upon this point the rule was refused.

Lush, Q. C., and Sir G. Honyman, on a subsequent day, shewed cause. The facts shew an inexcusable breach of the defendants' contract and their duty as agents. Their instructions in substance were, not to part with the goods out of their control without first obtaining payment for them. How have they obeyed those instructions? They have put the goods on board a vessel named by Sichel, and have allowed them to be taken to Australia uninsured and not paid for. [Willes, J. The sale was "free on board." The defendants were bound to put them in that position before they could properly call on Sichel for payment. The goods are not under the control of Sichel, he not having the mate's receipt.] The defendants have broken their promise: for, they have parted with the goods without obtaining payment for them. [Keating, J. The goods are still the plaintiffs' goods.] They will be, no doubt, if the plaintiffs do not retain their verdict. [Byles, J. The word "connaissance" is used twice in the letter of the 19th of June. Taking the whole of that letter, does it not mean, "Do not part with the goods without a bill of lading,—connaissance,—and do not part with the bill of lading without obtaining cash?" It means, "Do not part with the control over the goods until you have obtained payment." [Willes, J. The letter of the 27th of June rather tends to confirm the suggestion of my Brother Byles.] The expression "free on board" only means that the goods shall be delivered alongside the export ship at the expense of the sellers. The defendants should not have put the goods on board the "Laurel" without having the cash against the bill of lading. As to the damages, the value of the goods, which are lost to the plaintiffs, was clearly the only proper measure.

[62] Denman, Q. C., C. Pollock, and Taylor, in support of the rule. There was no such contract as that alleged in the declaration, and no such breach as to make the defendants liable. The question is, what is the meaning of the letter of the 19th of June, "Les informations sur Gustave Sichel sont telles que nous ne pouvons lui livrer les 2500 caisses que contre *connaissance*. Si vous voulez, nous vous enverrons les *connaissances*, et vous ne les lui délivrerez que contre payment." "Connaissance" means "Shipping document of title,"—Tullet et Oiseau, Dictionnaire des Termes de Droit (a)². [Willes, J. That is taken from the Code Maritime.] It means document of title for the time being. It is plain from the defendants' letter of the 29th of June, that they so understood it. That the property in the candles did not pass to Sichel by their being put on board the "Laurel," is clear from *Wait v. Baker*, 2 Exch. 1, *Brown v. Haro*, 4 Hurlst. & N. 822, and *Turner v. The Trustees of the Liverpool Docks*, 6 Exch. 543. In Abbott on Shipping, 8th edit. 526, 10th edit. 402, it is said: "It sometimes happens that goods intended for exportation are sold under a contract to deliver them on board a vessel named by the buyer. In such a case, the seller may retain his property in the goods by taking a receipt for them from the person in charge of the ship, so long as he keeps this receipt in his own hands, the shipment not being under such circumstances a complete delivery to the buyer: *Craven v. Ryder*, 6 Taunt. 433, 2 Marsh. 127. He will also retain his right to [63] the goods, at least as against the master of the ship, if he demand a receipt in his own name at the time of the shipment, although the receipt be not delivered, and the master afterwards sign and deliver a bill of lading to the buyer, who becomes insolvent before the departure of the ship: *Ruck v. Hatfield*, 5 B. & Ald. 632" (a)³. In *Courts-jee v. Thompson*,

(a)¹ Cited, Taylor on Evidence, 3rd edit. § 1280 A.

(a)² In the Dictionnaire de l'Académie Française, "Connaissance," is thus defined, —Déclaration contenant un état des marchandises chargées sur un navire, le nom de ceux à qui elles appartiennent, l'indication des lieux où on les porte, et le prix du fret." "Tous les connaissements," it is added, "sont signés par le capitaine et par le chargeur."

(a)³ See *Joyce v. Swann*, post, p. 84.

5 Moore's P. C. 165, goods contracted to be sold and delivered "free on board," to be paid for by cash or bills, *at the option of the purchasers*, were delivered on board, and receipts taken from the mate by the lighterman employed by the sellers, who handed the same over to them. The sellers apprised the purchasers of the delivery, *who elected to pay for the goods by a bill*, which the sellers having drawn was duly accepted by the purchasers. The sellers retained the mate's receipts for the goods, but the master signed the bill of lading *in the purchasers' names*, who, while the bill they accepted was running, became insolvent. Under these circumstances, it was held by the judicial committee of the privy council (reversing the verdict and judgment of the supreme court at Bombay) that trover would not lie for the goods, for that, on their delivery on board the vessel, they were no longer in transitu, so as to be stopped by the sellers; and that the retention of the mate's receipts by the sellers was immaterial, as, after *their election to be paid by a bill (b)*, the receipts of the mate were not essential to the transaction between the sellers and purchasers. Lord Brougham, in delivering judgment, there says, p. 176. "*Craven v. Ryder* differs materially from the present case, in having an order from the sellers to the captain 'to receive the goods for and on account of the plaintiffs' (the sellers), and in the receipt expressly stating that [64] they were received for and on account of the sellers: and it was proved that this form had been recently adopted, for the express purpose of giving the shipper a command over the goods until the receipt should be given up for the bill of lading. It is true, Gibbs, C. J., says he should have held the same opinion had the receipt been in the old form: yet he says the change is a circumstance to be considered. Nor can we argue that it is otherwise than an important distinction between that case and this. Dallas, J., who tried the cause, said the jury were clear that the plaintiff never had parted with the possession: so that he considered the fact of continuing possession as having been left to them. Moreover, there was evidence in the present case, that, by the custom of the trade, when goods were sold 'free on board,' the buyer is considered as the shipper, though the seller is to carry them for him to the vessel: and we know not if any such evidence was given in *Craven v. Ryder*. If that judgment be understood to hold this evidence immaterial, then we are unable to concur with it. The question in all the cases between buyer and seller, which is the case here, is whether or not anything remained to be done as between these two parties. The importance of keeping that in view, and always attending to this, whether the question arises between these two persons, or between one of them, the seller, and some third party, is well stated by Le Blanc, J., in *Busk v. Davis*, 2 M. & Selw. 403, and *Whitehouse v. Frost*, 12 East, 621. In the present case, it is quite clear that nothing whatever remained to be done between the buyer and seller, unless it be that the former ought most certainly to have delivered up the mate's receipt, which he wrongfully or by oversight kept possession of, without the shadow of a right to it: and, whether it be wrong or error, he is not the party to take advantage of this." Here the mate's receipt was made out in the names of the defendants as the agents of the plaintiffs. The ambiguity, if any there be, is the fault of the plaintiffs themselves. The words "contre connaissance," in the first part of the letter of the 19th of June, if they mean anything, must mean "against the Australian bill of lading," for that would be the only document the purchaser could have to countervail the delivery of the goods on board the export ship. The defendants, therefore, it is submitted, have fully and completely carried out their instructions, in preventing the goods from being at the control of the buyer. At all events, the damages are excessive: the goods are still subject to the control of the shippers, and, for anything that appears, may still realize enough to pay the invoice price and all charges. [Willes, J. If the plaintiffs are entitled to a verdict at all, I do not see how it can be for less than the value of the goods. By the defendants' breach of contract, they have been sent to a place to which the plaintiffs never intended them to go.]

Cur. adv. vult.

ERLE, C. J., now delivered the judgment of the court (a):—

This was a rule for a new trial, on the ground of misdirection.

(b) The election was the other way. A similar mistake occurs in the judgment, at p. 174.

(a) The judges present at the argument were, Erle, C. J., Willes, J., Byles, J., and Keating, J.

The declaration alleged that, in consideration that the plaintiffs would employ the defendants to sell and deliver certain goods to one Sichel, they the defendants promised not to deliver the said goods to him without payment of the price thereof, yet they had so delivered them without payment. The pleas denied the promise and the breach.

[66] It appeared that the goods in question were consigned by the plaintiffs with a bill of lading to the defendants for Sichel, and the defendants put the goods on board the "Laurel," a ship named by Sichel, and kept the mate's receipt, and that the "Laurel" sailed before Sichel had paid or any bill of lading on board that ship had been made out, and the goods could not be found; and this action was brought to recover their value from the defendants. The judge left the issues to the jury; and they found for the plaintiffs.

The rule nisi was granted on five grounds of misdirection,—first, for leaving the construction of the letter of the 19th of June to the jury, secondly, in telling the jury that the word "les" in that letter referred to the goods,—thirdly and fourthly, in leaving the issues on the contract and on the breach to the jury, without any evidence to support them,—fifthly, in allowing the jury to give for damages the value of the goods and the loss sustained in respect of a draft for their price.

After hearing the argument on that rule, we are now to decide whether any of those grounds for a new trial have been established; and our decision is in the negative.

The main question is, whether there was evidence of the contract declared on. The plaintiffs, in support of the affirmative, adduced the oral evidence of Mr. Wachter, and several letters: and we are of opinion that the whole of that evidence, including the letter of the 19th of June, was properly left to the jury.

The terms on which the defendants became agents of the plaintiffs appeared by the defendants' letter of the 9th of August and Mr. Wachter's statement. The defendants were to have a commission on all orders obtained through them; and the plaintiffs reserved to themselves the right to make inquiries before they [67] accepted any order proposed to them by the defendants.

The following letters shew the order here in question:—On the 30th of May, 1863, Sichel wrote to the defendants to propose an order for 2500 boxes of candles in two shipments, "free on board export ship, at certain prices, with $2\frac{1}{2}$ per cent. discount." On the 1st of June the defendants proposed this order to the plaintiffs,—*"Free on board export ship: $2\frac{1}{2}$ per cent. discount, against bill at three days' sight: goods, invoice, and draft for acceptance to be sent to us."* This order was never finally accepted by the plaintiffs: but, after intermediate correspondence not important, on the 19th of June they wrote to the defendants,—*"The information about Sichel is of such a nature that we cannot deliver the boxes except against bill of lading. If you like, we will send you the bills of lading, and you will not deliver them to him but upon payment."*

These were the instructions upon which the defendants were bound to act in their dealings with Sichel on behalf of the plaintiffs; and they shew the contract of the defendants for breach of which they are now sued.

The jury have in effect found (and, if the question was for us, we are of the same opinion as the jury,) that the defendants were thus instructed not to part with the goods out of their possession or control till they had received the price thereof from Sichel. The goods were to be consigned in two shipments from Rotterdam to London, with bills of lading making them deliverable to the defendants. Sichel was not to have the boxes except against those bills of lading; and those bills of lading were not to be delivered to Sichel till he had paid the price. That the plaintiffs so understood it, is clear from the documents they sent, viz., bill of lading for the shipment to London, with invoice "payable au [68] comptant," and draft at sight. So the defendants understood it: for, by letter of the 22nd of June, they informed Sichel that the plaintiffs accepted the order on condition that he handed a cheque to the defendants in exchange for bill of lading; and to this Sichel consented, provided he was allowed 3 per cent. instead of $2\frac{1}{2}$ per cent. discount; and to this the plaintiffs consented; and then, and not till then, the contract was made.

Furthermore, when the goods arrived, the defendants sent bill of lading, invoice, and draft at sight; and, if Sichel had accepted the draft and paid it against bill of lading, according to invoice, the defendants would have fulfilled their instructions

But they were induced by Sichel to place the goods on board an export ship named by him, without receiving the price; and thereby the loss was caused.

The defendants contended that they had fulfilled their instructions, because they had kept the bills of lading of the Dutch ship, and had kept the mate's receipt of the Australian ship, and so prevented Sichel getting the goods represented by that mate's receipt. But, in the opinion of the court and the jury, the letter of the 19th of June does not support this contention; the substance thereof being as above stated.

Some confusion was introduced, from assuming that the contract had been made as proposed in the letter of the 1st of June, with the term that the goods should be delivered "free on board" the export ship. But that letter was answered by the letter of the 19th of June; and no contract was formed until the subsequent letters had passed relating to the discount, as above mentioned; and the duty to receive the price before parting with the possession or control of the goods was plainly declared by the letter of the 19th of June, and was not altered by the subsequent letters relating to the discount to be allowed.

[69] In coming to the conclusion that there was evidence on which the jury might find that the contract was made in substance as alleged, we have in effect decided that there was also evidence on which they might find that the breach was proved. It also follows, in our opinion, that the jury were right in giving the value of the goods, which were lost to the plaintiffs, and the expenses incurred by them in respect of the bill of exchange for the price drawn according to the terms of the letter of the 19th of June.

An argument was founded on the meaning of the French pronoun "les," in the letter of the 19th of June. The letter is in these terms:—"Les information sur Gustave Sichel sont telles que nous ne pouvons lui livrer les 2500 caisses que contre connaissance. Si vous voulez, nous vous enverrons les connaissances, et vous ne les lui délivrerez que contre payment."

The word "connaissance" was alleged at the bar to be a general term comprehending any admission of the receipt of goods on board a vessel, such as a mate's receipt. But that appears to be a mistake. The appropriate general word to express a receipt or admission, and comprehending a mate's receipt, is "reconnaissance"; but the word "connaissance" has a well-known restricted and peculiar meaning. "Reconnaissance" is the genus; "connaissance" the species. "Connaissance," not only in popular French, but in French law, is said to mean bill of lading; see *Code de Commerce*, tit. 7, "Du Connaissance," art. 281.

An objection was made, that the learned judge had in effect led the jury to understand that the pronoun "les" in the last clause of the letter meant the goods; whereas, it was said to refer to some bill of lading or mate's receipt, so as to prevent the defendants' conduct [70] from being a breach of their contract with the plaintiffs.

We do not advert specifically to these suggested meanings, because we dissent from them. The meaning is, that we, the plaintiffs, will send you the Dutch bills of lading, and you will not deliver "them," that is, those bills of lading, to him till you have got the price. This instruction not to deliver the Dutch bills to Sichel without the price, was *a fortiori* an instruction not to part with the control of the goods represented by those bills of lading, till the price was paid. If, on tender of those bills of lading, the price was not paid by Sichel, he had no right to the goods under the contract, and the defendants did wrong in putting them on board the ship named by him in the course of a delivery to him, whereby they lost possession of or at least control over the goods, and a direction was given to them, as requested by Sichel, contrary to the instructions of the plaintiffs. In this view, the letter had in effect the meaning which it is alleged that the judge offered to the jury to be adopted or not by them as they should decide.

Upon this construction of the effect of the evidence, the declaration is in substance right. If any amendment was needed, it would not affect the rights of the parties to the cause, but would be made by the court, as a matter of course, without costs. On these grounds the rule is discharged.

Rule discharged.

[71] KOEBEL v. SAUNDERS. June 23rd, 1864.

[S. C. 33 L. J. C. P. 310; 10 L. T. 695; 10 Jur. N. S. 920; 12 W. R. 1106.]

It is not a condition precedent to the attaching of a policy on *goods* against sea-risks, that the subject of insurance should at the commencement of the voyage be fit to encounter the ordinary vicissitudes of a voyage.

This was an action upon a policy of insurance at and from any port or ports, place or places in Cochin, to Marseilles, with leave to call and stay for all purposes at all or any ports or places on either side of, at, and beyond the Cape of Good Hope, and with all risk of craft, upon any kind of goods and merchandises by the ship "Flore," beginning the adventure upon the said goods and merchandises from the loading thereof aboard the said ship as above, and to continue and endure until the said ship and goods and merchandises whatsoever should be arrived at as above, and until the said goods and merchandises should be there discharged and safely landed. And it was provided by the policy that it should be lawful for the said ship, &c., in the said voyage to proceed and sail to and touch and stay at any ports or places whatsoever, and for all purposes, without prejudice to the said insurance. And the said insurance was thereby declared to be on cocoa-nut oil and [or] cargo of produce as interest might appear, value to include 10 per cent. advance on invoice and charges: produce (oil excepted) warranted free from particular average, except the vessel should be sunk, burnt, or stranded: to pay general average as per foreign statement: warranted to sail on or before the 1st of January, 1863.

The declaration stated that, in consideration of the payment by the plaintiff to the defendant of a certain premium at and after the rate aforesaid [30s. per cent.] for the insurance of 200l. upon and in respect of the premises, upon the terms aforesaid, the defendant then became and was an insurer to the plaintiffs accordingly, and duly subscribed the said policy as such insurer of the sum of 200l.; that, before the happening [72] of the loss thereafter mentioned, divers goods, to wit, cocoa-nut oil and coprah, being goods covered by the said policy, had been and were loaded on board the said vessel, to be therein carried on the voyage mentioned in the said policy, and that the plaintiff at the time of the making of the policy and of the commencement of the said risk, and thence continually until and at the time of the loss thereafter mentioned, was interested in the subject-matter of the said insurance to the value and amount of all the moneys ever insured thereon, and that the said insurance was made for the use and benefit and by the order of and on account of the plaintiff; that, after the commencement of the said risk, and during its continuance, and while the said policy was in full force, the said goods were, by divers of the perils insured against, wholly lost,—of all which the defendant had notice; that, before this action was brought, all warranties had been complied with, and all conditions were fulfilled, and all things were done and happened, and all times elapsed, necessary to entitle the plaintiff to be paid by the defendant the said sum of 200l. so insured by him, and to sue him for the non-payment thereof thereafter mentioned: yet that the defendant had not paid the said sum of 200l., or any part thereof, and the same remained wholly unpaid and in arrear, contrary to and in violation of the terms and provisions of the said policy of insurance.

Fourth plea,—that the said premises so insured as aforesaid were not seaworthy for the said voyage at the time the said ship departed and set sail thereon.

To this plea the plaintiff demurred, the grounds of demurrer stated in the margin being,—"that there is no implied warranty of the sea-worthiness of the goods insured by a policy; and that the plea does not allege that the loss was attributable to the condition of the goods." Joinder.

[73] Sir G. Honyman, in support of the demurrer(a). This is the first time it has

(a) The points marked for argument on the part of the plaintiff were as follows:—

"1. That, in a policy on goods, there is no implied warranty that the goods are seaworthy:

"2. That the plea does not allege that the loss was attributable to the condition of the goods:

"3. That the plea admits that the goods were lost by the perils insured against, and does not aver anything to relieve the underwriters from responsibility."

been suggested to be an implied warranty on an insurance of goods, that at the commencement of the voyage the goods were sea-worthy. [He was stopped by the court, who called upon

Watkin Williams to support the plea (*b*). In an insurance on a voyage policy upon goods, it is an implied condition that they shall be seaworthy at the commencement of the voyage, that they shall be in a fit state to encounter the ordinary perils incident to the voyage. [Willes, J. Is not "seaworthy" a term of art which is inapplicable to goods⁽¹⁾] In *Park on Insurance*, 8th edit. 458, it is said: "There is in the contract of insurance a tacit and implied agreement that everything shall be in that state and condition in which it ought to be: and therefore it is not sufficient for the insured to say that he did not know that the ship was not seaworthy; for, he ought to know that she was so at the time he made the insurance. The ship is the substratum of the contract between the parties: [74] a ship not capable of performing the voyage is the same as if there were no ship at all: and, although the defect may not be known to the person insured, yet, the very foundation of the contract being gone, the law is clearly in favour of the underwriter, because such a defect is not the consequence of any external misfortune, or any unavoidable accident arising from the perils of the sea, or any other risk against which the underwriter engages to indemnify the person insured." So, in *Arnould on Insurance*, 2nd edit. 689, it is laid down that, "in every policy of sea insurance on a voyage, there is an implied warranty that the ship shall be seaworthy for the voyage when she sails; by which is meant that she shall be in a fit state as to repairs, equipments, crew, and all other respects, to encounter the ordinary perils of the voyage insured at the time of sailing on it,"—citing *Widderburn v. Bell*, 1 Campb. 1; *Christie v. Secretan*, 8 T. R. 192. The same reasoning is equally applicable to an insurance on goods as to an insurance on ship. It is assumed that when shipped the goods are in a fit state to bear the voyage. There is one case of that sort in the books, and one only, viz. *Oliver v. Cowley*, before Lord Mansfield at the Guildhall sittings after Trinity Term, 1765, which is thus given in *Park on Insurance*, 470:—"An action was brought by an innocent shipper of goods (no part-owner of the ship) against the underwriter, and the policy was effected on goods in the "Amy" and "Lætitia" at and from Montserrat to London. It appeared that the ship sailed on the 26th of July, and next day, *without any bad weather*, she was very leaky, and obliged to run for St. Thomas's, one of the Virgin Islands, where she was unloaded, and the goods, being much damaged, were sold. It could not but be allowed on all sides that the ship was not seaworthy to undertake the insured voyage; and it was agreed and admitted by defendant that the shipper of the goods was a stranger to it when the [75] goods were shipped. The plaintiff was nonsuited, Lord Mansfield saying that the implied warranty could not be dispensed with in any case; that it was a point of law, and, if the plaintiff's counsel thought there was any ground to go upon, he would save the point. But the plaintiff's counsel declined this, being satisfied the question was clear against them. The plaintiff was nonsuited" (*a*). In *Boyd*

(*b*) The points marked for argument on the part of the defendant were as follows:—

"1. That it is a condition precedent to the attaching of a policy of insurance on goods against sea-risks, that the subject of insurance should at the commencement of the voyage be fit to encounter the ordinary vicissitudes of a voyage:

"2. That the plea shews that the subject of insurance was not fit to encounter the ordinary vicissitudes of a voyage, and therefore the policy never attached."

(*a*) This loose note is inserted by the editor without any comment. But, in the next paragraph, he says, "In a late case, the law respecting the implied warranty of sea-worthiness was *accurately* stated, and the reason for it clearly illustrated, by Mr. Justice Lawrence. The learned judge said,—"I also doubt whether there is any analogy between a case like the present and cases where there is an implied warranty of seaworthiness. The latter is implied from the nature of a contract of insurance. The consideration of an insurance is paid in order that the owner of a ship, *which is capable of performing her voyage*, may be indemnified against certain contingencies; and it supposes the possibility of the underwriter gaining the premium; but, *if the ship be incapable of performing her voyage*, there is no possibility of the underwriter's gaining the premium: and, if the consideration fails, the obligation fails. In the case of *The Mills Frigate* (*Mills v. Imbuck*, Marsh. Ins. 154, Park, Ins. 460, 8th edit.), it was said that the ship's being capable of performing the voyage was the substratum of the

v. *Dubois*, 3 [76] Campb. 133, Lord Ellenborough says,—“If the hemp was put on board in a state liable to effervesce, and it did effervesce and generate the fire which consumed it, upon the common principles of insurance law, the assured cannot recover for a loss which he himself has occasioned.” In 3 Kent’s Commentaries, 287 (10th edit. 391), it is said: “There is in every policy an implied warranty that the ship is seaworthy when the policy attaches. This means that the vessel is competent to resist the ordinary attacks of wind and weather, and is competently equipped and manned for the voyage, with a sufficient crew, and with sufficient means to sustain them, and with a captain of general good character and nautical skill. It is also an implied condition that the goods, tackle of the ship, &c., shall be properly stowed.” In *Gibson v. Small*, 4 House of Lords Cases, 353, 384, Erle, J., thus defines seaworthiness: —“A ship, before setting out on a voyage, is seaworthy, if it is fit in the degree which a prudent owner uninsured would require to meet the perils of the service it is then engaged in, and would continue so during the voyage unless it met with extraordinary damage.” And Maule, J., at p. 388, says,—“It appears to me that the foundation of the admitted rule that, in a policy on a voyage, there is an implied condition or warranty that the ship was seaworthy at the beginning of the voyage is, that the parties to the policy are to be considered as contracting with reference to what is usual and of course in the transaction which is the subject of the policy; and that it is usual, and a matter of course, to make a ship seaworthy before the commencement of a voyage.” All this is just as applicable to an insurance on goods as to an insurance on ship. Until the cases of *Thompson v. Hopper*, 6 Ellis & B. 172, and *Fawcus v. Sarsfield*, 6 Ellis & B. 192, it was never distinctly decided that there is no implied [77] warranty of seaworthiness in a time-policy: and therefore it is no answer to say that such a plea as this has never before been pleaded.

WILLES, J. This is an action upon a policy of insurance on goods, to which the defendant has pleaded “that the said premises so insured as aforesaid were not seaworthy for the said voyage at the time the said ship departed and set sail thereon.” To this plea the plaintiff has demurred; and the question is whether the plea furnishes a sufficient answer to the action. I am of opinion that it does not. It might be sufficient to dispose of the matter by saying that the plea is a novelty. It is novel not merely with reference to the circumstances, but also in its character, and in the principle which it seeks to affirm. Questions of every kind so frequently arise in actions upon policies, that the ingenuity of counsel would doubtless have furnished one instance at least of an attempt to plead such a plea, if it had not been thought idle. But, with the exception of the short note of *Oliver v. Cowley*, which I utterly repudiate, no such defence is suggested in the whole history of insurance law. Apart, however, from its novelty, the plea is altogether inadmissible. It seeks to introduce into the contract of insurance a new implied warranty which is at variance with all principle. As a general rule, the insurer is not liable for damage resulting from a peculiar vice or infirmity in the thing which is the subject of insurance. It is upon that footing that the seaworthiness of the ship is held in our law, as well as in that of most commercial countries, to be an implied warranty. It is a sufficient answer to the assured to shew that the vessel was unseaworthy when she sailed on her voyage, without going on to shew that the damage sustained was the consequence of [78] that unseaworthiness. But, in the case of an insurance on goods, it is no answer to say that they were in an unfit condition to be shipped, unless it is shewn that the loss arose from that unfitness. In Smith’s Commercial Law, 5th edit. 346, it is laid down, upon the authority of *Boyd v. Dubois*, 3 Campb. 133, that, “if goods be put on board

contract of insurance. So, if a ship sail without a sufficient crew, she is incapable of performing the voyage:” *Christie v. Secretan*, 8 T. R. 192. Still better is the rule expressed in the summing up in the American case of *Prescott v. The Union Insurance Company*, 1 Wharton, 399.

The case of *Oliver v. Cowley* is also cited in Shee’s edition of Marshall on Insurance, 114, without observation. At the same page occurs this passage,—“If it be clearly ascertained that the ship at the time of her departure was not in a condition to perform the voyage insured, neither the innocence nor ignorance of the insured, nor any precautions he may have taken to make her sea-worthy, will avail him against the breach of this implied warranty.” But in this chapter the author is treating of the insurance on ship.

in a damaged condition, and are in consequence liable to effervesce and generate the fire by which they are consumed, the underwriters are not liable." Nothing can be more distinct than the rule of insurance law, that it is a warranty or condition that the vessel shall be seaworthy at the time she sets out on her voyage. That involves a competent captain and crew, and a sufficiency of stores and provisions. If there be any failure in this respect, the underwriters are discharged, though the loss is in no respect attributable to the unseaworthiness. That is the distinction between an insurance on ship and an insurance on goods. Suppose a cargo of cotton shipped at New Orleans. I am assuming a state of things which it is to be hoped may soon return, for this country in such a damp state as to be liable to spontaneous ignition, so that she could not continue her voyage without a strong probability that she would catch fire, but either the dampness was unknown or its probable consequences not foreseen; and suppose the vessel caught fire in the course of the voyage from some cause altogether remote from the condition of the cargo. That would be a case in which, fraud or misrepresentation or concealment apart, the underwriters would be clearly liable, unless we are to introduce the new implied warranty which is attempted to be set up here. I for one will not consent to lend myself to the introduction of a novelty the consequences of which it is difficult to foresee. I think the plaintiff is entitled to judgment.

[79] BYLES, J. I am of the same opinion. In a great deal that Mr. Williams has said I fully concur, viz. that a loss of goods which perish by some inherent vice or weakness, as in the case of tender animals unfit to bear the agitation of the sea, gun-cotton, or the like, or in the more ordinary instances of fruit, flour, or rice, which are liable to heat or perish on the voyage, is not a loss by perils of the sea. The proper mode of meeting such a case is by the ordinary plea that the goods were not lost by a peril insured against. It is said that this plea is a novelty. I have not time to look into it, but I incline to think that the very case is provided for by the French Code de Commerce (a). However, I quite agree with my Brother Willes as to the inexpediency of encouraging the introduction of a new plea like this.

KEATING, J., concurred.

Judgment for the plaintiff.

[80] HOUGHTON v. THE LONDON AND COUNTY ASSURANCE COMPANY, LIMITED.
June 8th, 1864.

Inspection under the 50th section of the Common Law Procedure Act, 1854, will only be allowed where it is reasonably shewn that the documents sought to be inspected really exist, and are relevant to the case of the party seeking the inspection.

This was an action against the defendants for wrongfully dismissing the plaintiff from their employ. The declaration contained counts for salary and travelling expenses due and payable by the defendants to the plaintiff as the inspector of the agents of the defendants, and for the wrongful dismissal of the plaintiff by the defendants from his said employment, for money paid by the plaintiff for the defendants at their request, and for money due upon an account stated.

The defendants pleaded the following pleas,—1. To the first and second counts, that they did not promise as alleged,—2. To the first count, a denial that the plaintiff entered into the service,—3. To the same, a denial of the plaintiff's readiness and willingness,—4. To the same, a denial of the breach,—5. To the same, that the contract was determined by reasonable notice before breach,—6. To the same, that the employment was conditional upon the plaintiff approving himself qualified for the appointment, and that he did not so approve himself,—7. To the second count, a

(a) See Code de Commerce, tit. x. Des Assurances, § 1, art. 352: Les déchets, diminutions, et pertes qui arrivent par le vice propre de la chose, et les dommages causés par le fait et faute des propriétaires, affrèteurs, ou chargeurs, ne sont point à la charge des assureurs." In the commentary on this article by the editors, MM. Teulet, D'Avilliers, et Sulpicy, it is said, "Mais il a été jugé avec raison que les assureurs d'une marchandise, sujette par sa nature à se détériorer, sont responsables de l'aggravation que son *vice propre* peut recevoir des événemens de mer mis à leur charge par la loi.

denial that the plaintiff entered into the service,—8. To the same, a denial of the plaintiff's readiness and willingness,—9. To the same, a denial of the breach,—10. To the same, that the employment was conditional upon the plaintiff approving himself properly qualified for the employment, and that he did not so approve himself,—11. To the last count, payment into court.

The plaintiff took and joined issue on the first ten pleas, and as to the last accepted the sum paid into [81] court in full satisfaction and discharge of the causes of action in respect of which it had been paid in.

The plaintiff obtained an order of Keating, J., under the 50th section of the Common Law Procedure Act, 1854, for an inspection of "all documents, books, or writings in the possession or power of the defendants in relation to this action." The affidavit of the plaintiff, upon which the order was obtained, after stating the nature of the action and of the pleadings, alleged "that the defendants have in their custody or under their control certain agenda, minute, and letter-books, and other books, which, as I verily believe, contain entries relating to my said appointment and employment by the defendants: that the said books relate to the matters in question in this cause, and it is advisable and necessary that I should inspect and be prepared to prove as part of my case on the trial of this cause the said entries in the said books: and that I believe I have a just ground to maintain this action."

Powell, Q. C., moved for a rule nisi to rescind the order of Keating, J. The affidavit upon which the order was made is vague in the extreme and wholly insufficient to warrant it: the deponent merely conjectures that there may be something in the defendants' books which may be useful in support of his case. According to the rule laid down by the court of Exchequer in *Hunt v. Hewitt*, 7 Exch. 236, an application under this section (50) of the Common Law Procedure Act, 1854, will only be entertained in those cases (of which this is not one) where inspection could be obtained by filing a bill of discovery or by other proceeding in the court of equity. [Byles, J. The words of the act are, "for the purpose of discovery or otherwise."] In *Thompson v. Robson*, 2 Hurlst. & N. 412, it was held that the documents must be shewn to [82] exist, and it must appear that they would be evidence for the applicant. Pollock, C. B., there says: "We cannot grant a rule calling on the defendants to give a list of documents, which is a mere attempt to fish out evidence to make a case. A proper foundation must be laid for the application: the court must see that inspection is required for the purposes of justice." [Williams, J. That has been very much narrowed, at least in this court: it is not necessary to shew that the document would be evidence: it is enough if it may fairly be serviceable to the applicant's case. Willes, J. The affidavit relates to documents which in the ordinary course of business must exist. Byles, J. They are very much like the minutes of a railway company, which this court in *Hill v. The Great Western Railway Company*, 10 C. B. (N. S.) 148, allowed to be inspected.] In *Woolley v. Pole*, 14 C. B. (N. S.) 538, this court held that a mere vague suggestion that some documents exist, will not suffice: and Erle, C. J., deprecates the construing the statute with too much laxity. [Erle, C. J. The order here does not seem to me to go any further than that in the case of *Hill v. The Great Western Railway Company*.] In that case it was assumed that there was a resolution which contained the terms upon which the plaintiff's services were retained. There is not a word in this affidavit to warrant such an assumption here: what the plaintiff swears is mere presumption arising from the existence of the books. No case has yet gone so far as this (a).

ERLE, C. J. I think there should be no rule in this case, although Mr. Powell's argument has to a considerable extent the sanction of my mind. I think it is important that there should be limits put to the in-[83]-spection which the statute has authorized us to grant, and that care should be taken to allow it only where it is shewn that the documents sought to be inspected do really exist, and that they are relevant to the case of the party seeking the inspection. But it seems to me that the affidavit produced on this occasion is reasonably sufficient. It states that "the defendants have in their custody or under their control certain agenda, minute, and letter-books, and other books, which, as the deponent verily believes, contain entries relating to his appointment and employment by the defendants." In transacting business at Chambers, many things are necessarily assumed. This is a complaint by the servant of a corporation against the corporation for wrongfully dismissing him from their service. The directors would

(a) See *Bull v. Clarke*, 15 C. B. (N. S.) 851.

necessarily, in the discharge of their duty, keep books in which entries are made of the appointment of servants and generally of the disposal of the funds belonging to the corporation. These are matters which cannot be detailed in an affidavit, but which must be taken for granted. There being no affidavit in denial, my Brother Keating made the order in the words of the statute. These entries, if they exist, are admissible in evidence, and relevant to the issue. The defendants may, as my Brother Willes suggested in *Hell v. The Great Western Railway Company*, cover up all but the entries which relate to the matter in question. I think the order was properly made, and ought to stand.

WILLIAMS, J. I entirely agree with everything my Lord has said, and especially in holding that upon this affidavit the order of my Brother Keating was properly made. Not that I think that this form of affidavit would in all cases suffice; but that, in this case, it presents such an air of probability of the ex-[84]istence of the entries suggested, not explained away by counter-affidavits, as to warrant the judge in acting upon it.

The rest of the court concurring,
Rule refused.

JOYCE v. SWANN. May 24th, 1864.

[See *Scammell v. Union Marine Insurance Company*, 1866, L. R. 1 C. P. 305. Observations applied, *Williams v. Cohen*, 1871, 25 L. T. 303. Approved, *Anderson v. Morice*, 1876, 1 App. Cas. 742.]

1. There may be a complete contract so as to pass the property in goods from the seller to the buyer, although the *price* has not been definitively agreed on between them.
- 2 Where from all the facts it may fairly be inferred that it was the intention of the seller to pass the property in goods shipped to order, the mere circumstance of the bill of lading being taken in the name of the seller, and remaining undorsed, will not prevent its passing —3 A., who had been in the habit of buying largely of guano from B. & Co., of Liverpool, at prices which were settled at the beginning of each year, wrote to them on the 14th of February ordering a shipment of 100 tons, provided freight did not exceed 6s. 6d. On the 26th B. & Co. wrote in answer. — “We have succeeded in fixing the schooner ‘Anne and Isabella’ to carry about 115 tons at your limit of 6s. 6d. per ton. We presume we may value upon you at six months from the date of shipment at 10l. per ton,” &c.; adding in a postscript, — “Please say if you purpose effecting insurance at your end.” On the 3rd of March, A. wrote, — “I am favoured with yours of 26th. You say we presume we charge you 10l. per ton net cash, &c. I really cannot understand this, when I know that Mr. L. supplies your guano in Scotland at 9l. 15s. net there to dealers. Besides, I look, as heretofore, for the special allowance made to me at the origin of our transactions: and, now that you are making some changes, it may be as well that I should know how we are to get on for the future.” And he concluded with a request that some flowering shrubs should be sent to him “in charge of the captain.” On the same day, A. effected an insurance on the guano per “Anne and Isabella.” — The guano was shipped at Liverpool on the 4th of March, under a bill of lading making it deliverable to B. & Co. or their assigns. The bill of lading (undorsed) was sent from Liverpool to one of the members of the firm of B. & Co. (then at Belfast) who was about to pay A. a friendly visit at Londonderry. That gentleman arrived at A.’s house on the evening of Saturday the 7th of March, when he told A. that he had received the bill of lading and invoice of the guano and a draft for A.’s acceptance for the amount: and on the morning of the 9th they went together to A.’s office, and there the bill of lading was indorsed and handed over with the invoice to A., who thereupon accepted the bill. In the course of the same day they heard for the first time that the “Anne and Isabella” with the guano on board had been wrecked on the coast near Londonderry: — Held, that the property in the guano passed to A. by the contract from the time of its shipment, — A.’s letter of the 3rd of March not being a repudiation, though expressing some dissatisfaction at the price: and that A. had an insurable interest in the cargo at the time of the loss. — *Scammell*, per Willes, J., that A. would have had an insurable interest,

even though the property in the guano had not absolutely passed to him by the contract.

This was an action upon a policy of insurance. The plaintiff, who is an insurance-agent at Londonderry, had been in the habit of taking out in his own name [85] at Lloyd's a policy of 10,000l. or other large sum, to cover cargo by ship or ships to be from time to time declared; and as he received orders from his customers from time to time to effect insurances on goods, he has, instead of taking out a specific policy in each case, given the assured a printed memorandum stating that he (the assured) was insured by a declaration on an open policy per ship or ships dated, &c. The policy upon which the action was brought was in the following form:—

"S. G. 10,000l.) In the name of God, Amen. James J. Joyce, as agent,
"Delivered the 31st of January, 1863. No 185.) as well in his own name as for and in the name and names
of all and every other person or persons to whom the same
doth, may, or shall appertain, in part or in all, doth make assurance and cause himself
and them and every of them to be insured, lost or not lost, at and from any port or
ports in the north of Ireland between Killalula and Belfast, both inclusive, to any
port or ports on the west coast of Great Britain between Tobermory and Holyhead,
both inclusive, and or vice versa, or from any port or place to any port or place in
the north of Ireland between Killalula and Belfast, both inclusive, including all risk
of craft to and from the vessel, upon any kind of goods and merchandises, and also
upon the body, tackle, apparel, ordnance, munition, artillery, boat, and other furniture
of and in the good ship or vessel called the [any ship or ships], whereof is master
under God for this present voyage , or whosoever else shall go for master
in the said ship, or by whatsoever other name or names the same ship or master
thereof is or shall be named or called; beginning the adventure upon the said goods
and merchandises from the loading thereof aboard the said ship, upon the said ship,
&c., and shall so continue and endure during her [86] abode there, upon the said
ship, &c., and further until the said ship, with all her ordnance, tackle, apparel, &c.,
and goods and merchandises whatsoever, shall be arrived at , upon the said
ship, &c., until she hath moored at anchor twenty-four hours in good safety, and upon
the goods and merchandises until the same be there discharged and safely landed:
and it shall be lawful for the said ship, &c., in this voyage to proceed and sail to and
touch and stay at any ports or places whatsoever without prejudice to this insurance:
The said ship, &c., goods and merchandises, &c., for so much as concerns the assured,
by agreement between the assured and assurers in this policy are and shall be valued
at 10,000l., on sundries, kelp excepted, as interest may appear, to be hereafter declared and
valued; to cover property the assured may receive orders to insure (a): Warranted free from
particular average, unless stranded, sunk, or burnt, and free from capture and seizure
and the consequence of any attempt thereat: Touching the adventures and perils
which we the assurers are contented to bear and do take upon us in this voyage, they
are of the seas, men of war, fire, enemies, pirates, rovers, thieves, jettisons, letters of
mart and counter-mart, surprisals, takings at sea, arrests, restraints, and detainerments
of all Kings, princes, and people of what nature, condition, or quality soever, barratry
of the master and mariners, and of all other perils, losses, and misfortunes that have
or shall come to the hurt, detriment, or damage of the said goods and merchandises
and ship, &c., or any part thereof: And, in case of any loss or misfortune, it shall be
lawful to the assured, their factors, servants, and assigns, to sue, labour, and travel
for, in, and about the de-[87]-fence, safeguard, and recovery of the said goods and
merchandises and ship, &c., or any part thereof, without prejudice to this insurance,
to the charges whereof we the assurers will contribute each one according to the rate
and quantity of his sum herein assured: And it is agreed by us the insurers that this
writing or policy of assurance shall be of as much force and effect as the surest
writing or policy of assurance heretofore made in Lombard Street or in the Royal
Exchange or elsewhere in London: and so we the assured are contented and do
hereby promise and bind ourselves each one for his own part, our heirs, executors,
and goods, to the assured, their executors, administrators, and assigns, for the true
performance of the premises, confessing ourselves paid the consideration due unto

(a) These latter words were inserted for the purpose of meeting the difficulty created by the decision of this court in *Watson v. Swann*, 11 C. B. (N. S.) 756.

us for this assurance by the assured, at and after the rate of 10s. per cent. In witness whereof, we the assurers have subscribed our names and sums assured, in London, this 30th January, 1863,

"N.B.—Corn, fish, salt, fruit, flour, and seed, are warranted free from average, unless general or the ship be stranded: Sugar, tobacco, hemp, flax, hides, and skins are warranted free from average under 5l. per cent.: and all other goods, also the ship and freight, are warranted free from average under 3l. per cent., unless general or the ship be stranded."

The defendant underwrote this policy for 400l. Among the interests declared by indorsement on this policy was one for 1200l. on the "Anne and Isabella" from Londonderry to Liverpool, "on guano, so valued."

The declaration, after reciting the policy, averred that, before the happening of the loss thereafter mentioned, certain goods covered by the said policy, to wit, guano, had been and were loaded on a certain ship, to wit, the "Anne and Isabella," to be therein carried from Londonderry to Liverpool, being a voyage [88] covered by the said policy, and that the plaintiff was at the time of the shipment of the said goods on board the said vessel, and of the commencement of the said risk, and thence continually until and at the time of the loss thereafter mentioned, interested in the said goods to the value and amount of all the moneys ever insured thereon, and that the said insurance was made for the use and benefit and on account of the plaintiff; that, after the commencement of the said risk, and during its continuance, and while the said policy was in full force, the said goods were by divers of the perils insured against, and not by any of the perils from which the said goods were warranted free, wholly lost,—of all which the defendant had notice: and that, before this action was brought, all conditions were fulfilled, and all warranties were complied with, and all things were done and happened, and all times elapsed, necessary to entitle the plaintiff to be paid by the defendant the sum of 400l. so insured by him, and interest thereon, and to sue him for the non-payment thereof thereafter mentioned: yet that the defendant had not paid the said sum of 400l. and interest, nor any part thereof, and the same remained wholly unpaid and in arrear, contrary to and in violation of the terms and provisions of the said policy of insurance.

There was also a count for money lent, paid, and received, for interest, and for money found due upon accounts stated.

The defendant pleaded to the first count,—that he did not become an insurer to the plaintiff as alleged,—that goods covered by the said policy had not been nor were loaded on board the said ship as alleged,—that the plaintiff was not interested in the said goods as alleged,—and that the said goods were not lost as alleged: and, to the second count, never indebted. Issue thereon.

[89] The cause was tried before Erle, C. J., at the sittings in London after the last Hilary Term. The facts which appeared in evidence were as follows:—M^cCarter, a merchant in Londonderry, and a dealer in guano, had been in the habit of purchasing large quantities of that article from Messrs. Seagrave & Co., merchants in Liverpool, who are extensively engaged in the guano trade, and are in the habit of issuing circulars from time to time giving a price for their guano for the year. On the 14th of February, 1863, M^cCarter wrote to Seagrave & Co. as follows:—

"Gentlemen,—I duly received yours of the 11th instant, and feel obliged by your attention. I had 12 tons of your guano on hands, and will not require any more before 1st May: but, if it serves you in any way to ship 100 tons soon, payable on the above date, you may do so, providing freight does not exceed 6s. 6d."

To this Messrs. Seagrave & Co. replied on the 26th, as follows:—

"Dear Sir,—In accordance with your favour of 14th February, we have now the pleasure to inform you we have succeeded in fixing the schooner 'Anne and Isabella,' of Arbroath, to carry about 115 tons, at your limit of 6s. 6d. per ton. We expect to have the cargo on board by the middle of next week. We presume we may value upon you at six months from the date of shipment, calculating it as a cash payment at the rate of 10l. per ton on the 1st May, *i.e.* charging you interest from this latter date till the due time of the bill. You will have learned from the analysis the continued improvements in the intrinsic value of the phospho, which now, according to Dr. Apjohn, places it beyond comparison as the best manure, for price, in the market: and, as you

were one of our first custo-[90]-mers in Ireland, we hope you will succeed in taking full advantage of the increased popularity which is sure to be caused by the more extensive use of the phospho guano this year.

"P.S.—Please say if you purpose effecting insurance at your end."

On the 2nd of March, M'Carter instructed the plaintiff to effect an insurance on the cargo for 1200l., and the plaintiff thereupon, in pursuance of his ordinary course of business, gave him a printed memorandum filled up with the necessary particulars, of which the following is a copy:—

"Marine Insurance Agency,
"Belfast Bank, Derry, 2nd March, 1863.

"Memorandum. W. M'Carter, Esq., is insured for 1200l. per 'Anne and Isabella,' from Liverpool to Derry, by a declaration on an open policy per ship or ships for 10,000l. effected at Lloyd's, London, and dated 13th January, 1863, on guano valued at 1200l., at 10s. per cent. : : : : : £6 0 0

Policy duty : : : : : 0 6 0

"J. J. Joyce, agent.

£6 6 0

"Warranted free from capture, seizure, and detention, and all the consequences thereof or of any attempts thereat."

On the 3rd of March, M'Carter replied to Messrs. Seagrave & Co.'s letter of the 26th of February, as follows:—

"Gentlemen,—I am favoured with yours of 26th. You say, we presume we charge you 10l. per ton net cash on 1st May, and interest on drafts from that date. I really cannot understand this, when I know that Mr. Lawson supplies your guano in Scotland at 9l. 15s. net there to dealers. Besides, I look, as heretofore, [91] for the special allowance made to me at the origin of our transactions (a): and, now that you are making some changes, it may be as well that I should know how we are to get on for the future. I should be sorry indeed to appear unreasonable in my demands; but you will admit there is no one in this country has a prior claim on you. I thank you for the mushroomspawn. If your Mr. George Seagrave could send me half a dozen nice flowering shrubs, including verberna, in charge of captain, I'll do as much for him."

On the 4th of March, Messrs. Seagrave & Co., having shipped the cargo, obtained from the captain a bill of lading making the guano deliverable at Londonderry "unto the order of George Seagrave & Co., or to their assigns."

On the same day, Messrs. Seagrave & Co. made out an invoice upon a printed form, as follows:—

"Liverpool, 4 March, 1863.

"Particulars of phospho guano delivered to account of W. M'Carter, Esq., Londonderry, by George Seagrave & Co., Liverpool.

"Terms, net cash.

"1605 bags phospho } 2311. 1. 13 gross
guano, } 14. 1. 9 tare

2297. 0. 4 net, at 10s. per cwt. 1148. 10. 4.

"Per 'Anne and Isabella,' of Arbroath."

The invoice and bill of lading were not sent direct from Liverpool to M'Carter, but were forwarded from Liverpool to Mr. George Seagrave, the senior partner [92] of the Liverpool house, who was then at Belfast. On Saturday evening, the 7th of March, Mr. George Seagrave arrived on a friendly visit at the private residence of

(a) This referred to an understanding between them, under which M'Carter had been in the habit of receiving a commission of 1½ per cent. on all independent trade in the phospho guano executed by Seagrave & Co. in the county of Londonderry.

M'Carter near Londonderry. He then told M'Carter that the bill of lading for the guano had been sent to him by his partners, who feared from M'Carter's letter of the 3rd of March that he was not satisfied. M'Carter expressed himself quite willing to take the cargo which had been shipped on his account: and an arrangement was then entered into between them in relation to future shipments, and settling the price for the year 1863. Mr. George Seagrave remained at M'Carter's house until the following Monday morning, when they walked together to M'Carter's office in Londonderry. Mr. Seagrave then indorsed the bill of lading and handed it with the invoice to M'Carter: and the latter accepted a bill of exchange for 1168l. 10s. 4d., being the amount of the invoice with some interest added, and, at the request of Mr. G. Seagrave, he inclosed it in a letter addressed to Messrs. Seagrave & Co. at Liverpool, who acknowledged its receipt by a letter of the 11th of March.

Having arranged this business, Mr. Seagrave and M'Carter left the office and were proceeding through the town, when they were informed that a guano ship (which they afterwards found to be the "Anne and Isabella") had been wrecked on a bank known as the Tuns, on the previous Saturday evening.

Messrs. Seagrave & Co. received M'Carter's letter of the 3rd of March on the evening of the 14th; and, fearing from its tenor that the cargo might be repudiated by him, they insured it at Liverpool in their own names.

On the part of the defendant, it was submitted that there had been no complete bargain as to price between Seagrave & Co. and M'Carter, so as to pass the [93] property in the guano to the latter, and consequently that, at the time of the insurance and of the loss, M'Carter had no insurable interest, and that nothing that passed between Mr. George Seagrave and M'Carter after the loss had actually taken place could alter the position of the parties (a).

For the plaintiff it was contended that there was a perfect contract by the letters of the 14th and 26th of February, and that the whole tenor of the letter of the 3rd of March shewed that M'Carter understood the bargain to be complete, though there was a little grumbling about the price.

In his summing up, the Lord Chief Justice told the jury that, in general, it is essential to a bargain for the sale of goods, that the price should be agreed upon, but that, nevertheless, it was perfectly competent to a vendor and vendee to be upon such confidential terms with one another as to contract for a sale of goods leaving the price to be settled thereafter; and that it was not a necessary condition to the passing of the property that the price should be definitively agreed upon. He then observed upon the correspondence, and upon the fact of the bill of lading having been sent to Mr. George Seagrave at Belfast, instead of to M'Carter direct, and also upon the fact of Messrs. Seagrave & Co. having effected an insurance upon the cargo at Liverpool: and he concluded by telling the jury, that, if the guano was appropriated to M'Carter by Seagrave & Co. when put on board the "Anne and Isabella," with the intention of passing the property to him, they must find for the plaintiff; but that, if they intended to keep the property in their own hands and under their own control until a final arrangement [94] took place as to the terms of the bargain, they must find for the defendant.

The jury returned a verdict for the plaintiff: leave being reserved to the defendant to move to enter a nonsuit, if the court should be of opinion that there was no evidence to go to the jury of a complete bargain between the parties so as to pass the property.

Watkin Williams, in Easter Term, accordingly obtained a rule to enter a nonsuit, on the ground that there was no evidence to go to the jury, or for a new trial, on the grounds, — first, that the verdict was against the weight of evidence, — secondly, that the Lord Chief Justice misdirected the jury in telling them that the property might pass though the price was not agreed upon.

Lush, Q. C., and Sir George Honyman, now shewed cause. The only question is, whether or not M'Carter had an insurable interest in the guano at the time of effecting the policy declared on. This, it is submitted, is abundantly clear from the correspondence. It is true that no precise agreement as to price is to be collected from the letters of the 14th and 26th of February: but that is not essential where the contract

(a) It was assumed that, if M'Carter had an insurable interest, the loss was recoverable in this action upon the policy declared on.

is executed: *Acebal v. Levy*, 4 M. & Scott, 217, 10 Bingh. 376: and here there was abundant evidence of an appropriation of the guano to M'Carter; and his letter of the 3rd of March, especially coupled with the fact of his immediately giving orders to effect an insurance on it, clearly did not amount to a repudiation. The mere circumstance of the bill of lading not having been indorsed to M'Carter at the time of the loss, and of its having been forwarded to Mr. George Seagrave, though fit for the consideration of the jury, is by no means conclusive to shew that Sea-[95]grave & Co. did not mean to pass the property to M'Carter: this question was left to the jury, and they have disposed of it. In *Brown v. Hare*, 4 Hurlst. & N. 822, the defendants, merchants at Bristol, through a broker, contracted to buy of the plaintiffs, merchants at Rotterdam, ten tons of the best refined rape-oil, to be shipped "free on board" at Rotterdam in September, 1857, at 48l. 15s. per ton, to be paid for on delivery to the defendants of the bills of lading, by bill of exchange to be accepted by the defendants payable three months after date, and to be dated on the day of shipment of the oil. On the 8th of September, the plaintiffs (having on the previous day advised that the shipment would be made) shipped on board a general ship trading between Rotterdam and Bristol five tons of the oil, and the master signed a bill of lading by which the oil was deliverable "unto shipper's order," and the plaintiffs indorsed it specially to the defendants. On the same day, the plaintiffs inclosed in a letter to the broker, the bill of lading, invoice, and bill of exchange drawn on the defendants in accordance with the contract. On the night of the 9th, the ship with the oil on board was run down in the Bristol Channel, and the oil totally lost. The plaintiffs' letter of the 8th arrived at Bristol on the afternoon of the 10th in due course of post, but after business hours. On the morning of the 11th, the broker left with the defendants the bill of lading, invoice, and bill of exchange for their acceptance. At that time he knew of the loss of the ship. In about two hours afterwards, the defendants returned to the broker the documents left with them, on the ground that, under the circumstances, they were not liable to pay for the oil. In an action for not accepting the bill of exchange, and for goods sold and delivered, the jury stated that, in their opinion, according to mercantile usage, the risk of the [96] loss of the oil was on the defendants. It was held by the Exchequer Chamber,—affirming the judgment of the court of Exchequer, that the property in the oil passed to the defendants when it was placed "free on board" in performance of the contract; and that it was a question for the jury whether the plaintiffs so shipped the oil in performance of their contract to place it "free on board," or for the purpose of retaining a control over it and continuing to be owners, contrary to the contract. Erle, C. J., in delivering the judgment of the court of error, says: "In this class of cases, the passing of the property may depend, according to the contract, either on mutual consent of both parties, or on the act of the vendor communicated to the purchaser, or on the act of the vendor alone. Here, it passed by the act of the vendor alone. If the bill of lading had made the goods 'to be delivered to the order of the consignee,' the passing of the property would be clear. The bill of lading made them 'to be delivered to the order of the consignor,' and he indorsed it to the order of the consignee, and sent it to his agent for the consignee. Thus, the real question has been on the intention with which the bill of lading was taken in this form; whether the consignor shipped the goods in performance of his contract to place them 'free on board,' or for the purpose of retaining a control over them, and continuing to be owner, contrary to the contract, as in the case of *Wait v. Baker*, 2 Exch. 1, and as is explained in *Turner v. The Trustees of the Liverpool Docks*, 6 Exch. 543, and *Van Casteel v. Booker*, 2 Exch. 691. The question was one of fact, and must be taken to have been disposed of at the trial; the only question before the court below or before us being, whether the mode of taking the bill of lading necessarily prevented the property from passing. In our opinion it did not." [97] [Willes, J. In that case, the bill of lading was sent, formally indorsed, to a common agent.] It is enough if there was a binding contract for the goods. Suppose the cargo had been destroyed by fire after the appropriation, upon whom would the loss have fallen?

Mellish, Q. C., and Watkin Williams, in support of the rule. The question is,—first, whether there was any binding contract between Seagrave & Co., the sellers, and M'Carter, the purchaser, at the time the loss happened,—secondly, what was the nature of the contract, and whether M'Carter had an insurable interest: for, this not being the case of a sale of a specific article, it does not follow that the property passed to

McCarter because there was a binding contract. It appears that Seagrave & Co. and McCarter had had a course of dealing in guano, the price being fixed at the beginning of each year; and that McCarter had always been in the habit of insuring. At the time the letters of the 14th and 26th of February were written, the price for the year 1863 had not been fixed: and the price named in the letter of the 26th was not the price of the preceding year. The letter of the 3rd of March was not an acceptance of the guano at the price named in the letter of the 26th of February: consequently, down to the time of the loss, the price was still left uncertain. [Byles, J. It manifests, however, an intention to accept the goods.] That the property in the guano did not pass by the contract itself is clear. In *Woot v. Baker*, 2 Exch. 1, the defendant, a corn-factor residing at Bristol, in December, 1846, wrote to one Lethbridge at Plymouth, requesting samples of barley, and to make him an offer of a cargo. In the same month, Lethbridge wrote to the defendant, and sent samples of barley, and offered to sell the defendant from 400 to 500 quarters f. o. b. at Kings-[98]-bridge or some neighbouring port, for a certain sum for cash on handing bill of lading, or by acceptance, &c. The defendant accepted the terms, subject to Lethbridge's reply. Lethbridge acceded to the defendant's proposal, and requested the defendant to give him instructions about the vessel, in order to get her correctly insured. Lethbridge sent to the defendant the charterparty (not under seal) of a vessel in which the barley was to be shipped, and which was made in Lethbridge's name. In January, 1847, the vessel was loaded with barley, and Lethbridge received from the master the bill of lading, by which the cargo was deliverable at Bristol to the order of Lethbridge or assigns on payment of freight. Subsequently, Lethbridge called at the defendant's counting-house in Bristol, and left the invoice and unindorsed bill of lading: he afterwards called again, when a dispute arose as to the quality of the barley: the defendant, after some further dispute, tendered the amount of the cargo in money to Lethbridge, who refused to accept it, but took away the bill of lading, and indorsed it to the plaintiffs. The defendant, on the arrival of the vessel, claimed and obtained part of the cargo; but the plaintiffs, on producing the bill of lading, obtained what remained, and paid the freight. The jury found that the defendant did not refuse to accept the barley from Lethbridge; that the tender was unconditional; and that he was not an agent entrusted with the bill of lading by the defendant. In trover by the plaintiffs for the value of the barley so obtained by the defendant, it was held that no property in the cargo passed to the defendant either by the transaction at Bristol or by the shipment of the cargo on board the vessel by Lethbridge, and that therefore the plaintiffs were entitled to recover. To constitute a complete contract, the parties must be *ad idem*. It is not necessary that [99] the price should be actually ascertained, but there must be some mutual understanding by which it can be ascertained: there must be a delivery and acceptance or a price ascertained. Suppose McCarter had declined to receive the cargo, could Messrs. Seagrave & Co., in declaring for goods bargained and sold or goods sold and delivered, have averred either that the one agreed to sell and the other to buy at 10*l.* per ton, or at 9*l.* 15*s.* per ton, or at a reasonable price. In the letter of the 3rd of March, something is said about a usual allowance. Was there an agreement for the one party to sell without making the allowance, or for the other to buy without receiving it? If the parties had not come to a mutual and final agreement prior to the loss, the plaintiff cannot recover upon this policy. At the time the contract was actually made, viz. when the bill of exchange was accepted and the bill of lading indorsed over to McCarter, the guano had ceased to exist: the loss had then taken place: see *Contourier v. Hastie*, 8 Exch. 40; *Hastie v. Contourier*, 9 Exch. 102; *Contourier v. Hastie*, 5 House of Lords Cases, 673. No doubt, the putting the goods on board the "Anne and Isabella" would pass the property to McCarter, if there was then any binding contract between him and Seagrave & Co.: but there was none. All the circumstances must be looked at to see whether or not the property passes: *Van Casteel v. Baker*, 2 Exch. 691; *Turner v. The Trustees of the Liverpool Docks*, 6 Exch. 543. The circumstances of the bill of lading making the guano deliverable to the order of Seagrave & Co. or to their assigns, and of its being transmitted to the partner and not to McCarter direct, and of the cargo having been insured by Seagrave & Co., all strongly shew that there was not any complete bargain at the time of the loss. [Byles, J. What was the date of Seagrave & Co.'s policy?] That did not appear: the policy was [100] not put in. The question is, had McCarter an insurable interest

in the subject of this insurance at the time of the loss. Unless the property in the guano passed to him by the mere shipment of it, he clearly had not. [Willes, J. In *Fragano v Long*, 4 B. & C. 219, 6 D. & R. 283, A., a resident at Naples, sent an order to M. & Co., hardwaremen at Birmingham, "to despatch to him certain goods on insurance being effected: terms, three months' credit from the time of arrival." M. & C. (having marked the package with A.'s initials) despatched the goods by the canal to Liverpool, and effected an insurance, declaring the interest to be in A. At Liverpool, the goods were delivered by the agent of M. & Co. to the owner of a vessel bound to Naples, through whose negligence they were damaged. And it was held that the property in the goods vested in A. as soon as they were despatched from Birmingham, and that the terms of the order did not make the arrival of the goods at Naples a condition precedent to A.'s liability to pay for them, and that he might therefore maintain an action for the injury done to the goods through the negligence of the ship-owner. A party who is under covenant to repair a house, may insure it though he has ceased to have any interest in the house.] The case in reality turns upon the distinction between *Wait v. Baker*, 2 Exch. 1, and *Browne v. Hare*, 4 Hurlst. & N. 822. The jury here were evidently misled by the general proposition stated to them by the Lord Chief Justice, that the property might pass although there was no complete and definite bargain as to price.

WILLIAMS, J. I am of opinion that this rule should be discharged. I think my Lord did not misdirect the jury in telling them that the property in the guano might pass by the contract from the sellers to the purchaser although the price was not definitely agreed upon at the time. Indeed, it was not disputed that, in the abstract, there may be a complete and binding bargain between the parties, notwithstanding the price remains to be adjusted and ascertained. As to the application of the law to the facts of the present case, I must confess my opinion is not very strong. But, upon the whole, I think there was a binding bargain, because I think there was virtually an adoption by the buyer of the price named by the sellers. It is true the correspondence does not shew any express assent to the price: but, in substance, it seems to me to amount to a grumbling assent. The goods are to be sent, though the buyer protests against the justice of the terms demanded: the buyer in substance says, I will take the guano you have shipped or contracted to ship, but I trust you will not insist on the price you mention. It is however an assent, and makes a binding bargain between the parties. It was a question for the jury, and I think they were warranted in assuming that the guano was put on board pursuant to that contract, with the intention of transferring the property from the sellers to the buyer. It is true that the bill of lading was taken in the names of the sellers, and at the time the insurance was declared was unindorsed. That was a circumstance which was well worthy the attention of the jury, and might have induced them to come to a contrary conclusion. But, if they thought that, notwithstanding this, there were other circumstances sufficiently cogent to induce them to come to the conclusion that the property was intended to pass, I am of opinion that the mere circumstance of the form of the bill of lading and of the invoice being transmitted to the partner then in Ireland, instead of to McCarter direct, was not sufficient to annihilate the other evidence in the cause, though it [102] might induce the jury to pause. The cases of *Wait v. Baker*, 2 Exch. 1, and *Browne v. Hare*, 4 Hurlst. & N. 822, appear to me clearly to establish the distinction, that, if from all the facts it may fairly be inferred that the bill of lading was taken in the name of the seller in order to retain dominion over the goods, that shews that there was no intention to pass the property: but that, if the whole of the circumstances lead to the conclusion that that was not the object, the form of the bill of lading has no influence on the result. Upon the whole, I think the rule should be discharged.

WILLES, J. I am of the same opinion. As to the alleged misdirection, I apprehend the Lord Chief Justice was quite correct in saying that the property in the guano might pass although the price was not agreed on. Of course he did not mean that the property might pass notwithstanding the contract was not complete as to price and other matters. That was not the proposition which he laid down. All that he meant was, that, though the price was not mentioned, the law would infer from the circumstances that the price should be a reasonable price, and that the property in the goods might equally pass as if the price had been fixed in moneys numbered by the contract itself. That is perfectly good law. A contract which

names no price may yet be a sufficient contract to satisfy the 17th section of the Statute of Frauds: *Hoadly v. McLane*, 10 Bingh. 482, 4 M. & Scott, 340. The price not being named, it must be assumed that the parties intended a reasonable price. That being so, the contract does in effect provide for a price: and the rest of the consequences follow. If the contract is for specific goods, the property passes by the contract: and, if it is not for specific goods, if the seller delivers them to a carrier for the buyer, the property vests by [103] the delivery to the carrier, — a proposition which is equally applicable to the delivery of goods on board a ship as to a delivery to a carrier on land. Then, as to the other grounds upon which the rule was moved. The first is, that the verdict is against the weight of evidence. The Lord Chief Justice not being dissatisfied with the verdict, that ground is disposed of. But the rule was argued on the part of the defendant's counsel as if there was no evidence at all of any interest in M'Carter. That question depends upon the construction of the letters of the 26th of February and the 3rd of March. The letter of the 26th of February informs M'Carter of the shipment of a cargo not exactly in accordance with his order of the 14th, the one being for 100 tons the other for 115. That letter, therefore, must be dealt with as an offer of 115 tons, the intention being to make a complete contract. Then comes the letter of the 3rd of March, in which M'Carter writes, — "I am favoured with yours of the 26th. You say we presume we charge you 10l. per ton, &c. I really cannot understand this, when I know that Mr. Lawson supplies your guano in Scotland at 9l. 15s. net there to dealers. Besides, I look, as heretofore, for the special allowance made to me at the origin of our transactions: and now that you are making some changes, it may be as well that I should know how we are to get on for the future." I agree with my Brother Williams that this letter of the 3rd of March is to be read as an assent, though a grumbling assent, to the letter of the 26th of February. The writer in effect says, — "I agree to accept the cargo you have shipped for me at the price named in your letter, but I shall expect the allowance." That, I apprehend, is nothing more than a statement of usual terms, which would be imported into the contract without being mentioned. "Expressio eorum que [104] tacite insunt nihil operatur." It is not proposing a new term, and so a rejection of this offer contained in the letter of the 26th of February. The letter goes on, — "I should be sorry indeed to appear unreasonable in my demands: but you will admit there is no one in this country has a prior claim on you." The writer then goes on to give directions about some small matters which are to be sent to him in charge of the captain; plainly shewing that he was contemplating the receipt of the cargo. Taking the whole of the letter together, it amounts to this, — "I will take the guano: but the price is high; and I hope you will be induced to re-consider the matter: but at all events I will have it." But, further, I agree that, if Messrs. Seagrave & Co.'s letter is to be looked at as a mere offer of a price, leaving it to be settled and adjusted on a future occasion, the property in the guano would pass, though the price had not at the time been settled. The law would infer a contract at a reasonable price. I am inclined to go further; for, it appears to me, that, if what was done by Seagrave & Co. was to put the goods on board the 'Anne and Isabella' with the intention of fulfilling M'Carter's order, even if by reason of some special circumstances the property did not pass on shipment, yet, by reason of the risk, the buyer might insure the cargo in respect of the interest he had in it. It is like the case I put of a tenant of a house bound by a covenant to insure: though he has no longer an interest in the house, yet, by reason of his covenant, he has an interest in the insurance.

BYLES, J. I am of the same opinion. I think there was a complete contract. The only difficulty is as to the price. I am disposed to agree with my two learned Brothers that the letter of the 3rd of March [105] amounted to an unwilling assent to the price named in Seagrave & Co.'s letter of the 26th of February. But, in the view I take, it is unnecessary to decide that. In order to satisfy the requirements of the 17th section of the Statute of Frauds, it is not necessary that the price should be actually agreed upon. In *Ashecroft v. Morrin*, 4 M. & G. 450, an order for goods "on moderate terms" was held to be a sufficient memorandum within the statute. I think the jury were properly directed. The test put by Mr. Mellish in his argument may be adopted, and yet our decision may be the same. The vessel was chartered for M'Carter. He was informed of it. His letter of the 3rd of August amounts to this, — Send the guano: but your price is high. He further directs the shrubs to be sent

by the same vessel. A delivery to the carrier for M'Carter would be a delivery to M'Carter. That gets rid of all difficulty as to the construction of the correspondence. With respect to the form of the bill of lading—in Smith's Mercantile Law, 5th edit. 299, the common form of the bill of lading is given, and it is said: "The bill is sometimes made out for delivery 'to order or assigns,' which imports an engagement to deliver to the person whom the consignor shall nominate, and his assigns, or sometimes to the consignor himself or his assigns. *Primâ facie*, a delivery of goods on board a vessel under a bill of lading in the latter form, though it be the vessel of the intended consignee, imports an intention on the part of the consignor, especially if he be an unpaid vendor, to reserve to himself the property in the goods, and that that shall pass by the indorsement of the bill of lading. In that case, until it has been indorsed, and accepted by the indorsee, the goods remain his, so as to preserve his rights, whether as an unpaid vendor or otherwise: and he has a perfect right to vary their [106] destination. But such a bill of lading is not conclusive, it only creates a presumption; and it will be for the jury, looking at the whole of the circumstances under which the shipment took place, to say whether the delivery was not really for and on account of the vendee, and the bill of lading was made out to the vendor on behalf of and as agent for the vendee, in which event the property will have passed and vested in the intended consignee; or whether it was not intended to preserve the rights of the unpaid vendor, until some further act was done by transferring the bill of lading." For this the editor cites *Van Casteel v. Booker*, 2 Exch. 691, *Turner v. The Trustees of the Liverpool Docks*, 6 Exch. 543, *Brown v. North*, 8 Exch. 1, and *Key v. Cotesworth*, 7 Exch. 595. In truth, the bill of lading is a two-edged weapon, because what took place subsequently, viz. the handing over of the bill of lading to M'Carter before the loss known to either party, throws great light upon the act of Seagrave & Co. in taking it in their own names. For these reasons, I am of opinion that there is no pretence for saying either that the jury were misdirected or that the verdict was contrary to the evidence.

ERLE, C. J., said nothing.

Rule discharged.

[107] BOLCKOW AND ANOTHER v. SEYMOUR AND OTHERS. April 20th, 1864.

Where a contract is to be made out partly by written documents and partly by parol evidence, the whole becomes a question for the jury.—A. having entered into a contract for the supply of iron rails for Vera Cruz, applied to B. & Co., ship-owners and brokers, to procure vessels to carry it thither: whereupon B. & Co. on the 19th of November wrote to A.,—"We hereby engage to find tonnage for about 5000 tons of rails to load at M. for Vera Cruz, subject to the following conditions, viz. 1000 tons to be delivered at Vera Cruz in three months from this time, and 1000 tons per month afterwards," &c. After a long correspondence and several interviews as to the class of vessels to be chartered, and the flag, B. & Co. on the 11th of December wrote to A. as follows,—"Our engagement to procure tonnage for Vera Cruz is the letter addressed to your Mr. B. on the 19th November: and, in accordance therewith, we are arranging to take up vessels for the first shipment of 1000 tons. We cannot restrict ourselves to vessels of any particular flag or class, but will of course give a preference to neutral ships of high class." On the 15th of December B. & Co. wrote to A. saying that they would prefer abandoning the contract altogether. And afterwards on the same day A. wrote,—"If we accept your offer of the 19th November last, coupled with the initialled offer of the 18th. Messrs. E. hold us to our contract, and therefore we must hold you to yours, and cannot consent to your abandoning it as intimated:"—Held, that these letters did not constitute a complete contract, but that recourse must be had to parol evidence: and, consequently, that it was properly left to the jury to say whether or not a binding contract as alleged in the declaration was to be inferred from the whole.

This was an action for the alleged breach of a contract to find tonnage for the conveyance of a quantity of iron-rails from Middlesborough to Vera Cruz.

The declaration stated that, before the making of the agreement thereafter mentioned, the plaintiffs were iron-masters at Middlesborough, and had obtained and entered into and were under a certain contract with certain persons to supply and

deliver at Vera Cruz, on behalf and for the use of the French government, 5000 tons of iron rails, on the terms, amongst others, following, that is to say, 1000 tons of the said rails to be delivered at the latest within three months from the 31st of October, 1862, 1000 tons in the course of the following month, and so on at the rate of 1000 tons a month until complete delivery; and, if the deliveries of the rails should not be effected at the times fixed as before mentioned, there would be withheld by the said French government from the contractor, as an indemnity simply for the sole act of delay, and without prejudice for damage and claims, 5 per cent per month upon the value of the rails delayed, for the delay, of all which premises the defendants were informed and had due notice before and at the time of the making of the agreement by them with the plaintiffs as therein [108] after mentioned: and thereupon, in order to enable the plaintiffs to complete their said contract and deliver the said rails at Vera Cruz aforesaid, and on the terms and at the times aforesaid, it was agreed between the plaintiffs and the defendants that the defendants would find tonnage for about 5000 tons of rails to load at Middlesborough aforesaid for Vera Cruz aforesaid, and would deliver 1000 tons of the said rails at Vera Cruz within the three months aforesaid, and 1000 tons of the said rails per month afterwards till the delivery be completed; the rails to be brought free alongside and taken free from ships; half the freight to be payable on shipment at Middlesborough-on-Tees, and the other half in London, on production of the certificate of proper delivery of the cargo at Vera Cruz: the freight to be 32s. 6d. per ton: Averment, that all things happened and all conditions were fulfilled, and all times elapsed, necessary to entitle the plaintiffs to a delivery of the said rails according to and at the place and at the times mentioned in the said agreement: Breach, that the defendants did not deliver 1000 tons of the said rails or any part thereof within the three months aforesaid, or within a reasonable time thereafter, and did not deliver 1000 tons of the said rails or any part thereof per month afterwards, nor within reasonable times thereafter; whereby the plaintiffs had lost and been deprived of the sum of 1044l. withheld by the French government, according to the terms thereinbefore mentioned, as an indemnity simply for the sole act of delay, and without prejudice for damage and claims, and which said sum of 1044l. does not exceed 5 per cent. per month on the value of the rails delayed: and that the defendants did not find tonnage for the whole of the said rails at Middlesborough, but at Sunderland: whereby the plaintiffs incurred and became liable to pay, and were [109] obliged to pay, a larger sum of money for extra insurance, and in the conveyance of the said rails from Middlesborough aforesaid to Sunderland aforesaid: and that the defendants did not deliver 1000 tons per month of the said rails, but delivered in a period much less than a month, and in much shorter intervals than a month, much larger quantities of the said rails than 1000 tons, whereby the difficulties of unloading the same at Vera Cruz were greatly increased and heightened, and great extra expenses were necessarily incurred in obtaining extra labour in and about the said unloading, and also in the payment of demurrage, which the plaintiffs became liable to and had been obliged to pay: Claim, 2000l.

The defendants pleaded,—first, a denial of the agreement,—secondly, that they were not informed nor had they notice of the premises in the declaration in that behalf mentioned, before or at the time of the making of the alleged agreement,—thirdly, that the plaintiffs were not ready and willing to deliver the rails for shipment according to the alleged agreement,—fourthly, a denial of the several alleged breaches of agreement,—fifthly, that, before any of the alleged breaches of the agreement by the defendants, the plaintiffs absolved, exonerated, and discharged the defendants from the performance of the matters of the non-performance of which the plaintiffs complain. Issue thereon.

The case was tried before Erle, C. J., at the sittings in London after last Hilary Term. The circumstances out of which the plaintiffs' claim arose were as follows:—The plaintiffs are iron masters and coal-owners at Middlesborough-on-Tees. Messrs. Blount, of Paris, were desirous of getting a contract for the supply of 5000 tons of iron rails for the French government, to be delivered at Vera Cruz, whence it was proposed to make a railway for the accommodation [110] of the troops then in Mexico. The plaintiffs agreed to supply the required quantity, and to find tonnage for their conveyance to Vera Cruz at the times stipulated for in Blount & Co.'s contract with the French government: and they accordingly entered into a treaty with the defendants, ship-owners and brokers in London, to find ships for that purpose, and on

the 18th of November, 1862, the following memorandum was drawn up, initialled, and delivered by the defendants to the plaintiffs:—

“London, November 18th, 1862. Vera Cruz. 1000 tons to be delivered in Vera Cruz in three months from this time, and 1000 tons per month afterwards. The French government reserve the power to delay the delivery, if required, and to commence again when they think proper: also the option to send a smaller quantity than 5000 tons. Half freight payable on shipment, and other half on advice of delivery at Vera Cruz. 2s. 6d. per ton to Messrs Bolckow & Vaughan to be added to our rate of 30s.”

On the next day, the defendants wrote and sent to the plaintiffs the following letter, which was relied upon by the latter as the contract between them:

“London, Nov. 19th, 1862.

“We hereby engage to find tonnage for about 5000 tons of rails to load at Middlesborough-on-Tees for Vera Cruz, subject to the following conditions, viz. 1000 tons to be delivered at Vera Cruz in three months from this time, and 1000 tons per month afterwards. The government to reserve to themselves the power to delay the delivery, if required, and to commence again when they think proper: also the option to send a smaller quantity than 5000 tons. The rails to be brought free alongside, and taken free from ships. Half the freight to be payable on shipment at Middlesborough-on-Tees, and the other half in London, [111] on production of the certificate of proper delivery of the cargo at Vera Cruz. The freight to be 32s. 6d. per ton.

“SEYMOUR, PEACOCK, & Co.”

No immediate reply was sent to this letter, but a correspondence and several personal communications took place between the parties as to the class of ships to be chartered, and their nationality,—only vessels of a certain class being convenient for the purpose, and American vessels being in danger of capture.

On the 10th of December, the plaintiffs wrote to the defendants as follows:—

“The parties with whom we have contracted for the Vera Cruz rails have a low offer for the insurance of the cargoes in France, and write us the vessels must not be less than 5 6ths veritas, and that this is the definition of the classes, viz. —first-class, A 1 black is 3 3rds veritas, A 1 red is 5 6ths ditto. —second class .E red is only 3 4ths veritas: and wish vessels not lower in Lloyd's books than A 1 red to be chartered. They would give a gratuity to captains of 3d per ton, provided they would only load the register-tonnage quantity in their ships. The insurance on freight advanced to be deducted when paying the first instalment.

“BOLCKOW & VAUGHAN.”

On the 11th of December, the defendants wrote to the plaintiffs as follows:—

“London, 11th December, 1862.

“Your favour of yesterday is duly to hand. Our *engagement* to procure tonnage for Vera Cruz is the letter addressed to your Mr. Boyd, dated 19th November: and, in accordance therewith, we are arranging to take up vessels for the first shipment of 1000 tons. We cannot restrict ourselves to vessels of any parti-[112]-cular flag or class, but will of course give a preference to neutral ships of high class. We inclose form of charter.

“SEYMOUR, PEACOCK, & Co.”

On the same day, the plaintiffs wrote to the defendants as follows:—

“December 11th, 1862.

“We can settle all matters in dispute in a few minutes, if your Mr. Offer will please meet Mr. Blount (from Paris) here at 5.30 p.m. to-day. Neither your letter nor charter-party are in the terms of our understanding: but, if we meet, all can be satisfactorily arranged.

“BOLCKOW & VAUGHAN.”

On the 12th, Mr. Boyd (on behalf of the plaintiffs) again wrote to the defendants as follows :—

“December 12, 1862.

“Dear Sir,—I regret much you could not send me the pro forma agreement to-day: the more particularly, as Mr. Turner had intended to leave this evening for Paris. At my solicitation, however, he has consented to stay in London over to-morrow, and is to see me then at 12 o'clock at this office, when I should be glad if you could make it convenient to call here, unless you send your ultimatum.

“JOHN BOYD.”

On the 13th, Mr. Offer (one of the defendants) wrote to Mr. Boyd as follows :—

“December 13, 1862.

“Dear Sir,—By the inclosed telegram (a) from my senior you will observe that I am unable to send you the pro forma contract so soon as I could wish. You shall hear from me without a moment's unnecessary delay.

“GEORGE OFFER.”

[113] On the 15th, Mr. Seymour wrote to the plaintiffs as follows :—

“London, 15th December, 1862.

“Re Vera Cruz contract.

“I have looked into this matter, and find from the lapse of time since we first took the business into consideration, and from the difficulties now raised, that I would prefer abandoning the contract altogether.

“GEORGE SEYMOUR.”

On the same day, the plaintiffs wrote to the defendants as follows :—

“London, 15th December, 1862.

“Re Vera Cruz contract.

“We expected for the last three days to have arranged all details with you as to this personally, which is the reason we have not replied to yours of the 11th instant sooner. Indeed, on the 12th instant, your Mr. Offer personally agreed to hand us details as soon as possible: and we now wait them, *and accept your offer of the 19th November last, coupled with the initialled offer of the 18th November last.* Messrs. E. Blount & Co. hold us to our contract, and therefore we must hold you to yours, and cannot consent to your abandoning the contract, as intimated by your Mr. G. Seymour to-day. We beg you will, therefore, without further delay, give us the details promised by your Mr. Offer, and further beg to inform you that Messrs. E. Blount & Co., of Paris, have waited ever since Friday last, and still wait in London to agree with us these details, and trust you will let us have them by 3.30 p.m., when they will be again here.

“P. pro BOLCKOW & VAUGHAN,

“JOHN BOYD.

“P.S.—We verbally accepted the contract with your Mr. Offer on Friday last, previous to the interview between him, Mr. Turner, of Messrs. E. Blount & Co.'s and the writer.”

A lengthened correspondence ensued between the parties, which resulted in nothing. The consequence was, that no tonnage whatever was provided until February, 1863, and the first delivery of rails at Vera Cruz did not take place until June, and the whole were not delivered until September (instead of June): and the result was disastrous for the French army, and the government called upon Messrs. Blount & Co. to pay penalties amounting to 6000*l.*, ultimately reduced to 1044*l.*, which the plaintiffs had to recoup them. The plaintiffs also incurred 350*l.* for demurrage, 79*l.* for extra insurance, and other expenses, which they now sought to recover in this action.

On the part of the defendants it was submitted that there was no complete contract

(a) “Do nothing with the Vera Cruz contract till we talk the matter over.”

as alleged in the declaration, but a mere proposal, withdrawn before it was accepted by the plaintiffs.

For the plaintiffs it was insisted that the memorandum of the 18th of November, and the defendants' letter of the 19th, coupled with the plaintiffs' acceptance of its terms in the letter of the 15th of December, constituted a binding contract: and it was urged that the defendant's letter of the 11th of December shewed what was their understanding of the matter.

In his summing-up the Lord Chief Justice intimated an opinion that the correspondence did not disclose any definite or distinct proposal on the one side and acceptance by the other: and he left it to them to say whether, taking the whole of the correspondence and the parol evidence together, there was any such contract as that declared on.

The jury returned a verdict for the defendants.

Montague Smith, Q. C., in Easter Term last, moved [115] for a new trial, on the grounds of misdirection, and that the verdict was against the weight of evidence. He submitted that the letters of the 19th of November and the 11th and 15th of December constituted a complete contract between the plaintiffs and the defendants, whereby the latter bound themselves to find tonnage so as to insure the delivery of the rails at Vera Cruz by the times and in the quantities mentioned in the earlier letter and the initialled memorandum of the 18th of November: and that the Lord Chief Justice ought not to have left it as he did, as a question of fact for the jury.

WILLIAMS, J. I am of opinion that there should be no rule in this case. If there was evidence to be submitted to the jury, and if the question was a proper one for their determination, the Lord Chief Justice not being dissatisfied with it, the verdict must stand. The only remaining question then is, whether my Lord misdirected the jury in leaving to them that which was properly a question of law to be decided by himself. The question left to the jury was, whether the parties had contracted with one another upon the terms of the document of the 19th of November, 1862. That depends upon whether all that was to be done by the judge at the trial was, to construe a contract which appeared to have been entered into between the parties in writing, or whether, upon the evidence, it was not proper first to leave it to the jury to say whether or not any such contract had in fact been entered into,—whether that which was in writing, and read without the aid of the parol evidence, might appear to be a contract, a definite and conclusive contract, between the parties, might not be shewn by such evidence to have rested in proposal and negotiation only, and was not meant to be a final agreement. Unquestionably, if [116] once it is established that a document or documents represent a contract between the parties, it is not competent to the judge to ask the assistance of the jury in construing it. The real question is, whether there was or was not any contract between the parties upon the terms expressed in the document of the 19th of November, 1862. I purposely use the word "document," as being a neutral term. Now, for the purpose of ascertaining whether or not there was a contract in writing embodying those terms, it is necessary to proceed chronologically, and take the documents in order, and to see whether any or all of them together constitute such a contract as is contended for on the part of the plaintiffs. I will first take the letter of the 19th of November. I conceive it to be unnecessary to refer to the letter of the 18th, because its terms are sufficiently set out in that of the 19th, which I take as representing the group of documents to which it refers. Now, no doubt, that is a document which upon the face of it purports to be an engagement on the part of Seymour & Co. to furnish vessels for the purpose of carrying the rails to Vera Cruz from time to time as Messrs. Bolckow & Co. were under engagement to have them delivered there. That letter does appear to be couched in language which would seem to constitute a contract, for it professes to be an engagement to supply ships so as to enable Bolckow & Co. to perform their contract. That is the strength of the plaintiffs' case so far as that document is concerned. On the part of the defendants, many arguments of weight were urged to shew that that was not intended to be a binding contract. The character of the transaction at that time would suggest to the mind of any person conversant with business that that could not have been meant to be a document which was to conclude the parties: but that all rested in contemplation and conjecture only. It [117] was not then certain that the French government would consent. If they did not, and were not satisfied with the initials of Seymour, Messrs. Bolckow & Co. might be left

to pay damages for breach of a contract to send the rails out, when they themselves were not certain of getting the contract which would enable them to ship them. It should seem, therefore, from the very character of the transaction, that the proper conclusion to come to with respect to that letter of the 19th of November, would be, to hold that it amounts to this, "We are ready to do so and so, in the event of your being employed to get the rails forwarded to Vera Cruz. It is quite clear that it was so dealt with, as a mere proposal. A correspondence between the parties followed. There was much discussion as to the tonnage and as to the flag and other matters; and this discussion appears to have lasted down to the middle of December. From the character of the transaction, therefore, and from the conduct of the parties, it is clear that that letter of the 19th of November was never intended to represent a complete and final contract; but that it was merely a proposal, which was never assented to by Messrs. Bolckow & Co. That which subsequently occurred, is shewn by two classes of evidence, the first of which is in writing, and the second of which consists of personal communications between the parties. With respect to the written evidence, I pass over the correspondence as to the vessels and the flag, and come to the letter of the 11th of December. That is a letter written by Seymour to Bolckow, not professing to conclude a contract which had not previously been concluded between the parties, or to be an acceptance of anything which had previously passed between them in writing or by word of mouth, but unquestionably describing the document of the 19th of November as being an engagement on the part of Messrs. Seymour & Co. [118] It is hardly necessary to say that that would not turn into a contract that which was not a contract before. In truth it was an incorrect expression. That letter, therefore, must be taken to be altogether inoperative. Then comes the letter of the 15th of December, from the plaintiffs to the defendants, which upon the face of it purports to be an acceptance of Seymour & Co.'s offer of the 19th of November, coupled with the initialled offer of the 18th. That is the way in which it must be dealt with, I apprehend, in order to shew a complete contract. Many answers, however, it appears to me, may be given to the assertion that that letter is an answer to or acceptance of a proposal. In the first place, it appears upon the face of it that the proposal was not then open. It does not purport to be dealing with a proposal which had been made and adhered to by Messrs. Seymour & Co., but intimates that the plaintiffs insist upon their performing their contract of the former date, notwithstanding they informed the plaintiffs that they receded from it. Unless, therefore, the letter of the 19th of November constituted a contract, the letter of the 15th of December came too late. Then we must resort to the parol evidence of the communications between the parties. It is sufficient to say that that evidence clearly shews that down to the time the letter of the 15th of December was written, there was an open negotiation between the parties as to whether and how the proposal of Seymour & Co. to find tonnage could be acted upon. It is clear that Messrs. Bolckow & Co. had not assented to the details of the contract. That again operated as a withdrawal of the document of the 19th of November, dealt with as a proposal. Then, there is another way in which the letter of the 15th of December may be dealt with, viz. as an offer in itself: and, though there was evidence from what subsequently passed between the parties that that offer [119] was not rejected, but that it was acted upon, yet that evidence was of a description which furnished not a principle of law, but merely matter for the consideration of a jury. I speak more especially of the evidence as to Mr. Seymour's desire to see the document of the 18th of November. The jury have come to the conclusion that there never was any complete and binding contract in writing, and that there never was any contract by parol in the terms of the document of the 19th of November. That being so, it appears to me that there was no misdirection, and no ground for our interference.

BYLES, J. I am of the same opinion. On examining the letters minutely, it seems to me that there never was any contract in writing between the parties. It is conceded that that is so, unless aid can be derived from the letters of the 11th and 15th of December. The letter of the 11th is in these terms:—"Your favour of yesterday is duly to hand. Our engagement to procure tonnage for Vera Cruz is the letter addressed to your Mr. Boyd, dated 19th November; and, in accordance therewith, we are arranging to take up vessels for the first shipment of 1000 tons." That is the statement of Seymour & Co. But that alone is not sufficient. It is necessary to resort to the letter of the 15th. That is an answer by Messrs. Bolckow & Co., not to the letter of the 11th, but to one of the 15th, in which Mr. Seymour expresses an intention

to abandon the contract altogether. Messrs. Bolckow & Co. write,—“We accept your offer of the 19th November last, coupled with the initialled offer of the 18th November last. Messrs. E. Blount & Co. hold us to our contract, and therefore we must hold you to yours, and cannot consent to your abandoning the contract, as intimated by your Mr. Seymour to day.” Neither of these letters, in my opinion, [120] shews a complete contract in writing, unless it had been made complete by some prior document. But, suppose a contract in writing could be made out by reference to the whole of the correspondence, that would not conclude the question whether there was an agreement in writing as alleged in the declaration. A very pertinent case illustrative of this matter occurred very recently at the Gloucester Assizes,—a case of *Rogers v. Hulley*, 2 Hurlst. & Colt. 227. There, the plaintiff, professedly as C.’s agent, sold bark to the defendants at a price to be subsequently ascertained by C. in a manner agreed on, and induced them to sign a bought-note which described the plaintiff as the seller at an ascertained price per ton, by representing that the price was nominal, and that, as the defendants were dealing with the Crown, whose officer C. was, they would incur no risk. A day was fixed by the note on which a deposit of 20 per cent. was to be paid. The plaintiff had, in fact, himself purchased the bark from C. by a verbal contract, but had not paid for it. Afterwards, and before the deposit was paid, the plaintiff sent the defendant an invoice specifying the quantity of the bark, and debiting them as buyers from himself with a sum calculated at the price per ton in the bought and sold-notes (the real price not having been then ascertained by C.), and requesting them to pay the deposit to C., as originally arranged. The deposit was accordingly paid to C. by the defendants without objection to the basis on which it was computed. The plaintiff subsequently treated the sale as a sale by himself as principal at the price in the bought and sold notes. The defendants thereupon disclosed the whole transaction to C., paid C. the price, which he had then ascertained in the manner originally agreed, and took possession of the bark. It was held that parol evidence was admissible to shew that the bought and sold-notes did not really contain [121] the contract between the parties. The Lord Chief Baron, in giving judgment, there says:—“In the course of the argument it was pointed out by my Brother Wilde that this is not an attempt to alter a written contract by parol evidence. There was, in fact, only one contract between the parties: but, as the exact price could not be ascertained until the account was made up, the defendants were requested by the plaintiff to sign a paper,—not as evidence of the contract between the parties, but to serve some merely apparent purpose,—probably to comply with some official requisition that such a document should be filled up. The finding of the arbitrator is express, that the object was to obtain a document, not to record a contract. There was, therefore, a real contract not in writing, and a paper prepared in order to comply with some form, which was stated at the time to contain a merely nominal price. If this were a fraud on the plaintiff’s part, the authorities shew that evidence of the fraud is as admissible as evidence of duress, illegality, or mistake. My Brother Bramwell during the argument put the case of the attesting-witness to an agreement signing the agreement, and the contracting party signing in the place intended for the attesting-witness, by mutual mistake. Such a mistake might undoubtedly be explained by parol evidence.” That case seems to me to be very much in point. The document which is now relied upon as a contract here, was evidently originally not intended to be an absolute contract between the parties, but was probably intended to be used in procuring the contract between Blount & Co. and the French government (a). Still the question was open whether or not [122] that was the real contract the parties entered into. That was a question of fact for the jury. They found that this was not the contract: and my Lord is not dissatisfied with the verdict. There will, therefore, be no rule.

KEATING, J. I agree with my two learned Brothers that there ought to be no rule in this case. I think it is clear that parol evidence was admissible to shew what was the real contract between the parties. That being so, the whole must necessarily be a question for the jury. It went to them; and my Lord is not dissatisfied with the result. It follows, of course, that there will be no rule.

Rule refused.

(a) The fact is,—whether it so appeared at the trial or not,—that Messrs. Blount & Co.’s contract with the French government was anterior in point of date to the document in question.

SAMUEL FITTON, Administrator of John Fitton, Deceased, v. THE ACCIDENTAL DEATH INSURANCE COMPANY. June 18th, 1864.

[S. C. 34 L. J. C. P. 28. Distinguished, *Smith v. Accident Insurance Company*, 1870, L. R. 5 Ex. 302.]

By one of the conditions of a policy of insurance against accidental death or injury, it was provided that the policy insured against cuts, stabs, concussions, &c., &c., "when accidentally occurring from material and external cause, where such accidental injury is the direct and sole cause of death to the insured, or disability to follow his avocations;" and then followed this exception,— "but it does not insure against death or disability arising from rheumatism, gout, *hernia*, erysipelas, or any other disease or cause arising within the system of the insured before, or at the time, or following such accidental injury, whether causing death or disability directly or jointly with such accidental injury:"—Held, that death from *hernia* caused solely and directly by external violence, followed by a surgical operation performed for the purpose of relieving the patient, is not within the above exception.

This was an action on a policy of insurance against accidents.

The declaration stated that, in the life-time of the said John Fitton, a certain policy of insurance and agreement was made and entered into between the defendants and the said John Fitton upon and for the considerations in the said policy and agreement in that behalf mentioned, and which said policy of insurance and agreement was and is in the words, letters, and figures following, that is to say,—

[123] "*Insurance against Death or Disablement from Accident.*
Accidental Death Insurance Company."

"Class General.

"No. 44,026.

First Payment.	£	s.	d.	
Premium to insure against death or) entire disablement.)	2	0	0	Renewal premium due 29th of November every year, £3 0s. 0d.
Extra premium to insure horse and) machinery risk)	1	0	0	
Extra premium to insure against) partial disablement . . . . . )	...	...	...
	£ 3	0	0	

"Incorporated pursuant to 7 & 8 Vict. c. 110, and empowered
by special act of parliament, 22 Vict. c. 23.

"Chief Office, 7 Bank Buildings, Lothbury, London.

"Whereas, John Fitton, of Buxton Road, Macclesfield, in the county of Chester, commercial traveller (hereinafter called the said insured), is desirous and hath proposed to insure in manner hereinafter described with the Accidental Death Insurance Company against accidents, and hath signed a declaration bearing date the 29th day of November, 1862, setting forth, amongst other things, his profession or occupation, which declaration it is agreed shall be the basis of the contract for the insurance hereby intended to be made; and the said insured hath paid to the directors of the said company the sum of 3l. as the premium and consideration for the said insurance for the period of one year from the date hereof:

"Now, this policy witnesseth that, in case the said insured shall be injured by accidental violence, and shall within three calendar months of its occurrence die from the direct effect of any such accident, the company shall be liable to pay to his executors or administrators the sum of 1000l. sterling three calendar months after proof has been given of such accidental death, to the satisfaction of the directors; or, in case [124] such accidental violence shall wholly disable the insured from attending to business, shall be liable to pay him a sum at the rate of 6l. per week during the continuance of such disability, for a period not exceeding in all six calendar months; or, in case such accidental violence shall not wholly disable the said insured, but shall partially disable him, or render him in part unable to attend to business, shall be

liable to pay to him a sum not exceeding in the whole one quarter of the sum payable in respect of the whole or entire disablement: Provided always that, in the event of any sum or sums of money being paid by the company in respect of disablement from accidental injury within the intent and meaning of this policy, by way of compensation as aforesaid or otherwise, the said policy shall after such disablement shall have ceased, or the insured shall have accepted a sum by way of compromise or compensation for the same as aforesaid, be valid for and in respect of death or disablement arising from future and other accidental injury only for the residue or balance of the whole sum hereby assured in that behalf remaining unpaid: and that the company shall not be liable to pay for disablement, being the result of two or more separate accidents, more than half the sum insured, in case of death, nor for disablement and death conjointly, by one sum or by several instalments, more than the amount insured in case of death, or, in case of any previous payment as aforesaid, more than so much of such amount as may remain unpaid: Provided always that this policy shall be in force for the period of one year from the date hereof, and thenceforth from year to year as long as the annual premiums shall be duly paid to the company as they shall become due and the directors shall agree to receive them: Provided always that this policy shall not be assignable in any case whatsoever: Provided always that the said insured [125] shall not be entitled to claim compensation under this policy on account of any accident which shall only in part disable him, unless he shall have paid the extra premium required to insure compensation in such cases: Provided always that the capital stock, funds, and property of the said company (subject to the act or acts of parliament under which it is impowered, and to the deed or deeds of settlement of the said company,) shall alone be answerable for claims under this policy: and no director or shareholder in the said company shall be subject to any demand in respect of such claims further than to pay to the funds of the said company the full amount of his or her shares or share for the time being in the capital of the said company remaining unpaid: Provided also that this policy and the insurance hereby effected are and shall be subject and liable to the several conditions, restrictions, stipulations, and notice hereupon indorsed, so far as the same are or shall be applicable, in the same manner as if the same respectively were here repeated and incorporated in this policy: Provided also that no insurance shall be effected until the premium due thereon shall have been paid, and that, if any statement or allegation contained in the aforesaid declaration, or any attempt be made to obtain compensation fraudulently or by untrue statements, this policy shall be void, and all moneys paid in respect thereof shall be forfeited to the said company. In witness whereof, the common seal of the said company is hereunto affixed, by order of the board of directors, this 29th day of November, 1862.

"Examined, R. B. Peacock.

"Entered, N. Shalders.

"Countersigned, Edwd. Solly.

"J. G. B. LAWRELL,

"GEORGE LOWE,

"CHARLES AINSLIE,"

} Directors."

Averment that the conditions, restrictions, stipulations, and notice mentioned and referred to in the said [126] policy and agreement, and indorsed thereupon, were and are in the words, letters, and figures following, that is to say,—

"Stipulations and conditions upon and subject to which the within policy is effected:—

"1. This policy insures against all forms of cuts, stabs, tears, bruises, concussions, crushings, gunshot-wounds, poisoned wounds, sprains, ruptured tendons, broken bones, dislocations, burns and scalds the effects of explosions and chemicals, frost-bites, bites of mad dogs, serpents, or insects, the action of lightning, suffocation by choking, drowning, hanging, when accidentally occurring, from material and external cause, where such accidental injury is the direct and sole cause of death to the insured, or disability to follow his avocations: but it does not insure against death or disability arising from rheumatism, gout, *herald*, erysipelas, or any other disease or cause arising within the system of the insured before or at the time or following such accidental injury (whether causing death or disability directly or jointly with such accidental injury), nor against death or disability arising from prize-fighting, duelling, the hands of justice, from intentional self-injury, whether under the influence of insanity or not, nor from injuries sustained on a railway whilst travelling otherwise than in a passenger carriage, nor whilst acting in violation of the bye-laws of the railway company, nor from injuries received in the wanton and voluntary exposure of himself to obvious and

unnecessary risk or injury, nor from injuries received whilst in a state of intoxication, or whilst performing any unlawful act, nor against death or disability arising accidentally from anything administered or act performed for the treatment of disease, whether surgical, medical, or otherwise, except for surgical operations performed for the treatment [127] of injuries enumerated in the first part of this clause, for which compensation under this policy would be otherwise payable, nor against injury occasioned by any invasion, foreign enemy, civil commotion, popular riot, or by any military or usurped power whatsoever; and in no case against death or injury occurring beyond the period of three months from the date of injury.

"2. The renewal premium due under this policy, and extra charge, if there be any, shall be due the day when the current year for which it is first granted expires, and may be paid during ten days from that date; and, though this policy virtually terminates on the day when such current year expires, yet, whether renewed or not, it shall be held to be in force for those ten days, and any accident occurring within those ten days shall be compensated the same as if it had occurred within the current year originally insured for; but the directors shall not be bound to send any notice of the renewal premium becoming due, and shall be at liberty, should they see fit, to decline altogether to renew the policy from year to year.

"3. The company will not incur double risks of the same kind upon a single life; and any policy of insurance effected on a life already insured with the company will be absolutely void, unless specially indorsed with reference to such existing policy. This policy will also become void, should the insured, without the permission of the directors duly indorsed on the policy, ride races or steeple chases, enter the naval, military, preventive, or police service, change his occupation, or go out of Europe, except in passing from one port in Europe to another in a decked vessel and in time of peace, or if any other similar insurance against accidents without the permission of the directors shall be hereafter effected with any other company. This [128] policy will, however, not become void in consequence of the said insured becoming a member of a volunteer corps, which will not be deemed military service, and all the peace risks of which are in this policy included in the term, horse and machinery risk.

"4. No sum payable by the company under this policy shall carry interest; and the company shall cease to be liable for such sum, if the same be not claimed within one year after it shall have become due.

"5. In case of this policy or of the moneys hereby insured to be paid becoming the subject of any trust whatsoever, the receipt of the trustee for the time being shall be an effectual discharge to the company, without the company being bound to see to the application of such moneys, or being answerable or accountable for the misapplication or non-application thereof.

"6. In the event of any accident occurring to the insured within the intent and meaning of this policy, he or his representative must give notice thereof in writing to the company at their office in London within seven days of the occurrence of the accident, stating the nature and date of the injuries, the place where, and the manner in which they were received, with the name, the then address, and the occupation of the person injured. In case the accident shall not prove fatal, but shall so seriously injure the said insured as to render him either altogether or in part unable personally to attend to or carry on any business, the insured shall within fourteen days of the accident furnish to the company a written report on the facts of the case and the injuries he has received, from his medical attendant, who shall be a duly-qualified and registered medical practitioner, and, further, shall within fourteen days after its occurrence, at the request of the company, submit himself to be examined [129] by their medical officer, either at their chief office or at the address so given by the insured as aforesaid, at his option; and, in case the disablement shall continue for longer than one month, he shall give all such further information by certificates or declarations from time to time to the company as they may reasonably require, in order to ascertain the nature and extent of such injury and disability. In case of death, the legal representative of the insured must send to the company, at their office in London, in addition to such written notice as aforesaid, a certificate from the medical attendant of the insured, stating as fully as possible the nature of the injuries and the cause of death. Compliance with the above conditions shall be a condition precedent to any liability of the company in respect of such injuries.

"7. In case of this policy becoming void under any of these conditions and stipula-

tions, or the provisions within contained, the company shall not be bound to refund any moneys which shall have been received by them in respect thereof: and all claims against the company in respect of this policy shall be extinguished.

"8. If any dispute arise respecting the amount of compensation to be paid to the insured, the matter shall be referred to arbitration in the usual way: and, in case the parties differ as to the appointment of arbitrator or umpire, or as to the terms of such reference, it shall be referred to the associate of the court of Queen's Bench for the time being to settle the same.

"Special Notice to Insurers.

"In every case of accident, where a claim is intended to be made, notice of such accident must be sent to the chief office, 7 Bank Buildings, Lothbury, London, within seven days, in pursuance of the 6th condition: and the insurers are informed that notice [130] given to any local agent will not be held by the company as a compliance with that condition.

"No renewal receipts are valid, unless they are in the printed office form, and under the signature of the manager: and no special or other indorsement will be held valid, unless the same is recognized and countersigned at the chief office.

"No compensation is payable under this policy to a person insured under the first class, on account of accidents caused by his personally riding or driving, or from accidents caused by the use, superintendence, or inspection of machinery or fire-arms of any kind, unless he has paid the extra premium required for such risk: and no compensation is payable under any class on account of accidents which may only in part disable, unless the extra premium of 2s. per cent. to cover such insurance has been paid."

The declaration then went on to aver that, after the making and entering into the said policy and agreement, and within the period of one year from the date thereof, and whilst the same was in full force and effect, and whilst the said John Fitton was insured thereby, the said John Fitton was injured by accidental violence within the true intent and meaning of the said policy and agreement, to wit, by accidentally falling with great force and violence upon and against the floor of a certain room: that the said John Fitton did within three calendar months of the occurrence of the said accident and injury, and whilst the said policy and agreement was in full force and effect, and whilst the said John Fitton was insured thereby, die from the direct effect of such accident, within the true intent and meaning of the said policy and agreement: And that all conditions necessary to be performed, and all things necessary to happen, and all times necessary to elapse, to entitle the plaintiff as such administrator [131] as aforesaid to the performance in all things of the said policy and agreement by the defendants, and to entitle him to be paid the sum of 1000*l.* therein mentioned, and to maintain this action against the defendants, were performed and did happen and elapse long before the commencement of this suit, and that nothing had at any time happened to disentitle the plaintiff as such administrator as aforesaid to the performance in all things of the said policy and agreement, or to be paid the said sum, or to maintain this action: Yet the defendants had not paid the said sum of 1000*l.* or any part thereof, and the same always had been and still was wholly unpaid: Claim, 1000*l.*

The defendants pleaded that the injury and accidental violence to the said John Fitton in the declaration mentioned, was as follows, and not otherwise, that is to say, the said John Fitton accidentally fell with violence on the floor of the said room, and thereby became and was immediately ruptured in his bowels, and afflicted with strangulated hernia in his abdomen, whereupon a surgical operation was necessarily performed on the body of the said John Fitton, for the purpose of relieving him from the said strangulated hernia: and the said John Fitton afterwards, and within three calendar months of the said accident and injury, died from the said hernia, and from the said surgical operation performed as aforesaid for the treatment thereof, and the effects thereof, and not otherwise, or from any other cause.

To this plea the plaintiff demurred, the ground of demurrer stated in the margin being, "that death from hernia caused solely and directly by external violence, is not within the [exception in the] first condition of the policy, so as to exempt the defendants from liability." Joinder.

[132] Coxon (with whom was Mellish, Q. C.) in support of the demurrer. To

bring the case within the exception contained in the first condition of this policy, the hernia which caused the death must have arisen from some internal cause, and not from accidental external violence. [Willes, J. It would be a most illusory policy, if it were not so.] It must be taken to apply only where the disease exists independently of the accident. Any other construction would make it a gross fraud. Erysipelas may be a constitutional infirmity. Against death from that, this policy would not insure the party: but erysipelas also frequently supervenes upon a wound or a surgical operation: and in that case the policy clearly would attach.

J. Brown, *contra* (a). The simple question is, what is the bargain between the assured and the company. This is not like an ordinary life-policy: for, the parties insured undergo no previous examination or inquiry. The directors find by experience that accidental external violence does not produce hernia, unless there be a predisposition in the party to that sort of infirmity, and that, however caused, it constitutes a permanent and continuous injury. This is clearly stated in a book of some authority, Drouet's *Surgeon's Vade Mecum*, p. 468. It is plain that some of the general words of the first condition are applicable to hernia. [Byles, J. The plea alleges that this [133] injury was occasioned by a violent fall. Is not that a "concussion"? Willes, J. You must find some negative words before you can avoid the policy.] The condition in question contains a clear indication that the company will not be liable for death from hernia not being the direct result of and solely caused by accidental violence. [Williams, J. It is a pity, if the company meant to rely upon that, that the plea did not allege that the death of the intestate arose from hernia occasioned by internal causes. Then, issue being taken upon it, surgeons might have been called to dispose of the question as one of medical science. Your argument leaves untouched the real question, viz. whether hernia which is the result of accidental violence is insured against by this policy.] Rheumatism, gout, hernia, erysipelas, all arise constitutionally. These were for obvious reasons intended to be excluded.

Mellish, Q. C., in reply. The plea admits that the intestate sustained an accident, and that that accident was the direct and immediate cause of the hernia of which he died. The case therefore comes distinctly within the words of the policy: and the conditions must be so read as to explain and make them consistent with and not destroy the policy. [Williams, J. Suppose the plea went on and said that gout supervened, and that without that the intestate would not have died from the accident!] Gout is a disease which is constitutional. But hernia may arise from the direct effect of violence. When it does so, the company are clearly liable under this form of policy. Erysipelas may arise in a perfectly healthy subject from a wound or a scald. The exception does not apply to a disease of which the accident is the *causa causans*. The true construction of the exception is, [134] that rheumatism and gout are always excepted, because they always arise within the system: hernia and erysipelas *when* they arise within the system. If any difficulty exists, the utmost that can be said is, that the condition is ambiguous, and, being the language of the company, must be construed most strongly against them.

WILLIAMS, J. I must confess I have entertained considerable doubt in the course of the argument, though the point really is a remarkably simple one. It is to my mind merely a question whether the proviso at the end of the first condition, that the company does not insure against death or disability arising from hernia, means hernia generally, whether arising from external violence or arising within the system, or whether "hernia" is governed by the other words "or any other disease or cause arising within the system of the insured before or at the time or following such accidental injury." If we decide that the company, on the true construction of the condition are liable where the death or disability arises from hernia caused by external

(a) The points marked for argument on the part of the defendants were as follows:—

"1. That the policy did not extend to cover death from hernia and a surgical operation performed to relieve or cure the same, as shewn in the plea; and that the fact of the hernia being caused by accidental violence or a fall made no difference in the case:

"2. That the facts stated in the plea bring the case within the events against which the company did not insure, as stated in the first condition set out in the declaration"

violence, the plea is clearly a bad plea. Looking at the language of the policy, and taking the first condition all together, upon the best interpretation I can put upon it, I am of opinion that it means to exempt the company from liability only where the hernia arises within the system. As far as I can understand the subject, I think that is the fair interpretation of the language used. Hernia is not in all cases a disease arising within the system. It may or may not do so. I think the company are not relieved from responsibility where the hernia is caused by external violence. I therefore think the plaintiff is entitled to judgment.

WILLES, J. I am of the same opinion. It is ex-[135]-tremely important with reference to insurance, that there should be a tendency rather to hold for the assured than for the company, where any ambiguity arises upon the face of the policy. No doubt this is a very valuable company: it has saved many families from severe distress. But its value would be very much diminished if it were held that the company was absolved from liability on its policies if it should appear that the immediate cause of the death of the insured was strangled hernia arising from external violence. Hernia being very likely to arise from external violence, many persons would be deprived of the benefit of their policies if the construction contended for by the company were allowed to prevail. For the reasons given by my Brother Williams, it seems to me that the terms of this policy are large enough to include this case.

BYLES, J. I am of the same opinion. According to the terms of the policy, the representatives of the assured were to be entitled to 1000*l.* in case the insured should be injured by accidental violence, and should within three calendar months of its occurrence die from the direct effect of any such accident. It is plain, therefore, that this case falls within the words of the policy. Then comes the first condition, which, after enumerating many forms of injury against which the policy is meant to insure, introduces an exception in these words,—“but it does not insure against death or disability arising from rheumatism, gout, *hernia*, erysipelas, or any other disease or cause arising within the system of the insured.” Now, that must be read in conjunction with what precedes it,—“This policy insures against cuts, stabs, bruises, concussions, &c., when accidentally occurring from material and external cause, where such accidental injury is the direct [136] and sole cause of death to the insured, or disability to follow his avocations.” The exception certainly goes on to say, whether “before, or at the time, or following such accidental injury, whether causing death or disability directly or jointly with such accidental injury,” which hernia may very well do. Another observation arises upon this; neither of these latter words *ex vi termini* excludes causation, and there are words which plainly would. I entirely agree with the construction which has been put upon this policy by my two learned Brothers. Death from hernia the result of external violence is within the first condition, and not within the exception therefrom.

Brown asked leave to amend pursuant to the suggestion thrown out by Williams, J., in the course of the argument.

Per Curiam. The defendants may have leave to amend: the amendment to be made within a week, and the costs of this argument to be plaintiff's costs in any event.

Rule accordingly.

[137] THE VESTRY OF ST. LEONARD'S, SHOREDITCH v. HUGHES AND ANOTHER.
June 18th, 1864.

[S. C. 33 L. J. C. P. 349; 10 L. T. 723; 12 W. R. 1106.]

By a memorandum of the 19th of August, 1862, the defendants contracted to sell certain freehold premises to the plaintiffs for 2850*l.*, 285*l.* to be paid at once to the vendors' solicitor as a deposit, and the residue on the 29th of October: and it was mutually agreed that the vendors should deliver an abstract, and that the purchasers should within twenty-one days after the delivery of the abstract, deliver in writing to the vendors' solicitor their objections, if any, to, or requisitions on, the title. It then went on to provide that, “in case any objection or requisition shall be so delivered, and the vendors shall be unable or unwilling to comply therewith or remove the same, they are to be at liberty, by notice, &c., to rescind their contract and return the deposit-money, without interest or other compensation, notwith-

standing any attempt made to remove or comply with such objection or requisition.” —An abstract was delivered to the purchasers’ solicitor on the 6th of September. On the 22nd of September objections and requisitions were delivered to the vendors’ solicitor. On the 4th of November (which was six days after the time mentioned in the contract for the completion thereof), the vendors’ solicitor forwarded to the purchasers’ solicitor replies to the requisitions on title. Nothing further was done until the 29th of November, when the plaintiffs issued a writ against *the vendors’ solicitor* to recover back the 285l. deposited with him. The deposit was thereupon returned: and on the 11th of December the vendors gave notice to rescind the contract.—In an action brought by the purchasers on the 16th of December, to recover interest on the deposit, and their costs of investigating the title:—Held, that the vendors were not bound to exercise their option to rescind immediately on receiving the objections and requisitions, or before the day named for the completion of the contract: but that, —time not being the essence of the contract,—they might do so within a *reasonable time*, and that, under the circumstances (which the court were to deal with as a jury ought), their notice was given within a reasonable time.

This was an action to recover damages for the breach of a contract for the sale of certain property.

The declaration stated that theretofore, to wit, on the 19th of August, 1862, an agreement in writing was made and entered into by and between the plaintiffs and the defendants, in the words and figures following, that is to say,—“Memorandum of agreement made this 19th day of August, 1862, between W. N. Hughes, of, &c., J. L. Hughes, of, &c., and N. Hardingham, of, &c., and Elizabeth his wife, devisees in trust under the last will and testament of William Hughes, deceased, and hereinafter described as ‘the vendors,’ of the one part, and the Vestry of the Parish of St. Leonard, Shoreditch, in the county of Middlesex, and hereinafter described as ‘the purchasers,’ of the other part: The said vendors agree to sell and the said purchasers agree to purchase of them, at the sum of 2850l., to be paid as follows, that is to say, the sum of 285l. to be [138] paid into the hands of Mr. F. R. Smith, the vendors’ solicitor, on the signing hereof, as a deposit and in part payment of the said purchase-money, and the residue thereof at the office of the vendors’ solicitor *on the 29th of October now next*. All that freehold plot or piece or parcel of land or ground fronting Old Street Road and King Street, leading out of the Old Street Road, in the parish of St. Leonard, Shoreditch, in the county of Middlesex, which said plot or piece of land or ground, with the dimensions and abutments thereof is more particularly delineated and set forth in the plan drawn in the margin of these presents, and therein distinguished by the colours pink and red, together with the several messuages or tenements, erections, and buildings now standing and being thereon, consisting of the public-house known as the King’s Head, situate in King Street aforesaid, and one shop in the Old Street Road, formerly in the occupation of William Leury, but now in the occupation of Charles Clark, as yearly tenant, at the yearly rent of 70l., and who is now under notice to quit at Christmas-day next, Also a messuage and premises situate and being between the King’s Head public-house aforesaid and the house and premises the corner of Old Street Road and King Street aforesaid, and known as No. 7 King Street aforesaid, in the occupation of John Damants, as yearly tenant, at the yearly rent of 17l., and who is under notice to quit at Christmas day now next. Also a messuage and premises the corner of King Street and the Old Street Road aforesaid, and five shops or sheds adjoining thereto fronting the Old Street Road aforesaid, and now in the occupation of the said John Damants and his undertenants at the yearly rent of 45l., and under notice to quit on or before Michaelmas day, 1863, together with their respective appurtenances: And it is mutually agreed between the ven-[139]-dors and purchasers that, subject to the stipulations herein contained, the vendors shall at their own expense prepare and deliver to the purchasers, or their solicitor, a proper abstract of title, and, subject to the said stipulations, make a good title to the premises sold, and, on payment of the balance of the purchase-money, the purchasers shall have a proper conveyance and assurance of the said premises, and the fee-simple and inheritance, and as to such portion of the lands as is coloured pink in the said plan, with the buildings thereon, free from land tax, which has been redeemed: such conveyance and assurance to be prepared by and at the expense of the purchasers: And the vendors shall pay or allow all outgoings to the time of completion, and be entitled to a proportionate

part of the accruing rent to that time, with the balance of the purchase-money at the time of the completion, but this stipulation is nevertheless to be without prejudice to the vendors' right reserved to re-sell the property as hereinafter contained: that the title to the plot of land coloured pink in the said plan, with the buildings thereon, shall commence with indentures of lease and release dated respectively the 4th and 5th days of October, 1804, and the title to the plot of land coloured red in the said plan, with the message thereon numbered 7, in King Street aforesaid, shall commence with indentures of lease and release dated respectively the 28th and 29th of September, 1830; and no earlier title shall in either case be required, notwithstanding any recitals in such several indentures respectively, nor shall any requisition be made in respect thereof; and no proof shall be required of any facts stated or implied in any deed, will, or other document dated more than twenty years back; that, as to such portion of the plot or piece of land coloured pink in the said plan, with the buildings thereon, the [140] vendors being devisees in trust for sale, with power to give receipts for the purchase-money, they shall not be required to enter into any covenants other than the usual trustee covenant against incumbrances by them, and the concurrence of the parties beneficially interested shall not be required: And, inasmuch as there is no plan upon any of the title-deeds, and the plan is inserted in this agreement at the instance of the purchasers, they shall not call for any proof as to the identity or boundaries of the property other than a statutory declaration, by some person who has known the premises for more than twenty years, that the boundaries remain the same as they were when first known to the declarant, or to a similar effect, and that the public-house premises are the same as were formerly in the occupation of John Hanson the younger; that, as to any evidence of identity of property sold, and all certificates, declarations, and other evidences, attested, official, and other copies of or extracts from and searches for and production of, and attendances for inspection or otherwise in relation to, wills, deeds, documents, writings, and assurances, whether for verifying the abstract or otherwise, and that may be required by the purchasers, shall be made and obtained at the purchasers' expense; and the purchasers shall within twenty-one days after the delivery of the abstract as aforesaid deliver in writing to the vendors' solicitor their objections (if any) to or requisitions on the title, and in default, and as to all matters not therein specifically objected to, the title is to be considered as accepted: And, *in case any objections or requisitions shall be so delivered, and the vendors shall be unable or unwilling to comply therewith or remove the same, they are to be at liberty by notice in writing under the hand of their solicitor to rescind their contract and return the deposit money without interest or other compensation* [141] *notwithstanding any attempt made to remove or comply with any such objection or requisition*, and the purchasers are thereupon to return the abstract delivered; and, upon failure by the purchasers to comply with the above stipulations, their deposit money shall at the expiration of the time limited for completion become forfeited to the vendors, who, without tendering a conveyance to the purchasers, shall be at liberty to re-sell the property by public or private sale; and any deficiency in the purchase money shall be made good by the present purchasers: As witness, &c.: Averment, that the plaintiffs did all things necessary on their part to entitle them to have the required abstract of title delivered to them, and the required title made to them by the defendants: and that the time for the defendants to prepare and deliver such abstract of title, and to make such good title as agreed, had elapsed: Yet the defendants did not nor would prepare or deliver to the plaintiffs a proper abstract of title, subject to the said stipulations in that behalf contained, or make a good title to the said premises so sold, but had hitherto wholly neglected or refused so to do; by reason whereof the plaintiffs had been deprived of all the benefit and advantage which would have arisen from the completion of the said purchase, and had been put to great expenses in endeavouring to procure such title as aforesaid, and to get the said purchase completed, and had lost all gains and profits which they might and would otherwise have made and acquired from using and employing the sums of money deposited under the said agreement and kept by the plaintiffs for the purpose of completing the said purchase. Claim, 100l.

The defendants pleaded, —first, that no such agreement as in the declaration mentioned was made or entered into by or between the plaintiffs and defendants [142] as therein alleged, —secondly, as to so much of the declaration as related to the defendants' not preparing or delivering a proper abstract of title, subject to the stipulations in the said agreement in that behalf contained, that they did prepare and deliver to

the plaintiffs a proper abstract of title subject to the stipulations aforesaid according to their said agreement, —thirdly, as to so much of the declaration as related to the defendants' not making, subject to the said stipulations in the declaration mentioned, a good title to the said premises, that they did make a good title to the said premises as agreed, —fourthly, as to so much of the declaration as the third plea was pleaded to, that a reasonable time for the defendants to make such good title as agreed had not elapsed before action, —fifthly, as to so much of the declaration as the third plea was pleaded to, that they delivered an abstract of title in accordance with the said agreement, and that, within twenty-one days after such delivery of the said abstract of title, the plaintiffs delivered in writing to the defendants' solicitor divers objections to and requisitions on the title, and the defendants were unable and unwilling to comply therewith or remove the same, and thereupon the defendants, by notice in writing under the hand of their solicitor rescinded the said contract, and offered to and did return the said deposit money to the plaintiffs, and the plaintiffs then accepted the said deposit money, and elected to and did rescind the said contract, —sixthly, that, after the making of the said agreement, and before any breach thereof, the plaintiffs exonerated and discharged the defendants from the said agreement, and from the performance of the same. Issue thereon.

Under a judge's order, the following case was stated for the opinion of the court, who were to be at liberty to draw any inference or find any facts which in their [143] opinion a jury ought to have drawn or found from the facts appearing on the case:—

The agreement in the declaration set forth was made and duly executed as therein stated, and afterwards abstracts of the title of the said premises so agreed to be sold were delivered by the defendants' (the vendors') solicitor to the plaintiffs' (the purchasers') solicitor on the 6th of September, 1862.

On the 22nd of September, the purchasers' solicitor sent to the vendors' solicitor requisitions on title, the only material ones of which were the following:—

“1. It is submitted that such a title is not shewn by the abstracts as the vestry are according to the contract bound to accept. The contract is made by the vendors as devisees in trust under the will of William Hughes. It appears, however, from the abstract that the premises coloured red in the plan in the margin of the contract were conveyed to uses to bar dower, in favour of J. L. Hughes, one of the vendors. The vendors, as trustees, had no right to concur with Mr. J. L. Hughes in a contract for the sale at one price of their trust-estate along with his property. An objection to the title of Mr. J. L. Hughes may thus prevent the sale of their trust-property. The sale is only justifiable in case the premises conveyed to Mr. J. L. Hughes form part of the estate of the testator William Hughes. But, in this case it should be shewn that the will of William Hughes contains power to purchase real estate thereby devised, and that the purchase made by Mr. J. L. Hughes was made in pursuance of this power: and there is no such power contained in the will in question.”

And as to the premises coloured red in the margin of the contract,—

“22. George James Constable, as administrator with the will annexed of John Tibbott, had no power to sell [144] the premises. Decisions have, no doubt, been recently made, contrary to all principle, authorizing *executors* to sell real estate for the payment of debts; but it is submitted that this doctrine has never been extended to *administrators*; and purchasers could not be advised to accept a title depending on such a sale.”

At the end was the following note,—“The above objections and requisitions are forwarded subject to the usual searches, and to any further requisitions that may arise on the vendors' replies thereto.”

Accompanying these requisitions was the following letter:—

“Hughes's trustees to Shoreditch vestry.

“Herewith I beg to forward you observations and requisitions on title, substantially based on the opinion of counsel (Joshua Williams, Esq.) taken thereon. The requisitions being such as I would confidently submit will prevent the vendors enforcing contract, it will be for them to determine whether under your advice they will not prefer to resort to the rescinding clause in the contract, rather than incur further expense. As I have paid you the deposit, 285l., in cash, I will thank you to return to me the cheque for that amount which I first gave you, the payment whereof

I stopped at my bankers'. I shall not attempt to examine any of the deeds not in your possession, until I hear further from you."

The vendors' solicitor, without replying to such letter, on the 6th of November, 1862, forwarded to the purchasers' solicitor replies to such requisitions on title, amongst others, as follows:—

To the 1st. "The vendors are described as devisees in trust, but are not stated to sell as devisees in trust. The vendors, having arranged with Mr. J. L. Hughes as to his premises, contracted to sell the whole, and are ready to procure the conveyance of the whole: and, if [145] any question of the propriety of doing so should arise, it will be with *cestui que trusts*, not with the purchasers."

And to the 22nd. "The testator directed the payment of the debts, and the administration with will annexed was granted to Mr. Constable as a creditor of the testator; and the fact must, therefore, have been proved to the court."

A copy of the will of William Hughes, deceased, was appended to the case. The defendants were in fact devisees in trust for sale, with power to give receipts for the purchase-money, under the will of William Hughes, of all that portion of the plot or piece of land coloured pink in said plan, with the buildings thereon, as mentioned in the said agreement. But they were not such devisees in trust in respect of that portion of the said plot coloured red: the said John Lockington Hughes being alone seised of that portion of the premises in his own right.

Nothing whatever occurred after the defendants' replies to the said requisitions, until afterwards, on the 29th of November, 1862, the plaintiffs issued a writ out of the Common Pleas against Mr. Smith, the stakeholder, to recover the sum of 285l., the amount of deposit under the said contract, which was paid to the plaintiffs' solicitor on the 9th of December, who on receipt of the same waived his costs in the said action against Smith, but expressly stated to the person who paid the said 285l. that he would not waive his right to this action, and further, in answer to a request of the said clerk of Smith for a return of contract and said abstracts (such clerk at the same time holding in his hand the duplicate contract executed by the plaintiff with, as alleged by the defendants' solicitor, the following indorsement thereon, viz.,—"I hereby give [146] notice to all whom it may concern that, in the exercise of the power reserved to the vendors by the said within-written contract of sale, the vendors hereby rescind the said contract and offer to return the deposit money, and demand the return of the abstract delivered. Dated this 9th day of December, 1862)," stated to the said clerk that he would not and might not do so, as his reason for bringing the said action against Smith had been to prevent the said vendors rescinding before action brought, and to prevent any question arising therefrom. Nothing was then, viz. on the payment of the said deposit as last aforesaid, or at any other time, said by the said clerk to the said purchasers' solicitor about any notice to rescind having been indorsed on the said duplicate contract in the vendors' solicitor's possession, in the letter next hereinafter set forth referred to.

The said vendors' solicitor afterwards, on the 11th of December, 1862, wrote and sent to the said purchasers' solicitor a letter and a notice in the words and figures following:—

"11th December, 1862.

"Hughes and Shoreditch.

"Dear Sir,—In consequence of your refusing on Tuesday last to receive back the contract executed by your client, upon which I had indorsed a notice rescinding the contract between the parties, I am under the necessity of sending you a separate notice, which I do on the other side.

"F. R. SMITH"

"I hereby give notice to all whom it may concern that, in exercise of the powers reserved to the vendors by the contract for sale, dated the 19th of August, 1862, made between William Nightingale Hughes, John Lockington Hughes, and Nathaniel Hardingham and Elizabeth his wife, of the one part, and the vestry [147] of the parish of St. Leonard, Shoreditch, of the other part, the vendors rescind the said contract, and, having returned the deposit money, now demand the return of the abstracts delivered. Dated," &c.

To the above letter the purchasers' solicitor made no reply, but afterwards, on

the 12th of December, 1862, wrote and sent to the vendors' solicitor a letter as follows:—

“12th December, 1862.

“Hughes's trustees to the Vestry of Shorditch.

“I am requested by the vestry of Shoreditch to demand payment of the vendors of the sum of 411. 12s., for interest on deposit returned, and costs of investigation of title (as per bill sent herewith); and, unless the same be paid at my office on or before Monday next, together with 5s., the cost of this application, proceedings will be instituted for the recovery thereof, without further notice. I beg also to add, that I shall treat the notice of rescinding contract signed by you, and only this day received by me, as a nullity.

“JOHN MILLS.”

The question for the opinion of the court was, whether upon the above facts, the plaintiffs were entitled to recover, in respect of the breaches in the declaration, upon any, and, if any, upon which of the issues joined by the pleadings in this cause.

If the court should be of opinion that the plaintiffs were entitled to recover in this action, then judgment was to be entered for the plaintiffs for such, if any, of the items of the said bill of costs as the court might consider them entitled to recover, subject to the taxation of the said items, and such other sums as the court should think they were entitled to recover, and costs of suit, if recoverable in law. If the court should [148] be of opinion that the plaintiffs were not entitled to recover in this action, then judgment of *nolle prosequi*, with costs of defence, was to be entered for the defendants:

Raymond (with whom was Keane, Q. C.), for the plaintiffs. The questions raised for the opinion of the court upon this special case are,—first, whether the vendors had any title to convey,—secondly, whether they had power to sell real estate for payment of debts,—thirdly, whether they were in a condition to rescind the contract after what had taken place,—and fourthly, what damages the plaintiffs are entitled to recover.

1. The statement shews that the vendors who profess to sell as devisees in trust are not so in fact. John Lockington Hughes is entitled to part of the property in his own right: the others had no power to deal with that. [Williams, J. If the legal estate is in him, and he is willing to convey, where is the difficulty?] There is no power to apportion. If we take the estate with notice of the claims of the *cestuis que trust*, we may be liable to them. [Tomlinson. The objection is, that the whole is comprised in one contract, and the purchase-money blended. That is no objection in the mouth of a purchaser.] Having notice of the trust, the purchasers would be bound to see that the vendors have power to sell. In *Dart on Vendors*, 3rd edit. 390, it is said that, “if, in dealing with an executor, the purchaser knows that all the purposes for the performance of which the law impowers him to sell have been already answered, or that he is selling for his own private benefit, the sale will be impeachable in equity: and a mortgagor or purchaser who has notice that the executor is dealing with the assets in part, but not altogether, for administration [149] purposes, is bound, if the transaction come to be impeached, to shew how much of the money raised was in fact properly raised: so, if a trustee sell to pay his own debts, or for any other unauthorized purpose, and the purchaser have notice that such is the case.” Here, the defendants should have sold the trust property by itself: they had no right to blend it with property of one of them. The will gave Lockington Hughes no authority to purchase: therefore, it is clear he was acting on his own behalf, and not as devisee in trust. [Byles, J. You say you would be responsible for the apportionment?] Yes. [Williams, J. It may be a mode of enabling the trustees to get a better price.]

2. An executor has no implied power to sell or mortgage land which descends to the heir charged simpliciter with the payment of debts: *Doe d. Jones v. Hughes*, 6 Exch. 223. A *fortiori* has not an administrator with the will annexed. In Williams on Real Assets, p. 82, the learned author, citing this case, says: “It might have been supposed that this decision would settle the law. This, however, was far from being the case, as will be seen by the remarks of the learned judge who had occasion to make the next decision on the subject. The next case was *Robinson v. Lowater*, 17 Beavan, 592; and in this case the following remarks were made by His Honour the Master of the Rolls on the decision of *Doe d. Jones v. Hughes*,—‘I have next to consider whether this case is varied by the circumstance that the devise is not a trust for the payment of debts, but merely a charge of such deficiency as the personal

estate shall be insufficient to pay. The case of *Doc d. Jones v. Hughes* is relied upon to shew that the executor could not make a good title to sell, and had no authority to sell vested in him. I find it difficult to reconcile the decision in that case with the numerous authorities to be found on [150] this subject in Chancery; amongst which I may refer to *Ball v. Harris*, 4 Mylne & Cr. 264, where Lord Cottenham observes that a charge of debts is equivalent to a trust to sell so much as may be sufficient to pay them, *Forbes v. Peacock*, 12 Simons, 541, which on this point is not affected by the reversal of the decision (1 Phillips, 717), and to the case of *Gosling v. Carter*, 1 Collier, C. C. 644. Before the case in the Exchequer, I had considered the law to be, that a charge of debts on an estate devised, gave the executors an implied power of sale, because, to use the expression of Sir John Leach in *Bentham v. Wiltshire*, 4 Madd. 49, the power to sell is implied from the produce being to pass through their hands in the execution of their office, as in the payment of debts or legacies.' In commenting on these dicta, the learned author, at p. 83, says: "The case of *Forbes v. Peacock* was the case of a mixed fund, and depended upon totally different principles. In *Gosling v. Carter*, all persons interested concurred in the conveyance. And the dictum of Sir J. Leach in *Bentham v. Wiltshire* seems directly opposed to the position in support of which it is cited. He says, the power to sell is implied from the produce being to pass through the hands of the executors in the execution of their office, as in the payment of debts or legacies. This is true, if the produce is by the will expressed or implied so to pass: but it merely begs the question, to say that a simple charge of debts creates such an implication. The charge charges the land only. The executor's duty is only with the personalty. The older lawyers never dreamt of any such doctrine. In *Walker v. Smalwood*, Ambler. 676, a testator devised his estate charged with payment of debts, and Lord Camden, in his judgment, said that the creditors had a right to call on *the heir or devisee* to execute the trust. He [151] says nothing about the executor; and it is obvious in what sense the word trust was here used, namely, in that of a duty to pay the creditors out of the lands which devolved upon the heir or devisee. So, in *Hargreaves v. Michell*, 6 Madd. 326, Sir John Leach says that a charge of debts is a trust to be executed by the *devisee or heir*. So, Lord Cottenham, in *Eland v. Eland*, 4 Mylne & Cr. 428, remarks, 'What evidence is it of a breach of trust that a party having such an estate subject to such a charge sells the estate as his own? He is in truth the owner subject to a charge, and it is *his duty* to satisfy the debts, which the sale may be the very means of enabling him to do.' Again, in *Johnson v. Kennett*, 6 Simons, 384, 3 Mylne & K. 624, there was a charge of debts, and a devisee was also executor: but neither Lord Lyndhurst, by whom the case was decided, nor Lord Cottenham in his comments on that case (in *Eland v. Eland*), nor Lord St. Leonards, in his remarks on the same case in *Stroughill v. Austey*, 1 De Gex, M'N. & G. 652, thought it worth while to mention the circumstance. Again, in *Walker v. Aston*, 14 Simons, 87, there was a general charge of debts and legacies, and a devise in strict settlement subject to that charge. The property was ordered by the court to be sold, but no person seems to have supposed that the executor could sell, and an order was accordingly made by the court for the tenant for life to convey under the 12th section of the statute 11 G. 4 and 1 W. 4, c. 47. The case of *Robinson v. Lowater* was a peculiar one. The decision of the court below was affirmed, on appeal: 5 De Gex, M'N. & G. 272: but neither the decision itself, nor the language of the learned judge who decided it, forms any authority for the general proposition which has been sometimes deduced from it, that a charge of debts always implies a power for the executor to sell. The [152] decision itself goes no further than *Gosling v. Carter* had already gone, namely, that where there is a charge of debts, and, subject thereto, a devise for life, with remainders over, all persons interested may convey the land so charged and devised to a purchaser, and the tenant for life may give a valid receipt for the purchase money." In Sugden on Powers, 8th edit. 121, dealing with this subject, it is said: "The recent decisions in equity run directly counter to a contemporaneous decision at law. I allude to *Doc d. Jones v. Hughes*, where it was decided that a mere charge of debts, funeral, and testamentary expenses, on estates, whether devised to others or allowed to descend, will not give to the executors an implied power of selling or mortgaging the estates to pay the debts or the funeral or testamentary expenses; and a dictum to the contrary by Shadwell, V. C., was overruled. It was held that the estate not devised descended to the heir-at-law, subject to an equitable charge of the debts, funeral, and testamen-

tary expenses. The same rule must ultimately prevail in both courts: a simple question of legal construction can only receive one solution. *The decision at law appears to establish the true rule*, and is justified and strengthened by the prevailing opinion in the profession. Upon the appeal in *Robinson v. Lovat*, one of the learned Lords Justices asked whether *Lord Jones v. Hughes* dealt with anything beyond the legal estate. Could it govern the case before them, which was an application to a court of equity to give effect to a charge? But the question in both cases was the same,—by whom was a legal title to be made? It was of course that the estate should be sold and the debts paid, but by whom the sale was to be made was the point to be decided. The true distinction *as bearing upon this question*, between a mere charge and a direct trust, has not perhaps in [153] all the cases been closely observed.” In the present case there is a mere direction to pay debts: it is not even a charge.

3. The next question is, whether the vendors had power to rescind. The clause in the contract of sale upon which this turns, is as follows:—“And, in case any objections or requisitions shall be so delivered, and the vendors shall be unable or unwilling to comply therewith or remove the same, they are to be at liberty, by notice, to rescind their contract, and return the deposit money, without interest or any other compensation, notwithstanding any attempt made to remove or comply with any such objection or requisition, and the purchasers are thereupon to return the abstract delivered.” By the terms of the contract, the day for completion of the purchase was the 29th of October. The answers to the requisitions were not delivered until the 4th of November. That was after the breach, when the plaintiffs had a vested cause of action. And this action was commenced on the 16th of December. [Willes, J. The question is, whether there was any breach before action.] Under such a condition as this, the vendor's option to rescind must be exercised at once, and he is not entitled, after making numerous fruitless attempts to remove an objection, to return the deposit only, without interest and costs: *Tanner v. Smith*, 10 Simons, 410; *Cutts v. Thodey*, 13 Simons, 206; *Morley v. Cook*, 2 Hare, 106; *Lane v. Debenham*, 17 Jurist, 1005; *McCulloch v. Gregory*, 1 K. & J. 286. In the last-mentioned case, Vice-Chancellor Page Wood says: “The vendor has admitted that the difficulty cannot be overcome, and has offered to repay the deposit without interest or costs: and the only question is, whether he is entitled to resist those terms. Clark (one of the purchasers) seems to have performed his duties in strict compliance with the [154] conditions of sale: one of those conditions was that, if there were objections which the vendor could not remove, the deposit was to be paid back without interest. But a vendor cannot in such cases retain the deposit as long as he pleases, making fruitless efforts to remove the difficulty. Here, four additional abstracts were sent, and at last the purchaser was told, ‘Now I give it up, and you shall have the contract rescinded, and your money paid back without interest or costs.’ I think that the condition cannot be so construed. The moment the vendor knew of the defect was the time for saying ‘I return your deposit without interest or costs.’ Clark was always pressing for the re-payment of his money, and never waived that for an instant: and I think that he is now entitled to have payment out of court of his deposit, and an account of the interest due thereon: and the costs properly incurred must be taxed.”

4. Then, as to the damages,—the plaintiffs are entitled to recover the expenses they have been put to in endeavouring to get the contract carried out, and interest on the deposit. [Tomlinson. The purchasers are not entitled to charge the vendors with the expense of copies of the abstracts. It was an improper thing to take copies at all.]

Tomlinson, for the defendants (*a*). If necessary, the [155] defendants are prepared to contend that they made out a sufficient title. [Williams, J. We wish to confine your argument to the right to rescind.] Formerly, it was the practice to provide that the vendor should have a power to rescind if he would not or could not answer objections: and, if he made any attempt to answer the objections, he waived his right to rescind. There are numerous decisions to that effect. But, under this form of condition, if requisitions are made by the purchaser, he waives the time for completion,

(*a*) The points marked for argument on the part of the defendants were as follows:—

“1. That it does not appear from the statement in the case that the defendants have been guilty of any breach of the agreement mentioned therein:

“2. That it appears therefrom that they delivered a good and sufficient abstract

and gives the vendor a right, if his answers are not satisfactory, to rescind. [Byles, J. [156] After the time fixed for the completion of the contract?'] Yes. The same form of condition was adopted in *Hoy v. Smythies*, 22 Beavan, 510, and *Steer v. Crowley*, 14 C. B. (N. S.) 337.

Raymond, in reply, referred to *Wilde v. Fort*, 4 Taunt. 334, where it was held that, if the vendor of an estate by auction does not shew a clear title by the day specified, the purchaser may recover back his deposit and rescind the contract, without waiting to see whether the vendor may ultimately be able to establish a good title or not; and to *Stowell v. Robinson*, 3 N. C. 928, 5 Scott, 196, where *Wilde v. Fort* was cited and acted upon by this court. [Williams, J. The decision in *Stowell v. Robinson* turned upon the Statute of Frauds.]

WILLIAMS, J. I am of opinion that the defendants are entitled to judgment. In the view which we take of the case, it is unnecessary to decide the points which have been raised on the argument before us as to the requisitions and objections made on the purchasers' part on the 22nd of September, because we think that the defendants are entitled to judgment on the ground set forth in the plea (fifth) relying on the condition giving the vendors power to rescind the contract. It will be convenient to see the terms in which this power of rescission is conferred. They are these:—"In case any objection or requisition shall be so delivered, and the vendors shall be unable or unwilling to comply therewith or remove the same, they are to be at liberty, by notice in writing under the hand of their solicitor, to rescind the contract and return the deposit-money, without interest or other compensation, notwithstanding any attempt made to remove or comply with any such objection or requisition." Now, it is contended on the part of the plaintiffs that, notwithstanding these large words, the vendors were bound to exercise the power thereby conferred upon them to rescind the contract immediately upon the sending in of the objections and requisitions. If the contract had been in the same terms as those in *Morley v. Cook*, 2 Hare, 106, and *Tanner v. Smith*, 10 Simons, 410, the argument might be well founded; for, those cases establish the doctrine that, in order to entitle a vendor to avail himself of a condition such as appeared in those contracts, his election to rescind must be made as soon as he is made aware of the purchaser's objections. But the contract here has been carefully worded with a view to avoid the effect of those decisions: it is for this purpose that the parties have introduced the words,—"notwithstanding any attempt made to remove or comply with any such objection or requisition." Under such a contract, it is clear that the vendor is not bound to make his election instant, but may do so after having taken a reasonable time to endeavour to answer or remove the objections. No time is mentioned in the contract within which the vendors are

of title, and that the plaintiffs accepted and made requisitions upon the same, and that the defendants were therefore entitled to succeed upon the issue on the second plea:

"3. That the requisitions made by the plaintiffs were untenable:

"4. That the defendants sufficiently complied with the requisitions made by the plaintiffs:

"5. That it does not appear that, at the time the defendants rescinded the contract, the time within which the defendants were bound to make out title had expired:

"6. That it appears that the defendants were entitled to and did by notice in writing rescind their contract and return the deposit, in accordance with the right conferred upon them by the said agreement to do so:

"7. That nothing had occurred to preclude their adopting that course:

"8. That it appears from the agreement that it was only as to the plot or piece of land coloured pink in the plan, with the buildings thereon, that the defendants professed to be devisees in trust for sale:

"9. That the said George James Constable, as administrator with the will annexed of John Tibbott had power to sell the property which he professed to sell:

"10. That it does not appear that the several items in the bill of costs (a copy of which was annexed to the case) constitute expenses in endeavouring to procure title and get the purchase completed, recoverable as special damage resulting from the defendants' alleged breach of contract, within the meaning of the declaration:

"11. That the reverse appears to be the case:

"12. That the plaintiffs are not entitled to recover interest on the deposit, by way of damages, or otherwise."

to elect: the general rule, therefore, must apply, viz. that the election must be made within a reasonable time, and that is to be implied from the nature of the agreement. Assuming that to be so, it has been urged on the part of the plaintiffs that, at all events, the right to rescind must be limited to the time fixed for the completion of the purchase. Here, the time fixed for completion was the 29th of November, and the notice of rescision was not given until the 11th of December, which it is contended was too late. But I am of opinion that the right to rescind is not so limited. It would be a strong thing if such a limit could be imposed, seeing [158] that in practice the time fixed for the completion of a purchase is almost invariably disregarded. Numerous authorities shew that time in these matters (in equity) is not of the essence of the contract. By reason of the multiplicity of business, it is impossible that those who have to advise on titles should at once give their attention to requisitions and objections to answer or remove which may require much research. It may be that the requisitions and objections may be delivered the very day before that named for the completion of the bargain, and thus only a few hours would be left for their consideration. If under such circumstances it were held that the vendors are bound to exercise their option within the time named for completion, the reservation of the power to rescind would be rendered futile. I therefore think we should be deciding contrary to the plain meaning of the parties, if we held the limit suggested to be the true one. The only remaining question is, whether the vendors did declare their option to rescind within a reasonable time. I am of opinion that they did. It appears that the abstract was delivered on the 6th of September, and that the objections and requisitions were delivered on the 22nd. It certainly was contemplated that the suggestions contained in these objections and requisitions should be attended to, and that the vendors should have an opportunity of endeavouring to remove the objections, for, at the foot was the following note,—“The above observations are forwarded, subject to the usual searches and to any further requisitions that may arise on the vendors’ replies thereto:” so that it is plain that the person who framed those objections and requisitions expected that time would be taken by the vendors’ advisers to comply with or remove them. They are no less than twenty six in number. Many of them are of such a nature as to [159] require very complicated investigations of fact; and two of them present questions of law of no small difficulty. Moreover, they were delivered during the long vacation, when every one knows that professional assistance in these matters is not readily accessible. And, when the answers came on the 4th of November, it was not pretended that they came too late. The vendors might, therefore, reasonably suppose that the purchasers’ solicitor was considering whether the answers given were satisfactory or not. On the 29th of November, there comes a writ against the vendors’ attorney: and the matter ends by the return of the deposit money on the 5th of December, and a formal notice on the 11th that the vendors elected to avail themselves of the condition enabling them to rescind the contract. Looking at all the circumstances, I think this option was exercised within a reasonable time, and therefore that the plaintiffs are not entitled to recover either interest or costs.

WILLES, J. I am of the same opinion. This action appears to have been commenced on the 16th of December, 1862. The vendors elected to rescind the contract on the 11th of December, which was after the day fixed by the contract for its completion. The material dates are these,—The contract was entered into on the 19th of August, and the time named for completion was the 29th of October. One of its terms was that the purchasers were to deliver in objections and requisitions within twenty-one days of the delivery of the abstract. The abstract was delivered on the 6th of September: and, on the 22nd, the purchasers gave in certain objections and requisitions, to which answers were delivered on the 4th of November. No objection now arises to the abstract. The only question is, whether the rescision was a valid one: and that depends upon the true construction of the contract of the 19th of August, one of the provisions of which was that, “in case any objections or requisitions shall be so delivered, and the vendors shall be unable or unwilling to comply therewith or remove the same, they are to be at liberty, by notice in writing under the hand of their solicitor, to rescind the contract and return the deposit money without interest or other compensation, notwithstanding any attempt made to remove or comply with any such objection or requisition.” No time is fixed for answering the objections: but the sellers might answer them and get rid of them if they could. The

answers were in fact delivered on the 4th of November, which was after the day for the completion of the contract. If Mr. Raymond is right in saying that it was not competent to the vendors to rescind after the 29th of October, he will be entitled to succeed. But it appears to me that there are many reasons for holding that the option reserved to the vendors to rescind is not limited to the time fixed for the completion of the contract. *Hoy v. Smythies*, 22 Beavan, 510, is precisely in point to shew that the effect of such a provision as this is not to limit the right to rescind to a period during which experience shews us that contracts of the sort are rarely completed. The court of Chancery does not hold itself bound by the time for completion mentioned in the contract, unless it is clear that the parties have agreed that time shall be of the essence of the contract: and there is no conflict that I am aware of between the courts of equity and the courts of law upon this subject. Much hardship might result from a contrary decision. It might be that the requisitions and objections might be delivered on the day before or on the very day mentioned as the time for completing the contract, when it would obviously be impossible for the sellers to advise with counsel as [161] to their validity or as to the advisability of attempting to answer or remove them. In any view, therefore, that I can regard this case, I feel compelled to come to the conclusion that the intention of the parties to the contract was, that the sellers might exercise the option to rescind within a reasonable time. The question then is, has that option been exercised here within a reasonable time? Looking at all the circumstances, the period of the year at which the objections and requisitions were delivered, and at their difficult and complicated nature, which would render a resort to the best professional assistance necessary. I think it is impossible to say that the delay in answering the objections (until the 4th of November) was an unreasonable delay. Until the 29th of November the vendors did not know that their answers to the objections and requisitions were not considered satisfactory: and it does not appear that any further expense was incurred by the purchasers after that day. The conclusion, therefore, at which I have arrived upon all the facts of the case, is that, upon the true construction of the contract, the sellers had a reasonable time for declaring their option to rescind, and that they did declare their option to do so within a reasonable time. I therefore think the defendants are entitled to judgment.

BYLES, J. I am of the same opinion. Mr. Raymond in his reply seemed to consider that we were about to alter the time fixed for the completion of the contract, by parol evidence. That however, is not so. By the terms of the contract it is expressly provided that, if the sellers are unable or unwilling to comply with or remove any requisition or objection, they are to be at liberty to rescind, notwithstanding any attempt made to remove or comply with the same. This is a sort of defeasance. No time being mentioned within which the [162] option to rescind is to be exercised, it follows, according to the ordinary rule, that it must be done within a reasonable time. I do not think it necessary to repeat what has already been said by my Brother Williams and Willes: it is enough to say that I agree with them. The only difficulty I have felt, has been, whether it was competent to the vendors to rescind after breach of the agreement. But the two cases of *Hoy v. Smythies*, 22 Beavan, 510, and *Steer v. Crowley*, 14 C. B. (N. S.) 337, were decided upon contracts which contained stipulations very much like that now under consideration, and in both the contract was rescinded after the day stipulated for its performance, and in one of them,—*Steer v. Crowley*,—after an action had been brought. These cases turn the balance in my mind. I must own I should have been inclined to come to the same conclusion upon principle. These contracts are hardly ever completed within the time mentioned. If we were to put upon this contract the narrower construction for which Mr. Raymond contended, we should in truth be inserting in it words which are not to be found there, instead of construing it, as all contracts should if possible be construed, ut res magis valeat quam pereat (a). I agree that it was competent to the sellers to rescind within a reasonable time, and that they did rescind within such reasonable time. I also think a proper abstract was delivered, and within the proper time.

KEATING, J. I am of the same opinion. We do not propose at all to interfere with the rule adverted to by Mr. Raymond, that a written contract for the sale of land cannot be varied by parol. Our decision proceeds upon the construction of the

(a) "Benignæ faciendæ sunt interpretationes, propter simplicitatem laicorum, ut res magis valeat quam pereat."

contract: and it suffices to say that we could not give any real or practical effect [163] to the stipulation which provides that, in case any objection or requisition shall be delivered which the vendors shall be unable to comply with or remove, they are to be at liberty to rescind the contract and return the deposit-money without interest or other compensation, notwithstanding any attempt made to remove or comply with any such objection or requisition, if we were to hold that time was the essence of the contract. All the cases shew that time is not of the essence of a contract of this kind. The contract was rescindable and was rescinded within a reasonable time.

Judgment for the defendants.

RUSSELL AND OTHERS v. NIEMANN. June 24th, 1864.

[S. C. 34 L. J. C. P. 10; 10 L. T. 786; 13 W. R. 93. Not applied, *The Felix*, 1868, L. R. 2 A. & E. 278. Referred to, *The Heinrich*, 1871, L. R. 3 A. & E. 435; *The Wilhelm Schmidt*, 1871, 25 L. T. 38. Discussed, *Serrano v. Campbell*, [1891] 1 Q. B. 283. Referred to, *The Industrie*, [1894] P. 71. Followed, *Diedericksen v. Farquharson*, [1898] 1 Q. B. 153. Referred to, *Temperley Steam Shipping Company v. Smyth*, [1905], 2 K. B. 802. Adopted, *Moel Tryvan Ship Company v. Kruger*, [1907] A. C. 279. See *The Portsmouth*, [1910] P. 297; [1911] P. 54; [1912] A. C. 1.]

1. A bill of lading for goods shipped in a Russian port on board a Mecklenburgh ship for a port in this country, contained an exception of "the King's enemies:"—Held, that "the King's enemies" meant, or at all events *included*, the enemies of the sovereign of the person who made the bill of lading, viz. the Duke of Mecklenburgh, and consequently that the exception protected the captain against the consequences of a hostile seizure by the Danes, then at war with Mecklenburgh.—2. By a bill of lading the goods were made deliverable to order or assigns, "paying freight for the said goods, and all other conditions as per charterparty:"—Held, that this did not incorporate an exception in the charterparty as to "acts of enemies" and "restraints of princes."

This was an action by the assignees of a bill of lading against the master of the ship, for not having proceeded on the voyage according to orders, pursuant to the terms of the charterparty and bill of lading.

The declaration stated that, after the 14th of August, 1855, certain persons, in parts beyond the seas, to wit, Messrs. Kellner & Co., at Odessa, delivered to the defendant certain goods, to wit, 3325 chetwerts fine Polish wheat in bulk, and 850 dunnage mats, to be by the defendant carried and conveyed in a certain ship of the defendant's from Odessa to Cork or Falmouth for orders, and thence to one of certain ports as ordered, under a certain bill of lading signed [164] for the same by the defendant, whereby the defendant agreed to carry the said goods and deliver the same at the port of destination (the act of God, *the King's enemies*, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of what nature and kind soever, excepted,) to the order of the said persons, or to their assigns, paying freight for the said goods, *and all other conditions as per charterparty* dated Odessa, the 13 25 October, 1863, with average accustomed: Averment, that afterwards, and after the said 14th of August, 1855, the said persons indorsed the said bill of lading to the plaintiffs, in order to pass the property in such goods to the plaintiffs; and that thereupon, and by reason of such indorsement, the property in the said goods passed to the plaintiffs: that the said ship proceeded with the said goods on board to Falmouth for orders, and was there duly ordered by the plaintiffs to proceed with the cargo to Limerick, and there deliver the said cargo, the same being a port to which the said ship was bound to proceed agreeably to the terms of the said bill of lading and charterparty: that, before action brought, all conditions were fulfilled, and all things were done and happened, and all times elapsed, necessary to entitle the plaintiffs to have the terms of the said bill of lading observed by the defendant, and to sue him for the breach thereof thereafter mentioned: yet that the defendant, although not prevented by any of the excepted perils, made default in obeying the said orders and proceeding with the said cargo to Limerick in pursuance of the terms of the said bill of lading and charterparty: whereby the plaintiffs had lost the profits they would

have gained if the defendant had proceeded to Limerick with the said cargo agreeably to the said orders and the terms of the said bill of lading; and the plaintiffs had also [165] thereby sustained great risk of the cargo heating and deteriorating in value: Claim, 10,000l.

The defendant pleaded,—fifthly, that the said charterparty was in the words, letters, and figures following, that is to say, “Odessa the 13 25 October, 1863. It is this day mutually agreed between Captain H. F. Niemann, of the good ship or vessel ‘Vorwärts’ 33 French veritas, of 3500 chetverts wheat, or thereabouts, under Mecklenburgh colours, now in this port discharging her cargo of coals, and Messrs. Kellner & Co., merchants and charterers of said vessel, that the said ship, being tight, staunch, and strong, and in every way fitted for the voyage, shall receive from the said merchants a full and complete cargo of tallow, wheat, seed, or other stowage goods or grain, oats excepted, all or either at the option of the charterers, not exceeding what she can reasonably stow and carry over and above her tackle, apparel, provisions, and furniture, and, being so loaded, shall therewith proceed to a safe port in the united kingdom of Great Britain and Ireland, north-west coast of Ireland excepted, or on the continent between Havre and Hamburg, both inclusive, Belgium excepted, or so near thereto as she may safely get, where the ship can always lay afloat, calling at Cork or Falmouth, at the master’s option, for orders (which are to be given by return of post in reply to the master’s letter to the charterers’ agents in London, or lay days to commence), unless ordered direct at port of loading, and deliver the same on being paid freight as follows, &c. The freight to be paid on unloading and right delivery of the cargo, all in cash, free of interest, discount, and commission. The cargo is to be brought to and to be taken from alongside the ship at merchant’s risk and expense, the captain rendering the usual assistance with his boats and crew (the act of God, enemies, fire, [166] restraint of princes, and all and every dangers and accidents of the seas, rivers, and navigation, of whatever nature or kind soever during the said voyage, always mutually excepted), &c. &c. Forty running days are to be allowed the said freighters (if the ship be not sooner dispatched) for loading and unloading; and, if one third or more of the cargo consists of wool, ten additional lay days to be allowed; to commence in each case when in every respect ready and by the local authorities permitted to load or discharge, of which notice is to be given in writing to the charterer or his agent: and, after the expiration of the said laying days, ten days on demurrage to be allowed at the rate of 7l. per day and payable day by day, detention by frost or quarantine not to be reckoned as lay days. Cash for ship’s use at Odessa not exceeding 200l. to be advanced the master free of interest and commission, but subject to insurance, and to be deducted from the freight upon payment thereof. It is further agreed that, should the whole or any part of the cargo consist of grain or seed, and any part of it be delivered in a damaged condition, the freight shall be payable on the invoice quantity taken on board as per bill of lading, or half-freight on the damaged portion, at captain’s option. The charterers’ liability to cease as soon as the cargo is shipped (provided it be of sufficient value to cover the freight at port of discharge): the master and owners having an absolute lien upon the cargo for all freight, dead-freight, and demurrage. The ship is to be free of commission at port of discharge. Penalty for non-performance of this agreement, half amount of freight. P. p. George Kellner & Co. W. Vaigts. H. F. Niemann:” That the said bill of lading was and is in the words, letters, and figures following, that is to say,—“Shipped in good order and well conditioned, by George Kellner [167] & Co., in and upon the good ship called the ‘Vorwärts,’ whereof is master for this present voyage H. F. Niemann, and now riding at anchor in the port of Odessa, bound for Cork or Falmouth for orders, 3325, three thousand three hundred and twenty-five, chetverts fine Polish wheat in bulk, and 850 mats for dunnage, being marked and numbered as in the margin, and are to be delivered in the like good order and well conditioned at the aforesaid port of destination (the act of God, the King’s enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of whatever nature and kind soever, excepted,) unto order or assigns, paying freight for the said goods and all other conditions as per charterparty dated Odessa the 13 25 October, 1863, with average accustomed. In witness,” &c.: Averment, that the owners of the said ship and the defendant were respectively subjects of the Duke of Mecklenburgh Schwerin, and the said ship was a Mecklenburgh ship sailing under Mecklenburgh colours; and that the default complained of was caused by the act of the enemies

of the said Duke of Mecklenburgh Schwerin, being the King's enemies within the true intent and meaning of the said bill of lading.

Sixth plea, that the said charterparty and bill of lading were respectively as in the fifth plea set out, and that the default complained of was caused by "the act of enemies" during the voyage, within the true meaning of the said charterparty.

Seventh plea, that the said charterparty and bill of lading were respectively as in the fifth plea set out, and that the default complained of was caused by "the restraint of princes" during the voyage, within the true meaning of the said charterparty.

The defendant also demurred to the declaration, the ground of demurrer stated in the margin being "that [168] it is not shewn that the defendant undertook to obey the orders of the plaintiffs, and that the indorsement of the bill of lading did not pass a right of action on the charterparty." Joinder.

The second replication to the fifth plea stated that the said charterparty and bill of lading were respectively made and signed at Odessa in the empire of Russia; and that the said Messrs. George Kellner & Co. were not, nor were nor was any or either of them, subjects or a subject of the said Duke of Mecklenburgh Schwerin.

The plaintiffs demurred to the sixth and seventh pleas, the ground of demurrer stated in the margin being "that the bill of lading specifies the excepted perils, and does not incorporate the exception in the charterparty of the perils there mentioned." Joinder.

The defendant also demurred to the second replication to the fifth plea, the ground of demurrer stated in the margin being "that it is immaterial whether the said Messrs. G. Kellner & Co. or any of them were or were not subjects or a subject of the Duke of Mecklenburgh Schwerin." Joinder.

Sir George Honyman (with whom was Lush, Q. C.), for the plaintiffs (a). The declaration is clearly good. [169] The proper and only person to give orders as to the destination of the cargo is, the consignee under the bill of lading. The fifth plea is bad. The cargo was neutral on board a Mecklenburgh ship, subject to an exception of seizure by "the King's enemies." The ship was loaded in a Russian port, the cargo to be delivered in an English port. Does the mere fact of the ship being a

(a) The points marked for argument on the part of the plaintiffs were as follows:—

"That the declaration is good, for the following reasons,—

"1. That the bill of lading expressly states that the goods are to be carried to the port of destination, and it appears by the declaration that the port of destination was to be determined by orders at Cork or Falmouth:

"2. That the declaration shews that the ship was duly ordered by the plaintiffs at Falmouth to proceed to Limerick, and the plaintiffs, as the holders of the bill of lading, were the proper persons to give the orders:

"3. That the declaration avers general performance of all conditions precedent, and consequently, if any orders from a third party were necessary, they must be considered as having been given.

"That the fifth plea is bad, for the following reasons,—

"1. That the enemies of the Duke of Mecklenburgh are not the King's enemies within the meaning of the bill of lading, merely because the ship was sailing under Mecklenburgh colours:

"2. That the fact of one party to the contract being a Mecklenburgh subject is no ground for putting a construction upon the words "King's enemies" other than that which *primâ facie* belongs to it:

"3. That the fifth plea, if good, is sufficiently answered by the second replication, which shews that the shippers were not Mecklenburgh subjects, and that the contract was made in another country, viz. Russia.

"That the sixth and seventh pleas are bad, for the following reasons,—

"1. That the bill of lading itself specifies the perils from which the carrier is to be free: and the question of liability or non-liability of the ship-owner is to be determined by reference to the bill of lading only:

"2. That the words contained in the bill of lading 'other conditions as per charterparty' only apply to matters not expressly provided for by the bill of lading, and consequently the exception of certain perils contained in the charterparty is not incorporated in the bill of lading."

Mecklenburgh ship, and the contract for carriage being signed by a subject of the Duke of Mecklenburgh, justify the construing the words of exception otherwise than according to their natural meaning? As to the sixth and seventh pleas, the question is, whether the general words in the bill of lading incorporate the excepted perils in the charterparty. It is submitted [170] that they are incorporated only so far as is not specifically provided for in the bill of lading. The exception relied on, "the acts of enemies," and "restraints of princes," merely point to things to be done by the consignee. [Willes, J. The common exception in the case of carriers is, of the carrier's King's enemies. Suppose a vessel seized by an enemy of the owner of the goods, would not that be a good answer to this action? War seems to justify that which cannot be remedied. Neither of the parties to this contract are subjects of the Queen.] If the words used are to have any other than their natural meaning, it lies upon the other side to shew it.

Mellish, Q. C. (with whom was Hannen), *contra* (a). The objection to the declaration is but a small matter: [171] it is, that it alleges that the ship was duly ordered by the plaintiffs to Limerick, without shewing that the plaintiffs had authority so to do. [Willes, J. A slight amendment will cure that: add the words "having authority from the charterers so to do."] As to the fifth plea,—the exception clearly *includes* the enemies of the Duke of Mecklenburgh Schwerin. Whether the Queen of England's enemies also, is immaterial. Hostility against the government of the owner of the ship must of necessity be within the exception. Generally speaking, all exceptions in a bill of lading are in favour of the master and owners. "King" has a generic sense,—all princes and rulers who hold sovereign authority. The sixth and seventh pleas are also good. The language of the bill of lading, "all other conditions as per charterparty," is amply sufficient to incorporate the whole charterparty. [Willes, J. Can it be necessary for a carrier to provide specially that he shall not be answerable for acts done by the shipper's own enemies? If a prize court gives up goods to hostile captors, the ship-owner gets his freight. War seems to put the enemy in the place of the party himself. If the owner himself took the goods, he of course could have no action. The exception must mean the enemies of the sovereign of the carrier. It may be [172] that the ship is a general ship, having goods of half a dozen nationalities on board. Keating, J. The enemies of the flag must be intended.]

(a) The points marked for argument on the part of the defendant were as follows:—

"That the declaration is bad, for the following amongst other reasons,—

"1. That the only orders which the defendant undertook to obey at Cork or Falmouth were, the orders of the charterers, Messrs. Kellner & Co., and not the orders of the plaintiffs or of the holder of any bill of lading:

"2. That it does not appear that the said charterers or their agents gave the defendant any orders, or that the defendant disobeyed any orders given by them:

"3. That the defendant did not by the bill of lading undertake to deliver at any port as ordered by the plaintiffs: and that, if the plaintiffs rely on the charterparty imposing on the defendant any such obligation, the declaration does not shew that it contained any such stipulation:

"4. That the plaintiffs are not entitled, as assignees of the bill of lading, to sue on a contract not contained in it.

"On the argument of the demurrer to the sixth and seventh pleas respectively, the defendant will contend that the same are good, on the ground that, if the charterparty and bill of lading are to be construed together for any purpose, they must be so for all purposes; and therefore the excepted perils mentioned in the charterparty, so far as they are not inconsistent with those in the bill of lading, must be given effect to.

"On the argument of the demurrer to the second replication to the fifth plea, the defendant will contend that the same is bad, on the ground, amongst others, that it is immaterial of what country the charterers were, inasmuch as the exceptions of perils in the charterparty and bill of lading are inserted for the protection of the ship-owner, and that therefore the exceptions of King's enemies must be read as meaning any enemies whatever, or enemies of the sovereign of the country to which the ship and owner belong."

Sir G. Honyman, in reply. "The King's enemies" cannot mean the enemies of the sovereigns of both parties. Their most obvious meaning is, the enemies of the sovereign of the owner of the goods. The general words "all other conditions as per charterparty" apply only to stipulations as to lay days and demurrage, to be performed by the parties who receive the cargo under the bill of lading (a).

WILLES, J. (b). This was an action on a bill of lading by which the defendant contracted with Messrs. Kellner & Co. at Odessa to convey certain wheat to Europe, calling at Cork or Falmouth for orders, with the usual exception of the act of God, the King's enemies, &c. The declaration alleges that orders were given (and we must assume properly given), and disobeyed. In answer, the defendant relies upon two points, first, he says that he was prevented from obeying those orders by the act of the enemies of his sovereign the Duke of Mecklenburgh Schwerin, being the King's enemies within the true intent and meaning of the bill of lading. The other point upon which he relies, failing the first, is that the bill of lading related to the conveyance of goods upon a voyage in respect of which there was a charterparty, and that that charterparty is by general words of reference incorporated in the contract in the bill of lading, and so he is entitled to rely upon a larger exception which is contained in the charterparty, "the act of God, *enemies*, fire, *restraint of* [173] *princes*," &c. I understand that, if Mr. Mellish has judgment upon the first point, he will be content that no judgment should be pronounced upon the second. I will therefore confine the few remarks I have to make to the first point. As to that, I agree with the argument which has been urged on behalf of the defendant, that "the King's enemies," in the bill of lading, meant the enemies of the sovereign of the owner of the vessel. In order to apply those words, we must take into consideration the circumstances under which and the place where the bill of lading was signed. It was signed at Odessa, which is in the empire of Russia, in favour of Messrs. Kellner & Co., who are merchants there, but as to whom we have no means of knowing whether they were Russians or Germans. The ship was a Mecklenburgh ship, and the owner a subject of the Duke of Mecklenburgh Schwerin. The persons who now sue as assignees of the bill of lading appear to be English subjects: and the distinction of the vessel upon the voyage in question was a port in Great Britain. We have, therefore, to choose between three persons who may equally satisfy the word "King" in this contract, viz. the Emperor of Russia, or the Queen of England, who strictly speaking fall within the definition of Kings, and the Duke of Mecklenburgh Schwerin, who cannot in strictness be called a King, but who evidently falls within the description of the person here intended, viz. of a sovereign ruler who may make war and against whom war may be made. Taking into consideration the persons between whom and the place where the contract was made, I see no reason to suppose that the enemies of the Emperor of Russia were contemplated, merely because the contract was made in Russian territory. The destination of the cargo was England. But I cannot help thinking that it would be foreign to the intention of [174] the parties to hold that therefore enemies of the Queen of England were pointed at. Then you have the fact that the person who made the document is a subject of the Duke of Mecklenburgh. I think that makes it abundantly clear that he meant to stipulate against dangers arising from his own sovereign's enemies. The good sense and reason of the thing manifestly lead one to the conclusion that the expression "the King's enemies" at least includes the enemies, of the sovereign of the person who made the contract. By reason of an act of aggression by one of those enemies, the defendant was prevented from obeying the orders given. It seems to me, therefore, that the fifth plea is a good answer, and therefore that the defendant is entitled to judgment thereon. The other question turns upon the words at the end of the bill of lading, "and all other conditions as per charterparty." If those words mean that the captain and his owner are to be bound by all the conditions contained in the charterparty as if they had been repeated in the bill of lading, then the contract is to be read as if it contained the exceptions upon which the sixth and seventh pleas are founded. But, if they mean, paying freight and performing the other conditions in the charterparty on the part of the freighters to be performed, it is not an exception varying the contract contained

(a) See *Wapman v. Smith*, 15 C. B. 285; *Chappell v. Comfort*, 10 C. B. (N. S.) 802; *Carthron v. Trickett*, 15 C. B. (N. S.) 754.

(b) Williams, J., had gone to Chambers.

in the bill of lading, and those pleas would be bad. If the parties desire it, I shall be prepared to give judgment upon that to-morrow.

BYLES, J. I am of the same opinion. The word "enemies" at least *includes* enemies of the carrier, if those are not the parties to whom it is specially directed. "King's enemies" means enemies of the sovereign of the carrier, whether that sovereign be an Emperor, a Queen, or a reigning Duke. Lest there [175] should be any left out, it is usual in charterparties to add the words "restraints of princes and rulers." These include all cases of restraint or interruption by lawful authority; leaving the case of pirates to be ranked with other dangers of the seas, within which, according to the authority of the case of *Pickering v. Buckley*, Styles, 132, it falls. There, "Pickering brought an action of covenant upon a deed of covenants of charterparty, whereby it was covenanted that the defendant, in consideration of a certain sum of money agreed to be paid to the defendant for freight of a ship, should make such a voyage, and bear all losses and damage which should befall the ship or merchandises in her, *excepting only perils of the sea*, and declares that the defendant had not performed his agreement, and for this he brings his action. The defendant pleads that, in the making of his voyage upon the sea, the ship was taken per quosdam ignotos homines bellicosos, whereby he was hindered in making of the voyage according to his agreement. To this plea the plaintiff demurs. The question was that, in regard that in the charterparty perils of the seas were excepted, whether the taking of the ship by these unknown men of war should be accounted a peril of the sea or not, according to the meaning of merchants. Twisden, of counsel with the plaintiff, held it should not, and so the plea was not good, and that therefore the plaintiff ought to have judgment, and said this was not a danger of the sea, but a danger upon the sea: secondly, he said the party (it may be) might have prevented it by vigilancy or by making resistance, and so it may be it was his own fault the ship was taken: thirdly, the men of war that took the ship were peradventure Englishmen, and then the defendant is not to be excused, for he may have his remedy for what he is damnified against them; and cited 33 H. 6, fo. 1, and prayed judgment [176] for the plaintiff. Hales (Sir Matthew Hale), of counsel for the defendant, held that to be taken and robbed by pirates is a danger of the sea, even as tempestuous winds and shelves and rocks are: and, secondly, to that it is said the pirates may be Englishmen, we are not able to say of what nation they were and therefore our plea is good in that point also, and prayed judgment for the defendant. Roll, Justice, said it was not well pleaded to say per homines ignotos. Bacon, Justice, said: The defendant doth not shew that he and his ship was carried per locos ignotos, as he should have shewn. But Roll, Justice, answered that it may be the ship is yet kept upon the sea, but I suppose that pirates are perils of the sea: and to this purpose a certificate of merchants was read in court, that they were so esteemed amongst merchants. Yet the court desired to have Granly, the Master of the Trinity House, and other sufficient merchants, to be brought into court to satisfy the court viva voce Friday next following. Judgment was given this term, nil capiat per billam, because the taking by pirates are accounted perils of the seas." The same law is laid down in 2 Roll. Abr. 248, pl. 11, and in *Barton v. Walliford*, Comberbach, 57. So that these three exceptions, the act of God, the King's enemies, and restraints of princes, seem to guard the owner against all that he need be protected from by express words.

KEATING, J. I am of the same opinion. The exception evidently means, if I am not prevented by the acts of the enemies of my sovereign.

Judgment for the defendant on the fifth plea.

Sir G. Honyman having on the following day intimated that the parties were desirous of having the judgment of the court upon the second point.

[177] WILLES, J. said: We disposed of the first question in this case yesterday; and we now proceed to dispose of the second, which is, whether the exception contained in the bill of lading is expanded by the exception in the charterparty. That depends upon whether the words "and other conditions as per charterparty" include all the stipulations and conditions contained in that instrument, or whether they are not limited to conditions ejusdem generis with that previously mentioned, viz. payment of freight,—conditions to be performed by the receiver of the goods. It is a mere question of language and construction: and we think it enough to say that the latter is the construction which we put upon these words.

As to the sixth plea,—which alleges that the default complained of was caused by

the act of *enemies* during the voyage, within the true meaning of the charterparty,—that raises another question of construction. We think that “enemies” there must be read as enemies of the carrier: and consequently upon that ground our judgment should be for the defendant upon the sixth plea.

As to the seventh plea, which is founded altogether upon the charterparty, that is to say, upon the substance of the charterparty, the exception of “restraint of princes,” which is relied on to justify the refusal to proceed to the port ordered,—that exception is not to be found in the bill of lading, and therefore we give judgment for the plaintiffs on the seventh plea.

Upon the whole, perhaps the more convenient course will be, to give judgment for the defendant on the fifth plea, and for the plaintiffs on the other two.

Judgment accordingly.

[178] LITTEN v. DALTON. May 30th, 1864.

The discharge of an insolvent debtor under the 1 & 2 Vict. c. 110, s. 75, is no release of a debt created by the payment of a surety, after the discharge, of a bill the consideration for which was inserted in the schedule as a debt for money lent due to the payee.

This was an action upon a bill of exchange for 30*l.*, drawn by the plaintiff on the 12th of November, 1860, upon and accepted by the defendant, payable three months after date; with a count for money lent, money paid, and money found due upon accounts stated.

The defendant pleaded to the first count,—first, that he did not accept the bill as alleged,—secondly, that the plaintiff was not at the commencement of the suit the holder of the bill,—thirdly, that, before the acceptance of the said bill, and after the act of parliament passed, &c. (1 & 2 Vict. c. 110) commenced and came into operation, and while it was in force, the defendant, being a prisoner in actual custody within the walls of a prison in England upon process for debt, duly petitioned the court for the relief of insolvent debtors in England for his discharge from such custody according to the provisions of the said act; and thereupon, afterwards, and before the discharge of the defendant pursuant to the said act, and whilst the said petition was pending, the defendant, in order to induce one Healey, who then claimed to be a creditor of the defendant, and as such entitled to oppose his discharge under the said act, to cease from opposing and not thereafter to oppose the discharge of the defendant pursuant to the said petition and the said act of parliament, as he had threatened to do, and in consideration that he would not thereafter oppose such discharge as aforesaid, and for no other consideration whatsoever, illegally and contrary to the form and effect of the statute in such case made, at the request of the plaintiff accepted the said bill for the purpose and [179] upon the terms and for the consideration aforesaid; and, except as aforesaid, there never was any value or consideration for the acceptance or payment by the defendant of the amount of the said bill, or for the plaintiff holding the same; and the plaintiff held and still holds the said bill without any value or consideration; and the plaintiff became the maker and holder of the said bill with full knowledge of the premises,—fourthly, that the defendant was duly discharged according to the act of parliament made in the second year of Her Majesty's reign, &c., in that behalf, of and from a certain debt then due from the defendant, and that the said bill of exchange was a new security given by the defendant to the plaintiff for the payment of the said debt, and without other value or consideration, and that such order remains in force,—fifthly, never indebted, to the money counts. Issue thereon.

The cause was tried before Williams, J., at the second sitting at Westminster in Easter Term last. It appeared that, early in the year 1860, the plaintiff drew a bill upon the defendant for 30*l.* for the accommodation of the latter, and to enable him to obtain a loan from one Healey. This bill was indorsed by the plaintiff and handed to Healey, but was not paid at maturity. A renewed bill similarly drawn and accepted was in like manner dishonoured. In September, 1860, the defendant petitioned for his discharge under the insolvent debtors act, and, in order to induce Healey to forbear from opposing his discharge, the defendant consented to accept the bill declared on, drawn by the plaintiff, as before. No notice was taken of either bill in the defendant's schedule, nor did the plaintiff's name appear therein: but Healey was inserted

as a creditor thus,—“No. 5 Healey, butcher, London Street, Tottenham Court Road. Admitted. 30l. for money [180] lent.” The defendant obtained his discharge on the 12th of December. And in April, 1861, the plaintiff was called upon by Healey and paid the bill, by allowing it in account between them.

Under the direction of the learned judge, a verdict was found for the plaintiff, leave being reserved to the defendant to move to enter a verdict for him on the fourth plea if the court should be of opinion that the evidence sustained it.

John Lloyd, in Easter Term last, obtained a rule nisi accordingly. He referred to the 91st section of the 1 & 2 Vict. c. 110, and to the case of *Goldsmid v. Hampton*, 5 C. B. (N. S.) 94.

Woollett and Baylis, now shewed cause. An insolvent's discharge is no bar to the action of a surety who after such discharge is called upon to pay, and does pay, a debt due before the discharge,—even though the plaintiff be surety upon a bill which is inserted in the insolvent's schedule. This was distinctly decided by this court in *Powell v. Eason*, 8 Bingh. 23, 1 M. & Scott, 68. Tindal, C. J., there says: “We are to take the description of the debts from which the insolvent is to be discharged, from the 10th and 46th sections of the act (7 G. 4, c. 57). The 10th section, which authorizes the insolvent's petition, describes them as ‘the demands of all persons who shall claim to be creditors of such prisoner at the time of presenting such petition.’ And s. 46 authorizes his discharge from custody ‘as to the several debts and sums of money due or claimed to be due at the time of filing such prisoner's petition.’ Then, was the plaintiff a creditor of the defendant at the time of presenting his petition? There was no debt as between him and the defendant: the debt was due from the defendant to Bell: the [181] plaintiff was no more than a surety, and consequently no creditor at the time of the discharge. As a confirmation of this view of the subject, we find that, in an act passed the year before,—the Bankrupt Act, 6 G. 4, c. 16,—a machinery is employed to relieve the bankrupt from the claim of a surety, for he may pay the debt, and stand in the place of the original creditor. There is no such clause in the present act; from which we may infer that the legislature intended to discharge a bankrupt from such claims, but not an insolvent.” [Willes, J. In *Boydell v. Champneys*, 2 M. & W. 433, it was held that an insolvent debtor who inserts in his schedule the name of the holder of a bill of exchange on which he is liable, or gives such other description of it as satisfies the statute (7 G. 4, c. 57, s. 46), is discharged as to all the parties to the bill (although they are not named in the schedule), and also as to the original debt for which it was a security.] The bill was not inserted in the defendant's schedule at all. [Willes, J. Is not this matter in effect decided by *Leonard v. Baker*, 15 M. & W. 202? It was there held that, under the Insolvent Debtors Act, 1 & 2 Vict. c. 110, s. 75, the prisoner is discharged only as to the particular debts and sums of money mentioned in his schedule to be due from him to his creditors named therein, and not generally as to all his debts then due to such creditors.] *Finnay v. Lord Browne* (cel), 1 C. B. (N. S.) 117, shews that reasonable accuracy of description must be used. To a declaration by an indorsee of a *promissory note* for 1000l. made by the defendant, payable to one John Lee Jackson, the defendant pleaded his discharge under the 1 & 2 Vict. c. 110. The entry in the defendant's schedule by which it was sought to support this plea was,—“James Lee Jackson, of, &c., 1000l., the amount of my bond given by me to this creditor for 725l. money lent,” &c. The [182] name of the plaintiff, who claimed as indorsee of the note, did not appear in the schedule at all. It was held that this was not a sufficient description of the debt to sustain the plea. *Beck v. Beverly*, 11 M. & W. 845, is also a very strong case. It was there held that the discharge of an insolvent debtor from a debt in respect of which he accepted a bill of exchange, is no discharge as to the bill in the hands of a third person, unless the holder's name is inserted in the schedule, or it be stated therein that he is unknown, pursuant to the statute 1 & 2 Vict. c. 110, s. 75. The 69th, 71st, and 75th sections of the act were also referred to.

John Lloyd, in support of his rule, submitted that the bill having been given to induce Healey to forbear to oppose the defendant's discharge, was illegal in its inception, and could not be enforced, in whose hands soever it might be (a).

ERLE, C. J. The plaintiff having paid the bill after the defendant's discharge, in satisfaction of his own liability thereon, the fourth plea is no answer. As between

(a) See *Clay v. Ray*, post, p. 188.

Litten and Dalton, there was no debt, until the former was called upon as surety to pay the bill. The plaintiff's claim, therefore, could not be comprised in the schedule, and consequently the defendant is not discharged from it.

The rest of the court concurring,
Rule discharged.

[183] THOMAS v. HUNT. June 25th, 1864.

[Referred to, *Bardie & Anon and Soda Fabrik v. Isler*, [1906] 1 Ch. 610 ;
[1906] 2 Ch. 443.]

A licence to A to manufacture a patent article is an authority to his vendees to vend it without the consent of the patentee.

This was an action for the alleged infringement of a patent.

The declaration stated that the plaintiff was the first and true inventor of a certain new manufacture, that is to say, of improvements in the manufacture of soap; and thereupon Her Majesty Queen Victoria, by letters-patent duly sealed in that behalf, to wit, under the great seal of the United Kingdom of Great Britain and Ireland, granted the said plaintiff, his executors, administrators, and assigns, the sole privilege to make, use, exercise, and vend the said invention within England for the term of fourteen years from the 5th day of November, 1855, subject to a condition that the said plaintiff should within six calendar months next after the date of the said letters-patent cause to be filed in the great seal patent office an instrument in writing under his hand and seal particularly describing and ascertaining the nature of the said invention and in what manner the same was to be performed; that the said plaintiff did within the time prescribed fulfil the said condition; and that the defendant during the said term did infringe the said patent right: And the plaintiff claimed 1000*l.*, as also a writ of injunction to restrain the defendant from the repetition and continuance of the said injury, and the committal of any injury of the like kind by the defendant relating to the said patent-right: And the plaintiff also prayed that account might be kept and taken of all the moneys which had been or which during the pendency of this suit might be had and received or obtained by the defendant by the infringement of the said patent-right, and of the loss which the plaintiff [184] had sustained or might sustain by reason thereof; and that the defendant might be by the court here ordered and compelled to pay the amount of all such moneys had or received or obtained by the defendant or lost by the plaintiff, as damages, to the plaintiff; and that the plaintiff might have such other and further relief as the court might order and adjudge in that behalf.

Eighth plea,—that the alleged infringement in the declaration mentioned was the sale by the defendant of certain soap manufactured by Lewis Cowan & Sons and George Hearn, and bought by the defendant from the said Lewis Cowan & Sons and George Hearn under and after certain agreements had been made and entered into between the said Lewis Cowan & Sons and the plaintiff and the said George Hearn and the plaintiff, respectively, whereby it was respectively agreed that the plaintiff should permit the said Lewis Cowan & Sons and the said George Hearn to use the said invention and combination in the manufacture of soap, and respectively to have, enjoy, and sell the said soap so manufactured as aforesaid for their own use and benefit absolutely, and that the said Lewis Cowan & Sons and George Hearn should pay to the plaintiff a royalty on all soap so manufactured by them respectively as aforesaid; and that the said Lewis Cowan & Sons and the said George Hearn respectively paid the said royalty to the plaintiff in respect of the said soap in the earlier part of this plea mentioned, and did everything to entitle them respectively to sell the said soap; and that afterwards, in due course of business, the said Lewis Cowan & Sons and the said George Hearn sold the said soap to the defendant for large sums of money, and the defendant afterwards re-sold the said soap, which was the infringement in the declaration mentioned.

To this plea the plaintiff demurred, the ground of [185] demurrer stated in the margin being, "that the plea is no sufficient answer to the action, and that the re-sale of the patent article by the defendant without the licence of the patentee is an infringement of the patent." Joinder.

Webster, in support of the demurrer (*a*)¹. The plea in this case raises substantially the same question as was raised in *Walton v. Lavater*, 8 C. B. (N. S.) 162, where it was held that a sale in this country of a patent article imported from abroad is a "user" of the invention within the prohibition of the letters-patent. The question there, as here, was, whether a sale simpliciter was an infringement. As to this, Erle, C. J., says,—p. 185,—“It was contended for the defendant that there had been no infringement, because the defendant had only *sold* the articles in question, and that the mere *sale* of articles imported from abroad is not an infringement of the patent, though the making of them would be. I have attentively listened to the arguments of counsel derived from the old statute and the language of the grant. The words in the Statute of James are, ‘working or making’ In the granting part of the letters-patent the words are, ‘make, use, exercise, and vend,’ and in the prohibitory part ‘make, use, or put in practice.’ All these words are susceptible of some of the constructions which have been contended for: but it appears to me to be clearly the intention of the Crown in granting letters-patent for a new invention, to prohibit and prevent third persons from using the patent article for the purpose of profit by selling. The object is, to give to the inventor the profit of his invention: and the most effectual way of defeating that [186] object would be the permitting others to derive from the sale of the patent article the profit which it was intended to secure to the patentee. It seems to me, therefore, that proof that a party has sold the patent article, without proof of his having made it or procured it to be made, would be good evidence to warrant a jury in finding that he has been guilty of an infringement. As to the circumstance of the goods having been imported from abroad, I should say that, if this were simply the case of an importation, without any proof of knowledge on the part of the importer that the article imported was a patented article, the mere sale would be sufficient to charge him. But it is unnecessary to lay that down here: for, the defendant acted with full knowledge: he has not imported goods by hazard which have been made by another manufacturer: but he has imported articles with his own name stamped on them as the maker, which he well knew to be a violation of the patent. Being himself the patentee (*a*)², and having the privilege of manufacturing the article in France, and the articles having been imported by him from France, and bearing his name, it is clear to my mind that the jury would have been warranted in coming to the conclusion that the defendant manufactured them in France for the purpose of importing and selling them in this country, in violation of the English patent.” Keating, J., expressed himself in similar terms. And Byles, J., said: “As to the selling the patent articles not being an infringement,—I will not say a word as to the principle: but, upon authority, the matter stands thus: there is no authority to shew that it is not, and there are two distinct authorities to shew that it is; for, in the case of *Minter v. Williams*, 4 Ad. & E. 251, 5 N. & M. 647, 1 Webster’s P. C. 135, every one of the learned judges [187] gave his judgment upon the ground that exposing for sale was not selling, which leads one to the inference, as clearly as if it had been expressed in words that, in their opinions, a vending or selling of the patented article is an infringement of the patent” (*a*)³. [Williams, J. Suppose that, after having bought the soap manufactured by Messrs. Cowan & Son and Mr. Hearn, the defendant had died, what were his executors to do with it? It might constitute the entire assets.] That might present a difficulty. [Keating, J. How is the manufacturer to have the full benefit of his licence, unless his vendees could sell again?] The court cannot hold that the vendee may resell, without overruling the case of *Walton v. Lavater*. [Williams, J. Does not the licence to manufacture and sell necessarily include all the privileges a vendee can have, —one of which is that of selling again? How can there be a doubt?] Aston, *contrà* (*b*), was not called upon.

(*a*)¹ The point marked for argument on the part of the plaintiff was as follows:—
“That the licence to certain persons to manufacture soap, is no authority to the defendant to vend such soap without the consent of the plaintiff.

(*a*)² The plaintiff was the assignee of the English patent.

(*a*)³ The other authority alluded to was the dictum of Tindal C. J., in *Gibson v. Brand*, 1 Webster’s P. C. 630.

(*b*) The points intended to be urged on the part of the defendant were as follows:—

“1. That an article manufactured under a licence from the owner of a patent, and in

WILLIAMS, J. The defendant is clearly entitled to [188] judgment on this demurrer. The vendee of the licensee has all the privileges of a vendee, including that of selling again. The very object of the licence would be frustrated if this were not so.

The rest of the court concurring,
Judgment for the defendant.

CLAY v. RAY. May 27th, 1864.

A., being about to compound with his creditors, in order to induce B. (one of them) to execute the deed, without the knowledge of the other creditors gave him two promissory notes for 25l. each beyond the amount of the composition. Upon the first of these becoming due it was dishonoured, and an action was brought upon it, and judgment obtained and execution issued. C., who was a party to the notes, in consideration of A.'s forbearing to enforce the judgment, gave him a guarantie for the amount of the judgment and the out-standing note; and thereupon the two notes were given up:—Held, that the guarantie was tainted with the original fraud, and therefore could not be enforced, notwithstanding part of the consideration for it was the giving up a judgment in an action in which the illegality might have been but was not pleaded.

This was an action upon a guarantie. The cause was tried before Willes, J., at the sittings in London after last Hilary Term. The facts which appeared in evidence were as follows:—

The son of the defendant having proposed a composition with his creditors, of whom the plaintiff was one, in order to induce the plaintiff to execute the deed, two notes, for 25l. each, to which the defendant was a party, were handed to him without the knowledge of the other creditors. The first of these notes being dishonoured, an action was brought upon it, and a judgment obtained, and execution issued. In order to induce the plaintiff to consent to a stay of proceedings upon that judgment, a bill of exchange for 49l. was given to the plaintiff (to which the defendant was no party), and a guarantie (joint and several) by the defendant and [189] the son; and the two notes were given up. The guarantie made no mention of the judgment.

On the part of the defendant, it was submitted that the plaintiff could not recover, the transaction in its inception being tainted with illegality.

For the plaintiff it was insisted that the giving up of the judgment was a good consideration for the guarantie, however illegal the transaction out of which the judgment arose might be.

The learned judge directed a verdict to be entered for the plaintiff, reserving to the defendant leave to move, if the court should be of opinion that the guarantie was under the circumstances void and incapable of being enforced.

Petersdorff, Serjt., in Easter Term last, obtained a rule nisi accordingly.

J. Brown now shewed cause. The consideration for the guarantie was the giving up the judgment. [Byles, J. And in part the giving up of an illegal note which has never been turned into a judgment.] Does that make the guarantie void? The original notes were obligations of honour, which could not be enforced in a court of law. [Byles, J. How obligations of honour? The transaction was contrary to the policy of the law: the notes were void for fraud. Williams, J. Suppose a judgment security were given to induce a creditor to sign a composition-deed, would not that be void?] Possibly it would. Here, the defendant not having availed himself of the illegality as an answer to the action upon the first note, it is too late to set it up now:

respect of which a royalty has been paid to the owner of a patent, may be freely sold and re-sold by all the world:

"2. That otherwise the owner of a patent would be paid many times over in respect of the same article manufactured under a licence from the owner of the patent:

"3. That the price of the article is increased by the royalty paid in the first instance by the licensee: and therefore the defendant, who paid such increased price to the licensee, has virtually paid the royalty for the article:

"4. That the licence given to the licensees to manufacture, enjoy, and sell, includes a licence to purchasers from the licensees to re-sell the article purchased by them."

see the notes to *Underhill v. Devereux*, 2 Wms. Saund. 72 dd. citing *Boylis v. Hayward*, 4 Ad. & E. 256, 5 N. & M. 613, *Bradley v. Urphart*, 11 M. & W. 456, and *Bradley v. Eyre*, 11 M. & W. 432. [Byles, J. [190] Those were cases where a rule of law gave the party a defence: this is an illegal thing.] No case is to be found establishing the distinction. The rule is universal. *Transit in rem judicatum*. This is not illegality in the strict sense of the term: it has, no doubt, been held that these transactions are contrary to the policy of the law. The cases, beginning with *Cockshott v. Bennett*, 2 T. R. 763, are too numerous to admit of that being now questioned [Willes, J. The cases have gone so far as to hold that, where the money has been paid, it may be recovered back: *Smith v. Cuff*, 6 M. & Selw. 160. It was urged there that the parties were in *pari delicto*. But Lord Ellenborough said: "This is not a case of *par delictum*; it is oppression on one side, and submission on the other: it never can be predicated as *par delictum*, when one holds the rod and the other bows to it. There was an inequality of situation between these two parties: one was creditor: the other debtor, who was driven to comply with the terms which the former chose to enforce. And, is there any case where money having been obtained extorsively and by oppression, and in fraud of the party's own act as it regards the other creditors, it has been held that it may not be recovered back! On the contrary, I believe it has been uniformly decided that an action lies." In *Wilson v. Ray*, 10 Ad. & E. 82, 2 P. & D. 253, the plaintiff being about to compound with his creditors, the defendant, a creditor, refused to subscribe the deed, unless he were paid in full. The plaintiff, to obtain his signature, gave a bill payable to the defendant's agent for the difference between 20s. in the pound and 8s., the proportion compounded for. The defendant then signed the deed. The plaintiff did not honour the bill when due: but, on a subsequent application, he paid it, some months after the dishonour, by two instalments, to the payee, and the defendant received the [191] money. The other creditors were paid according to the deed. It was held that the plaintiff could not recover back the amount paid to the defendant above 8s. in the pound: for that the transaction had been closed by a voluntary payment with full knowledge of the facts, and ought not to be re-opened: and that it made no difference that the sum in question had not been recovered by action. Lord Denman, in delivering the judgment of the court, there said,—after referring to *Turner v. Hoole*, Dowl. & R. N. P. C. 27,—“Lord Tenterden considered that case, as I on the trial considered this case, to be decided by the principle clearly laid down in *Cockshott v. Bennett*, 2 T. R. 763, often recognized, and never impeached: but he was not reminded of another principle of at least equal importance, which was established in *Marriott v. Hampton*, 7 T. R. 269, that what a party recovers from another by legal process, without fraud, the loser shall never recover back by virtue of any facts which could have availed him in the former proceeding. Money so recovered was not received to the plaintiff's use: it was received to the use of the successful party, by authority of law. If any error was committed in the former proceeding, still the plaintiff is estopped from proving it after failing to do so at that time. If this were otherwise, the rights of parties could never be finally settled by the most solemn proceeding; and verdicts and judgments might be rendered nugatory by evidence which, if produced at the proper season, might have received a complete answer.” His lordship subsequently adds,—“I am reminded by my Brother Patteson, that, in the present case, no action was brought on the bills in question, but they were voluntarily paid after they became due. *I think the same principle applies.*” [Byles, J. In *Atkinson v. Denby*, 6 Hurlst. & N. 778, the plaintiff, being in embarrassed circumstances, offered his creditors a [192] composition of 5s. in the pound. The defendant, a creditor, refused to accept it, unless the plaintiff paid him 50l. and gave him a bill of exchange for 108l. The other creditors would not accept the composition if the defendant did not. The plaintiff paid the defendant the 50l., and gave him the bill of exchange, and the defendant then executed the composition-deed. The majority of the court of Exchequer held (Martin, B., dissenting), that the plaintiff might recover back the money as money received to his use. And the decision was affirmed by the Exchequer Chamber: 7 Hurlst. & N. 934; Cockburn, C. J., saying,—“Where a debtor offers his creditors a composition, whereby they are all to receive the same proportionate amount in respect of their debts, it is contrary to the policy of the law to allow him to purchase the consent of one creditor by payment of his debt in full. It is said that both parties are in *pari delicto*. It is true that both are in *delicto*, because the act is a fraud upon the other creditors: but it is not *par delictum*,

because the one has the power to dictate, the other no alternative but to submit." That case does not necessarily conflict with *Wilson v. Ray*. Suppose, instead of signing the guarantee, the defendant had paid the money; could he have recovered it back? [Erle, C. J. Perhaps not: but the question now before us is whether an action can be maintained upon that promise.] This is not an illegality in the ordinary sense of the term: for, an illegality cannot be waived: see the judgment of Parke, B., in *Stearns v. Neandora*, 13 C. B. 285, 302. Here, the defendant chose to waive the illegality, by not availing himself of it in the action upon the note. [Erle, C. J. The fraud is upon the general body of the creditors; and there is no sign of waiver by them.] *Took v. Tuck*, 4 Bingh. 224, 12 J. B. Moore, 435, was also cited.

[193] Petersdorff, Serjt., in support of his rule, referred to *Gerre v. Mace*, 33 Law J., Exch. 50, 2 Hurlst & Colt. 339. There, the defendant being indebted to the plaintiff and other creditors, in order to induce the plaintiff to accept a composition, agreed to pay him an additional compensation, which was secured by a bill of exchange drawn by the plaintiff upon and accepted by the defendant's brother. The bill being dishonoured, and the plaintiff having threatened legal proceedings, the defendant by indenture assigned to the plaintiff a policy of assurance as a security for payment of the bill: and it was held that the indenture was tainted with the illegality of the original transaction, and therefore could not be enforced. Bramwell, B., there says: "It seems to me, both in reason and on the authority of *Fisher v. Bridges*, 3 Ellis & B. 642, that our judgment ought to be for the defendant. As to whether the defendant is in a better or worse position than if the original debt had been due from another person, I express no opinion. It is sufficient to say that he executed the indenture to secure the payment of an illegal debt, and, as that debt could not be enforced, neither can the security be enforced."

Per Curiam (stopping Petersdorff). The rule must be absolute.

Rule absolute.

[194] FISH v. KELLY. May 25th, 1864.

1. An attorney is not liable to an action for negligence at the suit of one between whom and himself the relation of attorney and client does not exist for giving, in answer to a casual inquiry, erroneous information as to the contents of a deed.—
2. A., B., & C. were employed in a manufacture in which secrecy was essential; and, to insure their fidelity, they were required to execute deeds under which a portion of their wages was to be invested in the name of a trustee, with a stipulation for determining the engagement on giving two months' notice, at the expiration of which, in the cases of B. & C., the money so invested was to be paid over to them, but, in the case of A., the deed was so framed as to make it payable only to his executors upon his death. D., the attorney for the employers, being upon the premises, was asked by A. if he would receive his money if he gave notice to quit the service; whereupon D. (not recollecting that A.'s deed differed in this respect from those of B. & C., though he himself drew them all, and had them in his custody,) answered in the affirmative. Upon receiving this information, A. gave notice, but afterwards discovered that the money invested for him could only be paid to his executors:—Held, that A. could not maintain an action for the loss and disappointment sustained by him in consequence of his acting upon this mistake on the part of D.

This was an action against an attorney for alleged negligence in giving mistaken advice to one not a client.

The declaration stated that, before and at the time of the making of the promise by the defendant thereafter mentioned, the plaintiff was employed as a workman at a certain large salary, under a certain deed bearing date the 1st of June, 1854, and made between one John Weston of the one part, and the plaintiff of the other part, which said deed had been prepared by the defendant, and still continued in his care and custody; and the plaintiff, being desirous of ascertaining the provisions and legal effect of the said deed, and his rights thereunder, and particularly whether, in the event of his giving notice according to the provisions of the said deed of his intention to leave his said employment, he would be entitled by the terms of the said deed to receive a certain large sum of money therein mentioned; and the defendant,

then being an attorney and solicitor, undertook to inform, counsel, and advise him upon his rights aforesaid : and thereupon it became and was the duty of the defendant to use due care and skill in so counselling and advising the plaintiff : yet the defendant did not use due and proper care and skill in informing, counselling, and advising the plaintiff, but, on the contrary thereof, he so carelessly, negligently, and unskilfully advised and [195] counselled the plaintiff, whereby [that thereby ?] the plaintiff was induced to and did give such notice as aforesaid, and the said employment was thereby determined, and the plaintiff had to leave and did leave the said employment in pursuance of the said notice, and then, trusting to the said information, counsel, and advice, unsuccessfully applied for payment of the said reserved fund, and lost the great benefits and advantages that would have accrued to him by the said deed, and which he might and would have enjoyed except for the said negligence and unskilfulness of the defendant : Claim, 500l.

The defendant pleaded,—first, that he did not promise as alleged,—secondly, a denial that he carelessly, negligently, or unskilfully advised and counselled the plaintiff, as alleged. Issue thereon.

The cause was tried before Williams, J., at the sittings in London after last Hilary Term. The facts which appeared in evidence were as follows :—In the year 1854, the plaintiff was engaged by one Weston, who was acting as manager for the trustees under an order of the court of Chancery of the business of the late firm of Day & Martin, blacking manufacturers in High Holborn, to assist in the manufacture, together with two others named Gill and Brisley : these three being alone entrusted with the secret of the component parts and proportions of the article. Shortly after he entered the service, viz. on the 1st of June, 1854, the plaintiff executed a deed of that date, which purported to be made between John Weston, “manager of the trade of Charles Day, Esq., deceased,” of the one part, and the plaintiff of the other part. This deed recited that “the said Charles Day lately carried on the business of a blacking-manufacturer at and in the premises No. 97 High Holborn, and was possessed of and manufactured and prepared blacking according to a va-[196] luable recipe for the making and preparing blacking, the knowledge of which was confined to him the said Charles Day, and the blacking before and at the time of executing those presents made and prepared in and for the purposes of the trade in those presents mentioned was made according to the said recipe.” It then recited the death of Charles Day, the proof of his will, the institution of the suit, and the appointment of Weston as manager : it then went on to recite that, “in obedience to an order bearing date the 3rd of May, 1854, made in the said cause, the said John Weston engaged and retained [the plaintiff] as and to be a workman in the service and employ of the said John Weston as such manager as aforesaid, on the terms thereafter mentioned ; that, for the purpose of teaching [the plaintiff] how to do and thereby enabling him to do the work by him to be done in the said service and employ of the said John Weston, it would be necessary that the said John Weston should disclose to and intrust him with, and he would thereby unavoidably learn and become acquainted with, the said recipe and the secret art or mystery of making and preparing blacking from and according to such recipe, and the manner in which the same was then made and prepared in and for the purposes of the said trade : that it had been agreed by and between the said John Weston and [the plaintiff] that, in order to secure the due performance by [the plaintiff] of the covenants and agreements therein contained and by him to be performed, and the faithful discharge of his duty as such workman as therein mentioned so long as he should be in the said service and employ of the said John Weston, the yearly sum of 50l, part of the wages agreed to be paid to him as thereafter mentioned, should be retained by the said John Weston, and invested by him, by [197] way of indemnity, in the manner and for the time therein mentioned, and that [the plaintiff] should execute and give to [the executors of Day] his bond,” &c. The deed then witnessed that the said John Weston thereby, for himself, his heirs, executors, and administrators, covenanted with [the plaintiff], his executors and administrators (amongst other things), as follows,—that, so long as [the plaintiff] should be employed as a workman in the said trade, and should faithfully perform and discharge his duty as such workman, he the said John Weston would pay or cause to be paid to [the plaintiff] the weekly wages of 2l., and would make the first of such weekly payments on the 3rd of June, 1854, and also would on the 3rd of June in each and every of the first ten years of the employment of [the plaintiff] as a workman in the said trade,

invest for the benefit of [the plaintiff], in such manner and upon such terms as therein in that behalf mentioned, the further wages or salary of 50l. of like lawful money, and would make the first of such instalments on the 3rd of June, 1855, and also would, on the 3rd of June in each and every year after the expiration of the said first ten years, for so long time thereafter as [the plaintiff] should be employed as a workman in the said trade, pay or cause to be paid unto [the plaintiff] the further wages or salary of 50l., and would make the first of such payments on the 3rd of June, 1865: and, in case [the plaintiff] should happen to die, or, after due and proper notice of his intention so to do, withdraw from such employment as aforesaid on any day except the 3rd of June, then and in any such case the said John Weston should and would, in such manner and upon such terms as therein in that behalf mentioned, invest a part of the sum of 50l. which should bear the same proportion to the whole of that sum as the period which should have elapsed be-[198]-tween the time of [the plaintiff] so dying or withdrawing and the last preceding 3rd of June should bear to the whole year: And it was thereby mutually agreed and declared that, in case either of the parties thereto should be desirous of determining the said service and employment of [the plaintiff], such party should give to the other of them two calendar months' notice, &c. And the [plaintiff] did thereby, for himself, his heirs, executors, and administrators, covenant with the said John Weston, his executors, administrators, and assigns, that he [the plaintiff] should not nor would at any time thereafter directly or indirectly divulge or make known to any person or persons whomsoever, either wholly or in part the said recipe, or any other recipe for the making and preparing of blacking, or the secret art or mystery of making or preparing blacking from and according to the said recipe, or any other recipe, or otherwise howsoever; and that [the plaintiff], whilst he should continue in the said service and employ of the said John Weston, would not, except in the performance of his work and duty as a servant or workman in such service and employ, make or prepare, or join or be concerned or interested in making or preparing blacking in any manner whatsoever, or according to any recipe whatsoever for sale on account of any person or persons whatsoever; and that, for seven years after the [plaintiff] should have ceased to be in the service of the said John Weston as such manager of the said trade as aforesaid, or of the manager for the time being of the said trade, [the plaintiff] would not within twenty miles from the said premises, No. 97 High Holborn aforesaid, make or prepare, or cause to be made or prepared, or be in any way concerned or interested in making or preparing according to any recipe whatsoever, or in any manner whatsoever, blacking for sale, [199] and would not within such seven years as aforesaid or within such distance of twenty miles aforesaid, set up or carry on, or be in any way concerned or interested in setting up or carrying on the trade or business of selling blacking: Penalty for breach 1000l.: Covenant for investment of the 50l. a year in the 3 per cent. annuities in the name of Weston upon trust, "in case the said [plaintiff] shall perform and observe the several covenants and agreements herein contained, and by him to be performed and observed, and shall faithfully and efficiently discharge and perform his duty as such workman as aforesaid, and also all the duties incident to the employment as such workman as aforesaid, then, *from and immediately after the decease of the said [plaintiff]*, to pay and transfer the aggregate amount of the several shares and amounts of the said stock or fund which at the time of such decease shall have been purchased and invested according to these presents in that behalf, *unto the executors, administrators, or assigns of [the plaintiff]* as soon as conveniently may be after such his decease: and, in the meantime, and subject as aforesaid, upon trust to pay the dividends of the aggregate amount from time to time of the shares and amounts of the said stock or fund which shall have been purchased and invested as aforesaid, as the same dividends shall from time to time accrue and be received, unto [the plaintiff] or his assigns, for his and their own use: but, in case [the plaintiff] shall fail in the observance or performance of any of the covenants or agreements herein contained and by him to be observed or performed, or shall not properly or faithfully discharge and perform either his duty as such workman as aforesaid or the duties incident to his said employment as such workman as aforesaid, or any of them, then upon trust and to the intent and purpose that the said John Weston, his [200] executors or administrators, shall and may sell and dispose of any such aggregate amount as aforesaid of such shares and amounts as in that behalf aforesaid, or a sufficient part thereof, and out of the proceeds upon any such sale, or, without any such sale, out of the

dividends of any such aggregate amount as aforesaid, if sufficient in that behalf, pay and make good any loss or damage which may accrue, arise, or happen in or to the said trade or the said testator's estate or otherwise howsoever, by reason or in consequence of any such breach of covenant, failure, neglect, default, or misconduct aforesaid of [the plaintiff], and shall pay the balance or surplus (if any) which shall remain after satisfying or making good such loss or damage as aforesaid unto [the plaintiff], *his executors, administrators, or assigns*: it being the true intent and meaning of these presents that the amounts of the said stock or fund which shall at any time hereafter be invested under and according to these presents shall be and remain vested in and under the control of the said John Weston, his executors or administrators, *so long as [the plaintiff] shall live*, as an indemnity against and as a fund out of and by means of which full and ample compensation and amends may be made for and in respect of any such loss or damage as aforesaid."

Indorsed upon the deed was the following memorandum:—

"Day v. Croft.

"By an order dated 9th June, 1854, and made in this cause, it was ordered that, notwithstanding the order bearing date the 3rd of May, 1854, and the agreement or arrangement therein referred to, the within-named John Weston, the manager of the within-mentioned testator's trade, should be at liberty to pay to the within-named William Fish the sum of 50l. ~~an~~[201]-ually after he should have been ten years in his the said John Weston's service as manager of the said trade of the said testator, such ten years to be computed from the day of the date of this agreement, and when the said John Weston should also have deducted the sum of 500l. due to him and invested the same in Bank 3 per cent. annuities in his the said John Weston's own name, or until the further order of this court."

The plaintiff and the other two workmen, Gill and Brisley, continued in the service of the firm down to the time of the death of John Weston, the manager, which took place on the 9th of March, 1863. The plaintiff had duly received all dividends accruing under the deed; and at the death of Weston the sum invested in his name in trust for the plaintiff was 429l. 19s.

The defendant was the solicitor to the trustees of Day's estate; and, being upon the premises shortly after Weston's death, he inquired of the plaintiff, Gill, and Brisley, whether they were willing to continue in the service of the firm under the new manager, telling them that in that case the deduction and investment would be made as theretofore. Upon their inquiring whether, in the event of their giving notice to leave, they could have the moneys invested transferred to them, he answered them all in the affirmative. The plaintiff, Gill, and Brisley thereupon gave notice, and, at the expiration of the two months, quitted the service, and Gill and Brisley received their money: but it was then discovered that the plaintiff's deed differed from those executed by the other two, and that the accumulations in his case were payable only *to his executors after his death*,—a circumstance which the defendant had forgotten when he gave the answers he did, although all the three documents had been prepared by himself.

[202] On the part of the defendant it was submitted that he was not responsible for the mistake, there being no relation of attorney and client between him and the plaintiff whence any contract or duty could be implied, and there being no suggestion that his answer to the plaintiff's inquiry had not been *bonâ fide*.

For the plaintiff it was insisted that, to render an attorney responsible for negligence and want of skill, it was not necessary that the strict relation of attorney and client should have subsisted between the parties: but that, having undertaken to answer the plaintiff's inquiry, though acting gratuitously, the defendant was bound to see that the information he gave was correct, the more especially as he had the means of so doing in his own hands at the time.

The learned judge directed a nonsuit, reserving leave to the plaintiff to move to enter a verdict for him if the court should be of opinion that the action could be maintained, and for such amount as the court should think fit.

Powell, Q. C. (with whom was Morgan Lloyd), now moved accordingly. There was clear evidence of negligence; and, to render the defendant liable for that, it was

not necessary that there should have been an actual retainer for reward (a)¹. [Williams, J. There is no pretence for saying that there was any retainer. The only question is, was there any duty? The defendant was at the premises in his capacity of attorney for the trustees; and, a question being put to him by [203] the plaintiff as to the effect of the deed of the 1st of June, 1854, he by accident gave him erroneous information.] The defendant had the means of knowing the contents of the deed. He was the attesting witness; and his name was indorsed upon it as the attorney by whom it was prepared: and he had the custody of it. [Byles, J. What obligation was he under to the plaintiff?] The same degree of obligation at least as the law casts upon every gratuitous bailee (a)². In *Shields v. Blackburne*, 1 H. Bl. 158, A., a general merchant, undertook voluntarily and without reward to enter a parcel of goods of B., together with a parcel of his own of the same sort, at the Custom House, for exportation, but made the entry under a wrong denomination, whereby both parcels were seized. It was held that A., - having taken the *same care* of the goods of B. as of *his own*, not having received any reward, and *not being of a profession or employment which necessarily implied skill in what he had undertaken*, - was not liable to an action for the loss occasioned to B. Heath, J., there says: "If a man applies to a surgeon to attend him in a disorder, for a reward, and the surgeon treats him improperly, there is gross negligence, and the surgeon is liable to an action (b)¹. The surgeon would also be liable for such negligence if he undertook gratis to attend a sick person, *because his situation implies skill in surgery*. But, if the patient applies to a man of a different employment or occupation, for his gratuitous assistance, who either does not exert all his skill, or administers improper remedies, to the best of his ability, such person is not liable." [Erle, C. J. The surgeon holds out a certain profession of skill, and that he will do his duty in exercising it.] So, the [204] attorney's position implies a reasonable amount of skill in his profession, - especially in reading and understanding the meaning of a legal document prepared by himself. The defendant here was not bound to answer the plaintiff's inquiry. He might have declined to do so, or he might have demanded a fee. His duty was not the less to give correct information because he gave it gratuitously. [Byles, J. Would the defendant under the circumstances be liable in an action *ex contractu*?] It is submitted that there would be an implied contract: and, if necessary, the court may amend the declaration. Lord Loughborough, in the case already referred to, says: "I agree with Sir W. Jones (a)² that, where a bailee undertakes to perform a gratuitous act, from which the bailor alone is to receive benefit, there the bailee is only liable for gross negligence: but, if a man gratuitously undertakes to do a thing to the best of his skill, *when his situation or profession is such as to imply skill*, an omission of that skill is imputable to him as gross negligence." The same principle is laid down in *Wilson v. Brett*, 11 M. & W. 113, where it was held that a person who rides a horse gratuitously at the owner's request, for the purpose of shewing him for sale, is bound, in doing so, to use such skill as he actually possesses: and, if proved to be a person conversant with and skilled in horses, he is equally liable with a borrower (b)² for injury done to the horse while ridden by him.

ERLE, C. J. I am of opinion that there ought to be no rule in this case. The action is brought by the plaintiff, a workman, against the defendant, an attorney, for having misinformed him as to the legal effect of a certain deed which regulated the terms of the [205] engagement of the former with the firm by whom he was employed; in consequence of which the plaintiff was induced to give notice to determine such employment, and was disappointed in his expectation of receiving certain moneys which had been invested for his benefit under that deed. The evidence upon which the plaintiff relies to fix the defendant with liability, is, that the defendant, being the attorney who prepared the deed, and having it in his custody as solicitor for the

(a)¹ See *Marshall v. The York, Newcastle, and Berwick Railway Company*, 11 C. B. 655.

Where it is stated that the defendant was retained as an attorney, a reward need not be alleged: "for, the court will take judicial notice that he will not act without reward:" *Bourn v. Diggles*, 2 Chitt. R. 311.

(a)² See *Ronneberg v. The Falkland Islands Company*, ante, p. 1.

(b)¹ *Scare v. Prentice*, 8 East, 348.

(a)² Jones on Bailments, 120.

(b)² See *Burnard, App., Haggis, Resp.*, 14 C. B. (N. S.) 45.

plaintiff's employers, upon being asked for gratuitous information as to whether, in the event of the plaintiff's giving the notice which he contemplated, the money invested as above mentioned would be payable to him, assured him that it would; and that, the notice having been given, when the deed was looked at, it was found that the money only became payable to the plaintiff's representatives upon his death. If the defendant is liable at all, it must be either in respect of the breach of some contract express or implied, or of some legal duty. The bare statement of the facts shews that there was no contract. The plaintiff, meeting the defendant casually at the premises of his employers, asked him a question, which the defendant, without any intention to mislead, inadvertently answered incorrectly. There was no relation between the parties from which any contract could be implied. Then, was there any duty which the defendant owed the plaintiff from the breach of which any liability could arise? I am unable to find any relation between the parties from which a duty could arise. The defendant stood in the capacity of solicitor to the trustees of Mr. Day's estate. The defendant was a workman in their employ. They did not, therefore, stand in such a relation towards each other as to make it any part of the defendant's duty to give professional advice to the plaintiff. He was applied to because it was thought [206] that he was in a position to be likely to give the required information. If Weston had been living, in all probability the inquiry would have been addressed to him. Under the circumstances, I do not think the defendant can be held responsible for the representation he made, unless it could be shewn that at the time he made it he knew it to be false. That, however, is not suggested. The defendant was mistaken in supposing that the terms of the plaintiff's deed were similar to those of the deeds which had been executed by the two fellow-workmen of the plaintiff. In the case of bailments, the relative rights and duties of the bailor and bailee are well defined by the law. So, in the case of one who holds out a certain profession, the law supposes him to be of competent skill, and he is responsible for any failure in that respect, as is put by Heath, J., in *Shiells v. Blackburne*, 1 H. Bl. 158. From the holding out, the law implies a contract or a duty to exert competent and reasonable skill. So, in the case of a common carrier; he undertakes safely to carry goods intrusted to him, subject to certain well-known exceptions. In these cases a duty often arises beyond the contract which the law implies. But I am unable to perceive any duty arising out of the casual conversation here. The defendant happened to be an attorney. He was not attorney for the plaintiff: nor was he applied to in that capacity. For the mere mistake he is not liable.

WILLIAMS, J., and WILLES, J., concurred.

BYLES, J. I entirely agree with all that has fallen from my Lord. There was no duty and no contract express or implied. In the case of a bailment, the intrusting the bailee with the chattel is treated as a consideration. So, in the case of the surgeon, the patient [207] submits himself to the knife in reliance upon the public profession which the practitioner holds out. This was not a mistake by an attorney in advising a client upon a question of law; but a mistake upon a matter of fact. If this sort of action could be maintained, it would be extremely hazardous for an attorney to venture to give an opinion upon any point of law in the course of a journey by railway.

Rule refused.

NAYLOR AND ANOTHER v. MORTIMORE. June 24th, 1864.

1. M., a trader, on the 31st of August, 1860, petitioned the court of Bankruptcy for protection under the 211th section of the Bankrupt Law Consolidation Act, 1849, and a sitting was duly appointed pursuant to ss. 213, 215, and a proposal for compromise made by the debtor pursuant to s. 214.—The first sitting, which was held on the 26th of September, 1860, was adjourned to the 4th of October, and there was a further adjournment to the 25th of October, when the commissioner, on the application of the plaintiffs' solicitors, adjudged M. a bankrupt, and adjourned his petition and all further proceedings thereunder into the public court. M. appealed against this decision, and on the 31st of January, 1861, the Lords Justices reversed it, and remitted the case to the commissioner for further consideration. The commissioner thereupon ordered the first sitting under the petition to be adjourned to

the 13th of March, 1861, and that any further modification of the proposal be made and filed ten days before the day so appointed. On the 28th of February, M. accordingly filed a modified proposal to pay his creditors a composition of 10s. in the pound, by four instalments, the first, of 4s. in the pound, to be paid in cash *within seven days* after confirmation by the court of any resolution agreed to by the creditors,—the second, of 2s. in the pound, on the 1st of June, 1861,—the third, of 2s. in the pound, on the 1st of December, 1861,—and the fourth, of 2s. in the pound, on the 1st of March, 1862: the three last instalments to be secured by the promissory notes of M., and to be guaranteed by A. and B. by their bond to the official assignee as trustee for the creditors; and the promissory notes to be ready for delivery to the creditors respectively *within ten days* after such modified proposal should have been agreed to and confirmed.—At the meeting of the 13th of March, 1861, the modified proposal was assented to by the required number of creditors who had proved, and a sitting appointed for the 3rd of April, for its confirmation.—On the 8th of March, 1862,—the arrangement having been completely carried out by the payment of all the instalments,—M. obtained from the court of Bankruptcy a certificate pursuant to the 221st section of the Bankrupt Law Consolidation Act, 1849: Held, that the certificate was not conclusive; but that it was competent to a creditor to shew that the arrangement had not been duly carried into effect and the creditors satisfied.—2. Many of the creditors were paid the full amount of the composition at once in cash, but some of them not strictly within the seven days limited by the modified proposal: all the rest of the creditors (except the plaintiffs, to whom the cash and promissory notes were duly tendered, but who refused to receive them,) were paid the first instalment in cash, and received the notes for the other instalments in due course:—Held, that it was not competent to the plaintiffs to object to the mode in which the arrangement had been carried out *quoad* the other creditors.—3. The condition of the bond contained a stipulation by which it was to be void if the promissory notes should be ready for delivery to the creditors within the period limited, and if the second, third, and fourth instalments of the composition should be duly paid, or “if before any default should be made in payment of the said instalments or any of them, or any part thereof, M. should be adjudged a bankrupt in respect of any debt proved or provable under the said petition so filed by him as aforesaid:”—Held, that the introduction of the latter stipulation did not vitiate the bond.—4. Certain of M.’s creditors were public unincorporated companies and banking companies incorporated under the 7 G. 4, c. 46, or the 7 & 8 Vict. c. 113. These creditors were represented at the meetings, and assented to the resolution, by a person who acted for them under powers of attorney (not under seal) respectively executed by their managers, secretaries, or public officers, respectively, who did not appear to be authorized *under seal* to grant such powers of attorney, or otherwise than by virtue of their being such managers, &c.: but the respective banks which they represented had ratified their acts by receiving the composition:—Held, that the assents were properly given, and that, at all events, it did not lie in the mouths of the plaintiffs to make the objection.—5. Held also, that the proceedings were properly continued by the commissioner after the petition had been remitted to him by the Lords Justices.—6. The plaintiffs (who were the holders of three bills of exchange accepted by M. amounting to 3314l. 19s.), for the purpose of putting themselves in a position to oppose the petition, at the first sitting, on the 26th of September, 1860, proved their debt. On the 7th of March, 1861, they commenced actions against M. upon these bills, and obtained judgments in those actions respectively on the 25th of March and 4th of April, 1861: and on the 25th of April, 1861, they brought an action upon those judgments:—Held, that the certificate, being a bar to the original debts, was equally a bar to the action upon the judgments.

This action was brought on the 25th of April, 1861, to recover 3425l. 7s 10d., being the amount of two judgments recovered by the plaintiffs against the defendant, and interest thereon.

[208] The cause came on for trial at the sittings in London after Michaelmas Term, 1862, before Willes, J., when an order of *nisi prius* was made, by consent, that a verdict should be entered for the defendant on all the issues, but subject to a special case for the opinion of the court as regards the issues raised by and arising out

of the first, fifth, sixth, seventh, eighth, and ninth replications; and that the court should have power to draw all inferences of fact, and should be at liberty to amend the pleadings in such manner and upon such terms as they might think necessary or advisable, to determine the real questions at issue between the parties, and to decide how the verdict and judgment should be entered up on the issues raised by and arising out of the first, fifth, sixth, seventh, eighth, and ninth replications; and that, in the event of judgment being given for the plaintiffs upon the whole record, the court should say for what sum it was to be entered up.

[209] 1. The plaintiffs, John Naylor and George Arkle, are bankers carrying on business at Liverpool under the style or firm of Leylands & Bullen.

2. The defendant was a tanner in an extensive way of business at Andover, in Hampshire.

3. The action was commenced on the 25th of April, 1861, and was brought to recover the amount of two judgments recovered by the plaintiffs against the defendant in the court of Common Pleas,—one judgment being dated on the 25th of March, 1861, for 1158l. 15s. 9d. (which included 4l. for costs of suit), and the other judgment being dated the 4th of April, 1861, for 2257l. 9s. 6d. (which included 6l. 6s. for costs of suit), making a total of 3416l. 5s. 3d., together with interest thereon at 4l. per cent. from the date of the respective judgments.

4. The action in which the judgment of March 25th, 1861, was recovered was brought by the plaintiffs on the 7th of March, 1861, under the Bill of Exchange Act, upon a bill of exchange dated June 23rd, 1860, for 1132l. 14s. 7d., drawn by Streatfield, Lawrence, & Co., upon the defendant, payable to the drawers' order four months after date, accepted by the defendant, and indorsed by the drawers to Lawrence, Mortimore, & Co., and by them to the plaintiffs. The defendant did not appear to this action, and judgment was obtained for default of appearance.

5. The action in which the judgment of the 4th of April, 1861, was obtained was brought by the plaintiffs on the 7th of March, 1861, against the defendant as acceptor of two bills of exchange for the sums of 955l. 7s. 7d. and 1221l. 4s. 1d., respectively dated April 14th, 1860, and March 10th, 1860, drawn by Lawrence, Mortimore, & Co., upon the defendant, payable to the drawers' order at four months after date, accepted by the defendant, and indorsed by the drawers [210] to the plaintiffs. The defendant appeared to this action, but suffered judgment to go by default.

6. Before the commencement of either of the said actions, and while the plaintiffs were holders of the said bills of exchange, namely, on the 2nd of July, 1860, the defendant stopped payment; and, on the 31st of August, 1860, the defendant presented a petition to the court of Bankruptcy for the London district, under the 211th section of the 12 & 13 Vict. c. 106.

7. The plaintiffs impeach, as will be hereafter seen, the regularity and validity of some of the proceedings under this petition: but the defendant, who has obtained the certificate hereinafter mentioned, contends, amongst other things, that the said certificate under section 221 is conclusive as to all steps in the proceedings antecedent to the obtaining thereof, and as to the regularity and validity of such proceedings.

8. On the 31st of August, 1860, one of the commissioners of the said court of Bankruptcy acting in the matter of the petition, made the usual order for protecting the defendant from process till the 26th of September, 1860, and appointed a private sitting for the said 26th of September, 1860, for the proof of debts, and for the purpose of obtaining the assent of three-fifths in number and value of the creditors who should have proved debts to the amount of 10l. to a proposal for the future payment or for the compromise of the debts and engagements of the defendant, or to a modification thereof, as required by the said act, and appointed G. J. Graham, an official assignee, to act in the matter of such petition.

9. On the 13th of September, 1860, the defendant filed his accounts in the court of Bankruptcy, wherein it appeared that his liabilities amounted to 96,842l. 5s. 10d., and his assets to 55,870l. 0s. 4d. He also then filed a proposal to pay his creditors a composition of 11s. in the pound.

[211] 10. At the first sitting under the petition, holden on the said 24th of September, 1860, of which meeting the plaintiffs had due notice, the plaintiffs, for the purpose of enabling them to oppose the said petition, proved their debt against the defendant on the said three bills of exchange, amounting together to 3314l. 19s., including expenses. By the practice of the Bankruptcy court, a creditor who has

not proved his debt is not entitled to oppose the petition or the proceedings under the same.

11. At the meeting of the 26th of September, 1860, a large proportion of the creditors of the defendant proved their debts. At the same meeting the above-mentioned proposal of the defendant was taken as read; and the plaintiffs by their attorney at once dissented therefrom, on the ground, as they alleged, that the defendant had not set forth in his petition the true cause of his failure; and they moved the commissioner to adjourn the case into the public court, and to adjudge the defendant a bankrupt. The defendant was examined at the said meeting; and, further time being required to complete the said examination, the sitting was adjourned to the 4th of October, 1860.

12. On the 4th of October, the sitting was again adjourned to the 25th of October, by order of the commissioner. At each of these meetings the defendant was examined and opposed by the plaintiffs.

13. On the 13th of October, 1860, the defendant filed a modified proposal under the petition, to pay his creditors a composition of 10s. in the pound, by five instalments.

14. At the adjourned meeting of the 25th of October, the court, on the application of the plaintiffs' solicitors, adjudged the defendant a bankrupt, and adjourned the defendant's petition and all further proceedings thereunder into the public court.

[212] 15. There was no formal adjournment of the said meeting of the 25th of October, 1860, other than may be implied from the said order of the commissioner; nor did the creditors of the defendant who had proved debts, or any of them, come to any resolution or vote at that meeting upon the said modified proposal of the 13th of October, 1860.

16. The defendant appealed to the Lords Justices against the commissioner's order of the 25th of October; and, on the 31st of January, 1861, the Lords Justices reversed the commissioner's decision, and remitted the case to him for further consideration: see *Ex parte Mortimore, In re Mortimore*, 30 Law J., Bankruptcy, 17.

17. On the 19th of February, 1861, after the above decision, on the motion of the defendant's solicitors, the commissioner in Bankruptcy ordered the first sitting under the petition to be adjourned to the 13th of March, 1861, and that any further modification of the proposal be made in writing and filed ten days before the day so appointed.

18. On February the 28th, 1861, the defendant filed under his said petition a modified proposal for paying his creditors 10s. in the pound by a cash payment of 4s. in the pound, and by three promissory notes each for 2s. in the pound, payable on the 1st of June and 1st of December, 1861, and 1st of March, 1862, to be secured by bond, as therein mentioned (a).

(a) The modified proposal of this date was as follows:—

"In the matter of a petition for arrangement between Thomas Heard Mortimore, of, &c., and his creditors, under the superintendence and control of the court of Bankruptcy.

"Further modification of proposal.

"In consequence of the delay which has occurred in the prosecution of his petition for arrangement, and the modified proposal filed on the 13th of October, 1860, having as to certain of the periods for payment thereby fixed become impossible to be carried out, the petitioner proposes further to modify his original proposal, and in lieu and place thereof proposes as follows:—

"To pay his creditors respectively a composition of 10s. in the pound upon the amounts and in full discharge of their respective debts, by four instalments, and in manner following, that is to say,—the first instalment of 4s. in the pound in cash within seven days after the court shall have confirmed any resolution of the creditors to accept this modified proposal, the second instalment of 2s. in the pound on the 1st day of June, 1861,—the third instalment of 2s. in the pound on the 1st day of December, 1861,—and the fourth, being the last instalment of 2s. in the pound, on the 1st day of March, 1862: the last three of the said instalments to be secured by the promissory notes of the said T. H. Mortimore, and to be guaranteed by Mr. William Boucher, of the firm of Boucher, Mortimore, & Co., Berronsdey, Surrey, leather-factors, and Mr. George Simmons, of East Peckham, near Maidstone, in the

[213] 19. On the 13th of March, 1861, being after the plaintiffs had commenced the actions mentioned in paragraphs 4 and 5, the meeting under the petition ordered by the commissioner as above mentioned was held, but was not attended by the plaintiffs or their [214] solicitors. The plaintiffs, however, had due notice of this meeting.

20. At this meeting, all the creditors of the defendant attended in person or by their agents, and proved their respective debts, to the amount of 103,610l. 10s. 5d.; and the said modified proposal of the 28th of February, 1861, was then read and submitted to the meeting; when it was resolved by all the creditors who had proved their debts, or by parties acting for them under powers of attorney as hereinafter mentioned, except the plaintiffs (such creditors being more than three-[215]fifths in number and value of the creditors who had then proved debts of 10l. and upwards), that the said modified proposal of the 28th of February, 1861, should be assented to: and an order was made appointing another sitting under the petition for the 3rd of April, 1861, to be held for the confirmation of such proposal.

21. The plaintiffs, as will be seen hereafter, object to certain powers of attorney used on behalf of some of the creditors at this meeting.

22. After the day for the second sitting had been appointed as aforesaid, the defendant, on the 20th of March, filed and delivered to the messenger of the court a list of the creditors upon whom to serve notice of such second sitting. In this list the names of the plaintiffs were included, as follows,—“Naylor, John, and George Arkle, carrying on business as bankers at Liverpool under the firm of Leylands & Bullen.” The messenger, on the 22nd of March, 1861, forwarded the notice of the said sitting of the 3rd of April to his agent at Liverpool, who received it on Saturday the 23rd of March. The said agent called at the plaintiffs' place of business on Monday, the 25th, and Tuesday the 26th of March, for the purpose of serving them with the

county of Kent, tanner, by their bond to Mr. George John Graham, the official assignee, as trustee for the creditors; such bond to be settled by the commissioner, in case the parties differ about the same:

“The promissory notes to be payable in London, and to be ready for delivery to the creditors respectively at the office of the said official assignee, No. 25 Coleman Street, London, within ten days after this modified proposal shall have been agreed to and confirmed under and in conformity with the provisions contained in the Bankrupt Law Consolidation Act, 1849:

“Creditors holding bills accepted or indorsed by the said petitioner, to produce the same on receiving the composition notes:

“In the event of default being made in the payment of either of the said instalments, the original claims or debts of the creditors to revive and become forthwith due and payable by the said T. H. Mortimore, less the amounts received by the said creditors respectively under the said composition, but without prejudice to such guarantee:

“The petitioner to pay the remuneration and charges of the official assignee and messenger; such remuneration and charges to be settled by the commissioner in case the parties differ about the same: the petitioner also to pay his solicitors' and accountants' charges, and all other charges attending his petition and arrangement:

“Creditors holding property of the petitioner as security, not to be deprived of or prejudiced with regard to such security by accepting or agreeing to accept such composition; but such creditors to receive such composition on the amounts which would remain due to them after realizing or giving credit for the value of such securities; such value to be agreed upon between the creditors and the petitioner, and, in case of difference between them, to be determined, at the expense of the petitioner, by the broker of the court for the time being acting under the commissioner before whom the petition is or may be in course of prosecution:

“Creditors holding securities from other persons, or holding third parties liable for their debts, not to be prejudiced in their rights or remedies as to or against such securities or third parties: but to receive the composition upon such amounts or balances as may be due to them at the time of proving their debts, or if they shall not prove the same, then upon such amounts or balances as may be due to them at the date of the confirmation of the resolution of the creditors accepting the modified proposal.”

said notice : but, owing to their being absent from their said place of business, he was not able to effect such service on either of those days : and the plaintiffs were not in fact served with the said notice until the 27th of March.

23. On the 3rd of April, 1861, the sitting so appointed as last aforesaid was held, when the plaintiffs attended by counsel, and opposed the said modified proposal of the 28th of February, 1861, and objected to the proceedings under the petition, but raised no objection on the ground of want of notice of the meeting.

24. This sitting was not attended by any creditor in [216] person (except C. W. Kellow), but was attended by, amongst others, Mr. G. Dawes, the defendant's solicitor, professing to act for a great many creditors of the defendant under certain powers of attorney, some of which are objected to, as mentioned below. The said modified proposal, which was in writing, and which had been signed and filed by the defendant on the 28th of February, as before mentioned, was then read ; and the said Mr. Dawes, professing to have right so to do under the said powers of attorney, then signed the said proposal on behalf of more than three fifths in number and value of the defendant's creditors. The document (of which a copy was annexed to the case) purporting to be the proceedings at the said sitting, was then signed by one creditor, viz. Mr. C. W. Kellow, and by Mr. John Green Elsey and the said Mr. Dawes, Fred. L. Hutchins, Thomas Hayter, and Mr. Hughes jun., on behalf of creditors.

25. Except as mentioned in the last paragraph, such proposal was not put in writing and signed by any of the creditors, or any one on their behalf, at the said meeting of the 3rd of April.

26. At the meeting of the 3rd of April, in the presence of counsel for the plaintiffs, an application was made on the defendant's behalf to the commissioner acting in the said petition, for his approval and confirmation of the said modified proposal of the 28th of February, 1861 : and thereupon the said commissioner, without objection by the plaintiffs' counsel, decided that, unless he intimated to the contrary, the said proposal should be confirmed as of the 3rd of April ; but that the bond and other things need not be delivered out until the 10th of April ; and that no party need attend on that day, unless he the commissioner intimated that he entertained a doubt. The commissioner did not make any such intimation ; and thereupon on [217] the 10th of April, the order dated the 3rd of April was made, of which a copy was annexed to and formed part of this case.

27. Of those who signed the document purporting to be the proceedings at the sitting of the 3rd of April, as mentioned in paragraph 24, the therein last four mentioned persons respectively professed to act as attorneys for the several creditors respectively whose names appear in the said proceedings under powers of attorney some of which are objected to by the plaintiffs, as mentioned below.

28. The said resolution was signed by the said G. Dawes expressly as attorney for the Bank of London, and also for the London Discount Company, Limited, and also for the National Discount Company, Limited ; and by the said Frederick L. Hutchins for the Bucks and Oxon Union Bank, and by the said Thomas Hayter for the London Joint Stock Bank, and by the said J. G. Elsey as agent for the Bank of England.

29. The Bank of London is a corporate bank established by letters-patent under the statute 7 & 8 Vict. c. 113 ; and Mr. Marshall, the acting manager of the bank, had proved under the said petition the debt due to the said bank, amounting to 2176l. 0s. 6d. : and the said Mr. Marshall, as such acting manager of the said bank, executed and gave to the said G. Dawes a power of attorney to act for the bank in the matter of the said petition. There was no power given to the said Mr. Marshall under the common seal of the bank, or otherwise, save by virtue of his being such acting manager, to give the said power of attorney to the said G. Dawes. The said Bank of London have never disputed the validity of the said power of attorney or the right of the said Mr. Marshall to give it : and they have since received the full amount of the composition agreed to under the said modified pro-[218]-posal, in respect of their said debt, and in full satisfaction thereof.

30. The powers of attorney under which the said G. Dawes voted for and signed the said resolution on behalf of the London Discount Company Limited and the National Discount Company Limited, were executed and delivered to the said G. Dawes by Edward J. Woodhouse and Richard Price, respectively, who were secretaries of and duly proved on behalf of the said companies respectively, under the said petition, for the debts due to the said companies respectively, viz. 3184l. 8s. 11d.

on behalf of the London Discount Company Limited, and 5069l. 8s. 3d. on behalf of the National Discount Company Limited. There was no power given under the common seal of either of the said discount companies to the said secretaries respectively to give the said powers of attorney to the said G. Dawes: but the said powers were respectively made and given in the form usually adopted in the court of Bankruptcy, and usually executed by the secretaries of the said discount companies. No objection has been made by the said companies, or either of them, to the validity of the said powers or either of them, or to the right of the said respective secretaries to give them; and both the said companies have since received the full amount of the composition agreed to under the said modified proposal, in respect of their said debts, and in full satisfaction thereof.

31. The London Joint Stock Bank is a co-partnership of more than six persons formed before the year 1837, and carrying on business in London under the above style, by virtue of the statute 7 G. 4, c. 46, and entitled to sue and be sued by their registered public officer. George Taylor (who was then one of the registered public officers of the said bank) proved under the said petition a debt of 17,094l. 19s. 9d. due [219] from the defendant to the London Joint Stock Bank; and the said George Taylor, under a special resolution passed by the directors of the said bank authorizing the public officers therein named (amongst whom was the said George Taylor), and each and every of them, to give such powers of attorney, executed and gave to the said Thomas Hayter a power of attorney to act for the bank in the matter of the said petition. No objection has been made by the said bank to the validity of the power, or to the right of the said George Taylor, as public officer, to give it: and the said bank has since received the full amount of the composition agreed to under the said modified proposal in respect of the said debt, and in full satisfaction thereof.

32. The power under which the said Frederick L. Hutchins voted for and signed the resolution of the 3rd of April, 1861, on behalf of the Bucks and Oxon Union Bank (which bank is established and incorporated under letters-patent dated the 9th of March, 1853), was executed and delivered to the said Frederick L. Hutchins by Richard Carter, then the secretary and manager of the said bank, and who had duly proved on behalf of the said bank, for the debt due from the defendant, namely 877l. 14s. 6d. The said power was made and given in the form and manner adopted in other cases by the said bank; but there was no power of attorney under the common seal of the bank authorizing the said Richard Carter to give such power to the said F. L. Hutchins. The said bank have never disputed the validity of the said power, or the right of the secretary or manager to give the same; and they have since received the full amount of the composition agreed to under the said modified proposal, in respect of their said debt, and in full satisfaction thereof.

[220] 33. The said J. G. Elsey voted for and signed the said resolution on behalf of the Bank of England, in respect of their proof of 9076l. 1s. 4d., under a power of attorney under the seal of the said bank. The Bank of England have never objected to the validity of the acts of the said J. G. Elsey in the matter of the said petition: and they have since received the full amount of the composition agreed to under the said modified proposal, in respect of their said debt, and in full satisfaction thereof.

34. The whole amount of the debts of 10l. and upwards proved against the defendant under the said petition on or before the said meeting of the 3rd of April, 1861, was 103,637l. 10s. 5d. Three fifths of this amount was 62,182l. 10s. 3d. Assuming that all the said powers of attorney the validity of which is disputed by the plaintiffs as aforesaid are valid, the assents given and signed to the said modified proposal by the said C. W. Kellow on his own behalf, and by the said George Dawes, Frederick L. Hutchins, J. G. Elsey, Thomas Hayter, and W. Hughes, jun., on behalf of other creditors as before mentioned, represented 84,583l. 10s. 2d. of debts in amount, and more than three fifths in number and value of the creditors who had so proved. But, if the said powers of attorney given on behalf of the said several banks and discount companies, and above objected to, were all invalid, and the debts proved by them are deducted, then the assents to the said resolution were less than three fifths in value of the debts of 10l. and upwards proved as above mentioned.

35. If the power of attorney given on behalf of the said London Joint Stock Bank was invalid, and if the power of attorney given on behalf of the Bank of England was also invalid, then the debts proved on behalf of the last-mentioned two banks, amounting [221] together to 26,171l. 1s. 1d., being deducted from the assents, the

remaining assents and signatures to the said resolution would be less than three fifths in value of the debts of 10l. and upwards proved as above mentioned. But, if both the last mentioned powers of attorney were sufficient, or if only that given by the London Joint Stock Bank was sufficient, then more than three fifths in number and value of the creditors who had proved debts agreed to and signed the said resolution.

36. The defendant, in compliance with his said proposal of the 28th of February, 1861, executed a bond (*a*) on the 3rd of April, 1861, as did his sureties whose names were mentioned in the said modified proposal be [222]-fore it was agreed to. And, on the 10th of April, 1861 (as the commissioner had not made any intimation of an intention to alter his judgment confirming the said proposal), the defendant deposited with Mr. Graham, the official assignee, as trustee for the creditors, the promissory notes which had been prepared in pursuance of the said modified proposal, and also the said bond. The form of the bond was not formally submitted to the creditors, or to the plaintiffs, or to the official assignee: but the said bond lay on the table at the said sitting of the 3rd of April, and was open to the inspection of any creditor. It was not settled by the commissioner, as no difference arose about the same between the parties; and no objection was made to the form of it by the plaintiffs or by any other creditor, or by the official assignee. It is now objected to by the plaintiffs as not being in compliance with said proposal.

37. On the 10th of April, 1861, the defendant tendered to the plaintiffs the composition of 10s. in the pound on the amount of the debt of 3314l. 19s. proved by them as above mentioned. The said tender was made as follows, that is to say, 4s. in the pound in cash, and three promissory notes, each of which was for [223] one of the three instalments of 2s. in the pound: but the plaintiffs refused to receive the said tender. These promissory notes were then again deposited with the official assignee: and, on the days they respectively became due, they were again tendered to the plaintiffs, together with the respective amounts of the same in cash: these several tenders were also refused by the plaintiffs. On the 1st of March, 1862, the whole composition of 10s. in the pound was tendered in cash to the plaintiffs, and refused.

38. On the 8th of March, 1862, the defendant applied for and obtained from the court of Bankruptcy a certificate purporting to be granted under section 221 of the

(*a*) The bond was in the penal sum of 72,000l. It recited the filing of the defendant's petition on the 31st of August, 1860,—the order of protection of the same date,—the appointment of a private sitting on the 26th of September,—the appointment of Mr. Graham as assignee,—that the defendant on the 13th of September filed an account of his debts and estate, and made a proposal to pay a composition of 11s. in the pound,—that, on the 13th of October, he filed an amended and modified proposal,—that, on the 28th of February, a further amended and modified proposal was filed,—that the first sitting was adjourned and had since been duly held, and that a second sitting had been duly appointed and held on the 3rd of April, 1861,—that the proposal of the defendant as so further amended and modified, and filed on the 28th of February, 1861, had been duly assented to and accepted and reduced into writing and signed by the requisite majorities of the creditors at the said several sittings, and had been duly approved and confirmed by the court of Bankruptcy, and filed and entered on record.

The condition was that, "if the said T. H. Mortimore shall duly make and have ready for delivery to the said creditors such promissory notes as mentioned in his said further and amended proposal of the 28th of February, 1861, in manner and within the period therein and in that behalf specified, and if the second, third, and fourth instalments of the aforesaid composition of 10s. in the pound upon the respective debts of the said creditors of the said T. H. Mortimore shall be duly paid at the respective times and in the manner in that behalf provided by the said further amended and modified proposal as aforesaid: or if, before any default shall be made in payment of the said instalments or any of them, or any part thereof, the said T. H. Mortimore shall be adjudged a bankrupt in respect of any debt proved or provable under the said petition so filed by him in the said court of Bankruptcy as aforesaid,—then and in either of the said cases the above-written bond shall be void; otherwise, to remain in full force and effect: Provided always that the principal money intended to be secured by this bond is limited to 36,000l."

Bankrupt Law Consolidation Act, 1849. On the same day, the court granted a certificate to the official assignee, purporting to be under section 222 of the same act.

39. Before the defendant applied for and obtained the said certificate, all the tenders had been made to the said plaintiffs as above mentioned, and all the creditors of the defendant except the plaintiffs had been paid by the defendant, and had accepted and received, in satisfaction and discharge of their respective claims against the defendant, the full amount of the said composition of 10s. in the pound upon their respective debts: and no objection was at any time made by any of them as to the time or mode of the payment of such composition.

40. Many of the creditors of the defendant were paid the full composition of 10s. in the pound in cash in one payment, without any promissory notes having been prepared for them. Of these, some who lived in the country were so paid on the 12th of April, 1861, and a few others who also lived in the country were not paid until after the 17th of April.

The question for the opinion of the court was, [224] whether, under the circumstances stated, the defendant had any defence to this action.

If the court should be of opinion that he had a good defence, then the verdict was to be entered on the several issues as the court might direct. If the court should be of the contrary opinion, then the verdict was to be entered for the plaintiffs for the amount of the said judgments, with interest thereon at 4 per cent. per annum.

J. Brown (with whom was Lush, Q. C., and Yonge), for the plaintiffs (a). The main question is, whether [225] the proceedings under the defendant's petition set out in the special case afford any defence to this action. That will depend upon the arrangement clauses of the Bankruptcy Act, 1849, 12 & 13 Vict. c. 106. The 211th section of that act enabled any trader unable to meet his engagements with his creditors to petition the court for protection. By s. 213 the court of Bankruptcy was empowered to appoint a private sitting, at which (s. 215) creditors were to prove their debts as

(a) The points marked for argument on the part of the plaintiffs were as follows:—

"1. That the proceedings, composition, and certificate under the defendant's petition to the bankruptcy court are not binding on the plaintiffs, and are no bar to this action:

"2. That the judgment-debts for which the action is brought having been recovered after the date of the defendant's petition in bankruptcy, were not affected or barred by the proceedings under the petition:

"3. That the proceedings under the defendant's petition were not in conformity to the Bankruptcy Act, 1849, and not binding on dissentient creditors:

"4. That no proposal or modified proposal of the defendant was assented to or signed by the requisite number and value of creditors at the first and second meetings under the said petition, or at any lawful adjournment thereof:

"5. That the meetings after the Lords Justices reversed the commissioner's decision were held without authority, and that the proceedings thereat were not binding on the plaintiffs:

"6. That the plaintiffs had not such notice as required by statute of the sitting of April 3rd, 1861, and were not bound by the proceedings at that meeting:

"7. That the several powers of attorney for the banks and discount companies mentioned in paragraphs 27 to 35, were invalid, and that the resolution of the creditors was not legally signed or assented to by the said banks and discount companies respectively:

"8. That the bond mentioned in paragraph 36 was not a compliance with the modified proposal mentioned in the same paragraph:

"9. That the facts stated in paragraphs 39 and 40 shew that the defendant did not carry out his modified proposal as to several other creditors: and that he gave some of them a preference over others and over the plaintiffs, by paying them cash in lieu of promissory notes: and that the plaintiffs are therefore not bound by the said proposal or proceedings thereupon:

"10. That the certificate of the commissioner in bankruptcy mentioned in paragraph 38 was contrary to the facts apparent on the special case, and was in no way binding on the plaintiffs, and was of no force or validity in law:

"11. That the alleged proposal and composition of the defendant was for the above reason of no force or effect as against the plaintiffs."

in bankruptcy, and, if three fifths in number and value of those who had proved debts to the amount of 10l. and upwards assented to the proposal made by the petitioner, or to any modification thereof, a sitting for confirmation was to be appointed. By s. 216, if at the second sitting three fifths in number and value of the creditors who had proved debts to the amount of 10l. and upwards agreed to accept such proposal as was assented to at the first sitting, the terms were to be reduced into writing, to be signed by the creditors, and the resolution so assented to and signed was to be binding on all; and the court, if it should think the resolution reasonable and proper to be executed, was [226] to approve of and confirm the same. By s. 217 any person duly authorized by letter of attorney from any creditor who had proved, was to be entitled to vote on the question of assent or dissent to the proposal of such petitioning trader. By s. 220 provision is made for a special meeting in case any difficulty should arise in the execution of the resolution or agreement. And, when the resolution or agreement has been carried into effect, the court is (s. 221) to give the debtor a certificate, which is to operate to all intents and purposes as fully as if the same were a certificate of conformity under a bankruptcy. In *Wesson v. Allcard*, 8 Exch. 260, it was held by the Exchequer Chamber,—affirming the decision of the court of Exchequer in *Allcard v. Wesson*, 7 Exch. 753,—that a certificate granted by a commissioner in bankruptcy to a petitioning trader under the 221st section is not conclusive as to the fact of the resolution and agreement having been carried into effect and the creditors having been satisfied. The certificate under this section cannot be binding: it is only an ex parte proceeding: it may be and usually is obtained upon a mere affidavit by the attorney's clerk: whereas, in bankruptcy, the certificate can only be obtained upon a hearing, when the creditors may attend and oppose. [Willes, J. Are you not content with the decision of the Exchequer Chamber in *Wesson v. Allcard*?] This court will, no doubt, hold itself bound by that decision. [Willes, J. Do you rely on the point that the judgments were not recovered until after the petition?] Upon looking into the cases in bankruptcy, that point seems conclusively settled, if this is to be taken to be a proceeding analogous to bankruptcy. The court of Bankruptcy seems to look at the judgment as a mere security for the debt. [Willes, J. The debt was provable: all the rest was mere accessory: see *Tan* [227] *Sandau v. Corsbie*, 3 B. & Ald. 13, *Jameson v. Campbell*, 5 B. & Ald. 250.]

The next objection is, that there was no lawful adjournment of the meetings after the case was remitted to the commissioner by the Lords Justices. On the 25th of October, 1860, the commissioner adjudged the defendant a bankrupt, and adjourned his petition and all further proceedings thereunder into the public court. The Lords Justices, on appeal, reversed that order: and, on the 19th of February, 1861, the commissioner ordered the first sitting under the petition to be adjourned to the 13th of March. This he clearly had no authority to do. In the absence of an adjournment over pending the appeal, the proceedings dropped. The commissioner's functions were at an end when he adjudicated the defendant a bankrupt.

Then, the requisite number of creditors did not assent to the proposal of the defendant, unless those who voted by means of powers of attorney are taken into account. The 217th section of the act authorizes creditors to be represented at the meetings and to vote by persons delegated by them for that purpose under powers of attorney. Now, the assent here given on the part of the London Joint Stock Bank was given by Thomas Hayter who professed to be acting under a power of attorney granted to him for that purpose by George Taylor, the public officer of the bank. To make this instrument available it should have been under seal, or at all events it should have been shewn that Taylor was authorized under seal. [Willes, J. This is not the case of a corporation. The public officer is authorized to receive the money, and to sue for it. He always represents the bank in proceedings in bankruptcy.] The question is, whether he has authority to execute a deed; for, according to Co. Litt. 52 a., and the authorities cited in argument in *The King v.* [228] *Fawcett*, 2 Bingh. 413, 10 J. B. Moore, 1, a power of attorney is a deed. The same objection applies to the assents given on behalf of the other banks and public companies: and, these being rejected, the necessary number of assents were not given. [Williams, J. A warrant of attorney to confess judgment need not be sealed, unless it contains a release: *Kinnersley v. Mussen*, 5 Taunt. 264. Byles, J. Suppose one of the creditors had been a married woman, having no trustee, if your argument be correct, she could not authorize any person to represent her.] Suppose one of

the creditors was a lunatic, the same result would follow. The only consequence of the disability will be, that the particular creditor cannot vote. [Williams, J. The question is set at rest by the decision of the court of Bankruptcy in *Ex parte Ackroyd*, *In re Munroe*, 1 Mont. D. & De Gex, 555, where it was distinctly held that a power of attorney by a banking company need not be by deed.]

Several of the creditors, it appears, were paid the full composition of 10s. in the pound in cash, instead of being paid the last three instalments by promissory notes: of these, some were paid on the 12th and some on the 17th of April, 1861; whereas, the time fixed by the proposal for the payment of the first instalment was the 10th. These clearly were not payments such as were contemplated by the agreement: consequently the certificate that the resolution or agreement had been fully carried into effect was not true. Now, the authorities are numerous to shew that these arrangements must be strictly carried out: see *Evans v. Powis*, 1 Exch. 601, and the cases cited in the notes to *Cumber v. Wane*, (1 Stra. 426), in 1 Smith's Leading Cases, 5th edit. 295. [Willes, J., referred to *Clapham v. Atkinson*, 33 Law J., Q. B. 81, in error, 10 Law Times, N. S. 908. Williams, J. The question is, whether the resolution or [229] agreement has been carried into effect and the creditors satisfied. Suppose one of them chooses to take something short of performance, who has a right to say that the creditors have not been satisfied? There is a case where a bond was conditioned to render the defendant in the palace court, and, the cause having been removed by certiorari to the Queen's Bench, a render to the Queen's Bench was held to be a performance of the condition.] There, the condition was carried out according to the intention of the parties. Here, those creditors who received 10s. in the pound in cash obtained an advantage over the rest. [Willes, J. This is not like a fraudulent agreement to prefer one creditor, made at the time of entering into the composition.]

Then, the bond is not in the form contemplated by the proposal. It was to have been an absolute security for the due payment of the last three instalments; whereas, the bond executed is made conditional upon the debtor not being adjudicated bankrupt before default made, in respect of any debt proved or provable under his petition,—the effect of which may be that, in one event, the creditors may lose the benefit of the arrangement. [Williams, J. The statute seems to contemplate that there may be some modification of the bond.]

Manisty, Q. C. (with whom was Holland), for the defendant, referred to *Hunter v. Parker*, 7 M. & W. 332. He was stopped by the court (a).

[230] WILLIAMS, J. I am of opinion that the defendant is entitled to our judgment. The main part of the case on behalf of the plaintiffs rested upon the decision

(a) The points marked for argument on the part of the defendant were as follows:

"1. That all the proceedings and certificates set out in the case were regular and in accordance with the Bankrupt Law Consolidation Act, 1849, and are a bar to the claim of the plaintiffs in this action:

"2. That the certificate obtained by the defendant under s. 221 of that act is conclusive as to all steps in the proceedings antecedent to the obtaining thereof, and to the regularity and validity of such proceedings:

"3. That the plaintiffs are by their conduct as set forth in the case estopped from setting up irregularities, if any, in the proceedings:

"4. That, under s. 215 of the 12 & 13 Vict. c. 106, it was not necessary to give the plaintiffs notice of the second sitting, which was held on the 3rd of April, as they had by their appointed agent been present at the first sitting:

"5. That, at all events, the plaintiffs have by their conduct waived and estopped themselves from setting up any irregularity as regards such notice:

"6. That all the powers of attorney objected to by the plaintiffs were regular: but that the plaintiffs should not be heard to dispute them, if irregular, inasmuch as the full composition has been received by the banks and discount companies, without any objection being raised by them, or any of them:

"7. That the bond was regular and in compliance with the proposal: but that, at all events, as the plaintiffs made no objection to it then, their present objection is too late:

"8. That, under the circumstances stated in the case, the payments to the different

of the court of Exchequer in the case of *Allcard v. Wesson*, 7 Exch. 753, in error, 8 Exch. 260. That case has established that a certificate granted under the 221st section of the Bankrupt Law Consolidation Act, 1849 (12 & 13 Vict. c. 106),—and which was relied on as a bar to this action,—is not conclusive as to the [231] fact of the resolution and agreement having been carried into effect, and the creditors of the petitioning trader having been satisfied; and that, inasmuch as the 221st section only authorizes the commissioner to give a certificate in the event of the resolution or agreement having been carried into effect and the creditors of the petitioning trader having been satisfied according to the tenor thereof, it is competent to a creditor who seeks to impeach the validity of that certificate to shew that in truth that condition has not been performed, that the resolution has not been carried into effect, and that the creditors have not been satisfied according to the tenor of the agreement.

Several objections have been urged by Mr. Brown on the part of the plaintiffs. In the first place, it was contended that the agreement had not been carried into effect, because a certain portion of the creditors had been paid the amount of the composition in cash, instead of in the mode described in the proposal which was assented to by the majority of the creditors, viz. by promissory notes, and because certain others of the creditors did not receive payment until a later date than it was proposed they should have done. I am of opinion that it does not lie in the mouth of the present plaintiffs to object that other creditors of the petitioning debtor have not been properly satisfied according to the agreement,—that the agreement has not been carried into effect quoad them in precise accordance with its terms. I think it is quite sufficient if in substance it appears that the creditors have been paid the stipulated composition, and that they are content with the mode in which the resolution or agreement has been carried into effect. A creditor who has refused to be a party to the arrangement ought not to be allowed to urge such an objection as this.

Then it was contended that such a bond was not [232] given as was contemplated by the proposal to which the general body of the creditors assented. The ground of this objection is that, according to the proposal, the bond was to be given to secure the last three instalments of the composition; whereas, the condition of the bond actually given was, that the bond should be void if the second, third, and fourth instalments of the composition should be duly paid, or if, before any default should be made in payment of the said instalments, or any of them, or any part thereof, the petitioning debtor should be adjudicated a bankrupt in respect of any debt proved or provable under the petition so filed by him as aforesaid. But it appears that the bond was only intended to be given in order to secure the performance of that part of the resolution by which the instalments were agreed to be paid: and the instalments have been paid. The agreement therefore has been substantially carried into effect in this respect, if that which the bond was simply meant to be a security for has been accomplished. It would be very like an absurdity to hold that the agreement had failed because there was an informality in the bond which was to be given to secure the payment of the instalments, when all the instalments had been actually paid before the certificate was granted. It seems to me that the certificate cannot be invalidated by any such informality,—not to mention that, in the events which have happened, the condition objected to could never attach. Under the circumstances, it appears to me that there is nothing in the form of the bond to shew that the resolution assented to by the creditors has not been carried out, or that the creditors have not been duly satisfied.

The next objection urged by Mr. Brown turns upon the 217th section of the Bankrupt Law Consolidation Act, 1849, which provides that any person duly authorized [233] by letter of attorney from any creditor who has proved a debt to the amount of 10*l.* and upwards shall be entitled to vote on the question of assent or dissent to the proposal of such petitioning trader. Now, it is admitted by Mr. Brown that a

creditors were made in time, and in substantial accordance with the terms of the confirmed proposal:

“9. That the plaintiffs, who had tenders made to them at the proper times, cannot be allowed to set up the trifling irregularities (if any) as mentioned in paragraph 40 in the times of payment, inasmuch as all the creditors except the plaintiffs have received their full composition, and not one of them has made any objection to the mode or time of receiving such composition.”

sufficient number of creditors assented to the modified proposal of the defendant, provided the assents of all those who purported to have authority from creditors to assent were reckoned; but he has contended that some of those persons were not duly authorized, inasmuch as the only authority under which they could properly act was a letter of attorney under seal, or, in other words, by deed, and the persons giving the powers of attorney had no authority under the common seals of the respective companies to give them. It is quite true that for a variety of purposes a letter of attorney must be by deed, as in the case of a letter of attorney to deliver seisin, as put by Lord Coke in *Co. Litt.* 52 a., where he says "Letter d'attorney is as much as a warrant of attorney by deed, for, *literæ* doe signifie sometime a deed, as *literæ acquietanciæ* doe signifie a deed of acquittance; and herewith agreeth Britton, 101 b." Though with reference to certain subjects a letter or warrant of attorney must be by deed, it by no means follows that it should in all, and indeed in many cases it cannot be by deed. Some of these powers of attorney were executed by the managers or secretaries of unincorporated joint-stock companies or public officers of banking companies incorporated under the 7 G. 4, c. 46, or the 7 & 8 Vict. c. 113; and it did not appear that these parties had been authorized under seal to grant them. It seems to me that there is nothing in the objection: and indeed it may be very much doubted whether it is competent to these plaintiffs to take it. I by no means admit that the decision of *Wesson v. Allard*, in the court of Exchequer, and *Allard v. Wesson* in [234] the Exchequer Chamber, though full to the point that it is competent to a creditor to dispute the validity of the certificate on the ground that the resolution has not been carried into effect, and though the authorities are binding on us to the extent that a creditor may notwithstanding the certificate object that no proper notice was given to him, is also binding on us to the extent of saying that as to other matters the certificate is not conclusive as to the proceedings under the petition having been regularly taken. But it is unnecessary to enter into considerations of that kind here; for, the case of *Ex parte Ackroyd, In re Munroe*, 1 Mont. D. & De Gex, 555, is a direct authority on the subject of the alleged informality. The very point was there raised and disposed of by Sir John Cross, then Chief Judge of the court of Bankruptcy. Votes had been given on the choice of assignees, on behalf of two banking companies, viz. the Bank of Manchester and the West Riding Union Banking Company, under powers of attorney executed by the public officers of those associations, who, it was contended, had no right to delegate their authority. The learned judge, in giving judgment, says: "Here, the public officer of a company established by act of parliament, who must by the act be a partner in the company (*a*), is author-[235]-ized to represent the company in all legal and equitable proceedings whatsoever. He goes before the commissioner to prove a debt on behalf of himself and his co-partners. I must consider him as a partner, since if he were not a partner he could not hold his office: and, considering him as a partner, I must hold that all those incidents belong to that character which belong to it in other partnerships, and which may reasonably and properly belong to it in such a partnership as this. Now, it is considered proper in ordinary partnerships that a partner may vote on behalf of the firm, by attorney, at the choice of assignees: and I see nothing unreasonable in applying that rule here."

Two other points were mentioned by Mr. Brown, but not much pressed. Indeed

(a) The 7 G. 4, c. 46, s. 4, enacts that, "before any such corporation or co-partnership exceeding the number of six persons in England shall begin to issue any bills or notes, or borrow, owe, or take up any money on their bills or notes, an account or return shall be made out, according to the form contained in the schedule marked A. to this act annexed, wherein shall be set forth the true names, title, or firm of such intended or existing corporation or co-partnership, and also the names and places of abode of all the members of such corporation, or of all the partners concerned or engaged in such co-partnership, as the same respectively shall appear on the books of such corporation or co-partnership, and the name or firm of every bank or banks established or to be established by such corporation or co-partnership, and also the names and places of abode of two or more persons, *being members of such corporation or co-partnership*, and being resident in England, who shall have been appointed public officers of such corporation or co-partnership, together with the title of office or other description of every such public officer respectively, in the name of any one of whom such corporation shall sue and be sued, as hereinafter provided," &c.

there is nothing in them. The one was, that the adjournment was informal. But I think that, when the Lords Justices remitted the matter back to the commissioner, the effect of that clearly was to restore it to its original state, for the commissioner to go on with it from the point at which the appeal took place. The other point was, that the judgments upon which the actions were brought were obtained after the date of the certificate. As to that the authorities are conclusive; and indeed the point was given up by Mr. Brown.

Upon the whole I am of opinion that there is no ground upon which the plaintiffs can impeach the certificate, and that it is a good bar to the action.

[236] WILLES, J. I am of the same opinion. The first objection divides itself into three heads. The first is that, whereas the arrangement was that the creditors were to receive promissory notes for the amount of three of the instalments, certain of them, instead of receiving promissory notes, received the full amount of the composition in cash. So far as those individual creditors are concerned, they got something more than they bargained for. The payment of the amount in money rendered the giving of the promissory notes to them a vain and useless act, because, if they had been given, the previous payment would at the time when the promissory notes fell due have operated of itself as satisfaction of the notes, so as to prevent their ever being of any practical utility: and, I apprehend that, in the absence of any fraud upon the plaintiffs, or undue preference of those particular creditors,—neither of which is suggested,—it might as well be argued that, if one of the creditors had thought fit altogether to release the debtor, and dispense with the payment of the money as well as with the giving of the promissory notes, there would be a failure to comply with the arrangement,—a conclusion so absurd as to require us to try some means of avoiding it. What we have to see is, whether the resolution or agreement assented to and approved has been substantially carried into effect, regard being had to the object of all parties, which was that the creditors should be paid to the extent of 10s. in the pound on the amount of their respective debts. Provided that object has been attained, and the creditors who are willing to receive the composition are satisfied with the mode of doing it, the particular details may be treated as immaterial as between the debtor and a non-assenting creditor. I cannot conceive a case to which the maxim *Qui hæret in litera hæret in cortice* more forcibly applies than to the present.

[237] The next objection is one pretty much of the same kind, viz. that some of the creditors did not receive the first instalment of the composition until seven days after the time fixed for the payment of that instalment. If that had been the case with the creditor who relies upon the objection, it might, no doubt, have afforded a good answer to the defence, as appears from *Hasard v. Mare*, 30 Law J., Exch. 97. In that case, to an action of debt, the defendant pleaded that, after the accruing of the debt, he became bankrupt, and that, after the bankruptcy, he and P. R., in pursuance of the 230th section of the Bankrupt Law Consolidation Act, 1849, made an offer of composition, which was accepted by nine tenths in number and value of the creditors, the offer being to pay 4s. in the pound in full satisfaction of his debts, such composition to be paid to all the creditors in cash within fourteen days after the second sitting to be appointed under the 230th section; that the court ordered the adjudication to be annulled: that P. R. joined in making the offer of composition in consideration of all the effects of the defendant being assigned to him by the defendant; that the defendant and P. R. paid the composition to the other creditors, and that the defendant had always been ready and willing to pay, and brought into court the amount of the composition on the plaintiff's debt ready to be paid to him. The court of Exchequer held that the plea was bad, for not shewing a payment or tender within the fourteen days. The same considerations, therefore, are, it seems, to be applied to deeds of composition under the 12 & 13 Vict. c. 106, as to ordinary composition deeds. But here the plaintiffs were not the persons whose payments were delayed: everything that was due to them under the resolution was tendered to them at the proper time: and it was only in respect of some [238] few of the other creditors that accidentally, and not in consequence of any design which could in any way interfere with the plaintiffs' rights, the payment of the composition was postponed. Those creditors were content: and, their own rights only being in question, I apprehend it was competent to them to waive payment at the day.

The third objection is, that the bond was not such as the debtor engaged to give. The bond which by the proposal the debtor was to give was a bond to secure the

due payment of the last three instalments of the composition. The bond which he gave was conditioned to be void if the debtor should make and have ready for delivery to the creditors such promissory notes as were mentioned in the amended proposal of the 28th of February, 1861, in manner and within the period therein and in that behalf specified, and if the second, third, and fourth instalments should be duly paid at the respective times in that behalf provided: and there was this further condition added,—“or if, before any default shall be made in payment of the said instalments or any of them, or any part thereof, the said T. H. Mortimore shall be adjudicated a bankrupt in respect of any debt proved or provable under the said petition so filed by him in the said court of Bankruptcy as aforesaid,” the bond was to be void. As at present advised, I incline to think that, if Mr. Brown could have pointed out any person who could have effectually proceeded to an adjudication of bankruptcy against Mortimore, the bond would have been open to a very serious objection. But he has failed to point out any person who could do so; because, as to all persons bound by the resolution or agreement, I apprehend they were in this respect in the same condition as persons who have assented to a composition deed independently of the act of parliament; and, in [239] such a case, I apprehend, the rule is that a person who has agreed to accept a composition from his debtor could not, provided the debtor had fulfilled all the covenants or agreements in the deed on his part, or if the time for performance had not arrived, proceed to an adjudication in bankruptcy against him. There would in such case be no good petitioning creditor's debt, because it would be a violation of the agreement into which the creditor had entered with his debtor to molest him in any way before any default had been made by him in carrying out the new engagement which by agreement of the parties was substituted for the original debt. And creditors who have had notice of the proceedings under the act, and are bound by them, would equally be prohibited by the arrangement from taking any proceedings in bankruptcy before any default made by the debtor. It only remains, therefore, to see whether the bond could have been made void under this branch of the condition, by reason of proceedings in bankruptcy taken by a creditor who either had no notice of the proceedings or to whom an excepted debt was due. It does not appear from the case that any creditor existed by whom such proceedings could have been taken: we must, therefore, assume that none such in fact existed. The bond was under the circumstances a sufficient security according to the terms of the proposal which was assented to and confirmed. This objection consequently fails.

I now pass to a new head of objections,—those relating to the proceedings before the commissioner in which the proposal now under consideration was made and assented to. It is in effect an objection in the nature of a discontinuance under the former practice of the courts. Now, what are the facts? A proper petition for an arrangement was duly filed, and proper notices given. In the course of the proceedings, an order was made by the commissioner that, instead of proceeding with the private arrangement, the debtor be adjudicated a bankrupt and the proceedings adjourned into the public court. That order for the time put a stop to the proceedings under the petition. Then there was a competent appeal to the Lords Justices against that order, and they upon the hearing determined that the adjudication of the commissioner was erroneous, and remitted the matter back to him in order that the proceedings upon the petition should go on as before the interruption. Unless it can be said that the functions of the Lords Justices were merely to pronounce the commissioner's decision wrong, without reinstating the appellant in the position in which he stood before the erroneous order was made, one course only was possible, viz. that the commissioner should do as he did here, re-adjourn the case from the public court, into which it ought never to have found its way, and proceed with the petition under the arrangement clauses. That is what the commissioner did: and it appears to me that it was quite competent to him to make the adjournment and proceed as he did. The proper course was to place the matter in statu quo. The maxim *Non potest aduci exceptio ejusdem rei cujus petitur dissolutio*, is one of universal application in proceedings by way of appeal.

With respect to the objection that the proper assent was not given by certain of the creditors under the provision contained in the 217th section of the statute, which enables persons authorized by letters of attorney to vote, I apprehend, for the reasons given by my Brother Williams, that a power of attorney given by the public officer of a joint-stock bank under the 7 G. 4, c. 46, or of any other public trading company

under the 7 & 8 Vict. c. 113, in which public officer is [241] vested the power to sue and to prove in bankruptcy in respect of debts due to the company, is a good power of attorney. That objection also therefore fails.

Then, there is a further objection, which is founded upon the fact that the debt now sued for was not existing debt at the time these proceedings were first instituted, viz. by the filing of the petition for arrangement. As to that, I will only say that a discharge under the power of arrangement contained in the Bankrupt Law Consolidation Act, 1849, appears to have attributed to it by the legislature precisely the same force and efficacy as a discharge by certificate under an ordinary bankruptcy; and it is only necessary to refer to the class of cases of which *Van Sandau v. Corshie*, 3 B. & Ald. 13, is one, to shew that, where a debt is barred, all accessories in the shape of damages and costs also are barred. And, as the certificate bars a debt in respect of which an action is pending at the date of the petition, though it does not ripen into a judgment until afterwards, any discharge of that debt discharges also those accessories which the law attaches to the debt.

I must own I am not dissatisfied at the failure of these numerous objections; for, perhaps, there never was a case of this sort in which the debtor has so thoroughly and substantially carried out his engagement as the present.

BYLES, J. I also am of opinion that all the objections fail, giving the fullest effect to the means afforded by the decision in *Alleard v. Wesson*, confirmed by the Exchequer Chamber in *Wesson v. Alleard*, for upsetting these arrangements. As to the first point, all I shall say is that, where the debt is discharged by a certificate in bankruptcy, it has been held that a judgment subsequently obtained does not operate as a [242] merger of the debt, but that the discharge from the debt operates a discharge from the judgment obtained thereon. In this, as in some other cases, the bankrupt law disregards some inconvenient distinctions which exist at common law. And, as to the objection to the adjournment of the meetings by the commissioner, it seems to me that it would be but a waste of time to add a word to what has been said by my Brothers Williams and Willes.

The next objection is that, without the help of the joint stock companies mentioned in the case, there was not a sufficient proportion of assents to the debtor's proposal, and that the assents given on behalf of those bodies were not properly given. That depends upon the 217th section of the Bankrupt Law Consolidation Act, 1849, which enacts that any person duly authorized by letter of attorney from any creditor who has proved a debt to the amount of 10l. and upwards, shall be entitled to vote on the question of assent or dissent to the proposal of such petitioning trader. These joint-stock companies, not being bodies corporate, could not appear at the meeting. Among such a numerous body, there must have been some shareholders under disability, such as married women, lunatics, or infants. Then the statute provides that any person duly authorized by any creditor by letter of attorney may appear and vote. It may be observed here that the letter of the statute has been complied with: the person who assented on behalf of these joint-stock companies was authorized by letter of attorney. Was he *duly* authorized? The letter of attorney under which he in each case professed to act was executed by the secretary or public officer of the company. It is objected that he was not authorized under seal to give such power of attorney. If this were an instrument which by law was required to be under seal, no [243] one of course could grant such a power unless himself impowered or authorized under seal to do so. But, looking at the circumstances and the ordinary course of business, it is impossible that there could be an authority under seal. All the shareholders must act: the majority would have no power to affix the seal. Independently, therefore, of technical reasons, I should have no hesitation in saying that the statute was literally as well as substantially complied with. As soon as the party to whom the power of attorney was given appeared at the meeting, and agreed with the other creditors, and consented on the part of those whom he represented to forego a portion of their debt, the other creditors, doing the like, it seems to me that there was a binding bargain which a court of equity would enforce, and which probably also might be made the foundation of an action at law. Besides, here the principals have afterwards actually accepted the composition. This would be a *ratihabitio*, which would render the transaction valid from the commencement. But we are relieved from all difficulty upon this objection by the decision in *Ex parte v. Ackroyd*, *In re Munroe*, 1 Mont. D. & De Gex, 555, which is precisely in point.

The next objection which has been urged, is that the agreement has not been carried into effect according to the tenor thereof. In the first place, it was said, certain of the creditors were paid the full amount of the composition by one payment in cash, instead of partly in cash and partly by promissory notes. Again, it is objected that others of the creditors were paid the first instalment of 4s. in the pound in cash, and the remaining instalments by promissory notes after the time stipulated by the proposal which was assented to and confirmed. This, it was urged, rendered the whole arrangement void. Indeed, Mr. Brown went so [244] far as to contend, in answer to questions which I put to him in the course of his argument that, if these payments had been made five minutes after twelve o'clock on the night of the seventh day after the confirmation by the commissioner of the resolution of the creditors to accept the debtor's proposal, or if a counterfeit sovereign formed part of one of the payments, the whole would be frustrated and rendered void. These particular creditors do not complain of the way in which they have been paid: and, for the reasons already given, I think the plaintiffs ought not to be heard to make this objection.

The only point which has caused me any trouble is the argument as to the form of the bond: but, when that comes to be fairly looked into, it seems to me to have as little foundation as the rest of the objections. The modified proposal of the 28th of February, 1861, provides that the composition shall be paid by four instalments, the first, of 4s. in the pound, in cash, the other three, of 2s. in the pound each, by promissory notes at certain dates, to be guaranteed by the bond of two persons named. The objection to the bond was that, besides the condition for payment of the promissory notes, it contained a condition that it should be void, if, before any default should be made in payment of the said instalments,—viz the promissory notes,—or any of them, or any part thereof, the debtor should be adjudicated a bankrupt in respect of any debt proved or provable under the said petition so filed by him in the said court of Bankruptcy as aforesaid. Before the certificate of the commissioner under the 221st section of the statute was given, a breach of this latter condition had become impossible: the whole of the instalments had been duly paid, and the debtor had not been adjudicated a bankrupt, and so the bond had become useless.

[245] Giving, therefore, the fullest effect to all Mr. Brown's objections, I am clearly of opinion that there is nothing to prevent the certificate from being a complete bar to the claim in this action: and I entirely agree with my Brother Willes that it is rare indeed to see an arrangement of this sort so satisfactorily and faithfully carried into effect as this has been.

KEATING, J. I entirely concur in all that has been said by the rest of the court, and especially do I concur in the last observation, as to the manner in which this arrangement has been carried out by Mr. Mortimore.

Judgment for the defendant.

READ v. EDWARDS. July 4th, 1864.

[S. C. 34 L. J. C. P. 31; 11 L. T. 311; 5 N. R. 48.]

An action lies against the owner of a dog, who, knowing the animal to have a propensity for chasing and destroying game, permits it to be at large, and the dog in consequence "breaks and enters" the plaintiff's wood, and chases and destroys young pheasants which are being reared there under domestic hens.

This was an action brought by the plaintiff to recover damages for the destruction by a dog belonging to the defendant of certain pheasants of the plaintiff.

The first count of the declaration stated that, before and at the several times of the committing by the defendant of the grievances thereafter mentioned, the plaintiff was possessed of certain breeding-places for pheasants, and of certain pheasant-coops, which said breeding-places and pheasant-coops were then used by the plaintiff for the purpose of breeding and rearing pheasants: and the plaintiff was also then possessed of divers tame hens and pheasants, which said pheasants were at and during the times aforesaid, being reared and bred up by the plaintiff in the said breeding-places and pheasant-coops through and by means of [246] the said hens, which said hens were kept and used by the plaintiff to brood, harbour, and cherish the said pheasants in

the said breeding places and pheasant coops: that the defendant then wrongfully and injuriously kept certain dogs, he the defendant at and during the said several times aforesaid knowing the premises, and also then well knowing that the said dogs were used and accustomed to hunt, chase, pursue, and drive about pheasants, and to kill and destroy the same: and at and during the several times aforesaid the defendant wrongfully and negligently behaved and conducted himself in and about the keeping and taking care of the said dogs, and the restraining, confining, and controlling the same, and the said dogs, whilst the defendant so kept the said dogs (and in the manner aforesaid), on divers days and times, to wit, between the 1st of July, 1863, and the 1st of August, 1863, by reason of the premises aforesaid, hunted, chased, pursued, and drove about the said pheasants, and killed and destroyed divers and very many, to wit, two hundred, of the said pheasants: whereby and by reason of the premises the plaintiff had been and was seriously damaged and injured, and divers moneys theretofore expended and laid out in and about and incident to the raising, rearing, feeding, taking care of, and watching the said pheasants, became and were wholly lost to the plaintiff: and the plaintiff had been also thereby deprived of the said pheasants, and of the enjoyment thereof, and had been prevented and hindered from therewith stocking his the plaintiff's woods and grounds with pheasants, and from having such recreation and pleasure therein as but for the premises he would have had: and had also thereby been deprived of divers gains and profits which otherwise and but for the premises he would have derived, and which might and would have accrued to him therefrom [247] and from the disposal thereof: and also by reason of the premises the plaintiff had been necessarily put to and had incurred great expense in and about the watching, keeping, and taking care of the said breeding-places, pheasant coops, hens, and pheasants: and also by reason of the premises the plaintiff was forced and compelled to keep and employ a much greater number of servants and keepers to attend upon and superintend the same than otherwise and but for the premises he would or need have kept or employed.

The second count stated that, on divers days and times, the defendant, then knowing that certain of his dogs were accustomed to hunt for and pursue game, and also then knowing that the plaintiff preserved and had game in the wood and plantation of the plaintiff thereafter mentioned, so negligently and carelessly controlled, kept, and restrained the said dogs near to the said wood and plantation, that through and by reason thereof the said dogs broke and entered the said wood and plantation of the plaintiff called Hockering Wood, situate at Hockering, in the county of Norfolk, and trod down, damaged, and destroyed the herbage, soil, and underwood thereof, and ran about, hunted, and chased therein, and hunted, chased, pursued, drove about, disturbed, killed, and destroyed the game, pheasants, hares, and rabbits which were in the said wood: by reason whereof large quantities of the said game, pheasants, hares, and rabbits were greatly terrified and affrighted and caused to leave the said wood and plantation, and were injured: and by reason of the premises the plaintiff had been and was seriously damaged and injured, and the plaintiff's right to shoot and sport in the said wood and plantation had been spoiled and damaged, and divers moneys theretofore expended and laid out in and about and incident to the raising, rearing, feeding, taking care of, and watching the said [248] game, pheasants, hares, and rabbits became and were wholly lost to the plaintiff: and the plaintiff was thereby caused to incur greater expenses than he would have done in and about the watching and taking care of the said wood, game, pheasants, hares, and rabbits: and the plaintiff had also been thereby deprived of the said game, pheasants, hares, and rabbits, and of the enjoyment thereof, and from having such pleasure and recreation therein as otherwise and but for the premises he would have had: and also thereby the plaintiff had been deprived of divers great gains and profits which otherwise and but for the premises he would have derived, and which might and would have accrued to the plaintiff therefrom and from disposal thereof. Claim, 250l.

The defendant pleaded, — first, not guilty, — secondly (to the first count), that the said pheasants were not, nor were any of them, the plaintiff's, as alleged, — thirdly (to the second count), that the said dogs were not his, as alleged, — fourthly (to the second count), that the said wood and plantation were not the plaintiff's, — fifthly (to the second count so far as related to the alleged right to shoot and sport), that the plaintiff had no right to shoot or have sport as alleged, — sixthly (to the second count), that he did not know that the said dogs were accustomed to hunt for and pursue game,

nor did he know that the plaintiff preserved and had game in the said wood and plantation, as alleged. Issue thereon.

The cause was tried before Cockburn, C. J., at the last Spring Assizes at Norwich, when the following facts appeared in evidence:—The plaintiff was possessed of a wood called Hockering Wood, about 200 acres in extent, in which he was in the habit of rearing and preserving pheasants and other game. In the Summer of 1863, he had caused a large number of [249] pheasants' eggs to be hatched under hens in a breeding-place about one hundred yards from the wood. When the broods were about eight weeks old, they were removed into the wood, together with the coops and hens,—the hens being kept in the coops, and the young pheasants allowed to run in and out at their pleasure. Whilst the young pheasants were so in the wood, viz. on the 17th and 19th of July, a pointer belonging to the defendant chased and worried them, killing or driving away (according to the evidence of the plaintiff's keeper and his assistant) about one hundred and sixty of them. It was proved that the defendant had had notice that his dog was in the habit of trespassing in Hockering Wood and chasing the game there; and, particularly, that in the year 1862, he was informed of his having chased and killed there three hares and four rabbits, on which occasion he was threatened with an action by the plaintiff.

On the part of the defendant it was objected that the first count could not be sustained, inasmuch as there could be no property in pheasants, they being animals *feræ naturæ*.

Leave being reserved to him to move upon this point, the defendant's counsel proceeded to address the jury upon the second count,—contending that the evidence did not shew that the pheasants in question had been destroyed by dogs, or that the dog was the defendant's dog; and that there was no proof of a scienter.

His Lordship left it to the jury to say,—first, whether the plaintiff's pheasants were destroyed by dogs,—secondly, if so, whether the defendant's dog was one of them,—thirdly, if so, was the propensity of the dog to chase and destroy game, going out for that purpose of its own accord, known to the defendant. And he told them that, if a man has a dog which has *to his knowledge* a propensity to any particular mischief, [250]—chief, whereby injury may be caused to another, it is the duty of the owner to restrain the dog from going on another man's land or premises to do the mischief and thereby cause the injury. But he reserved leave to the defendant to move, if the court should take a different view.

The jury returned a verdict for the plaintiff, damages, 5*l*. The verdict was taken upon the second count only.

O'Malley, Q. C., in Easter Term last, accordingly obtained a rule calling upon the plaintiff to shew cause why the verdict should not be set aside and a verdict entered for the defendant, on the grounds,—first, that there was no evidence to go to the jury in support of the declaration,—secondly, that the second count of the declaration, on which the verdict was taken, was framed as for an infringement of the plaintiff's right of shooting and sporting, and there was no evidence of any infringement of such right; or for a new trial, on the ground that the verdict was against the weight of the evidence, or on the ground of the misdirection of the judge in leaving to the jury the question of the negligence of the defendant, and in not telling them that the destruction of the game was no ground of action; or why the judgment should not be arrested, on the ground that the second count of the declaration disclosed no ground of action. He submitted that, though a man is responsible for injury done by an animal of a wild or ferocious nature, such as a lion or a tiger, whose propensities are known, yet, in the case of domesticated animals, he is only responsible for their acts where he has become aware by previous experience that they have acquired habits of ferocity or mischief; referring to the case of *May v. Bardett*, 9 Q. B. 101. [Willes, J., referred to *Mason v. Keeling*, [251] 1 Ld. Raym. 608, and observed that the second count here was evidently founded upon the case in the Year Book, 20 E. 4, fo. 10, b.(a).]

(a) "In trespass for entering the plaintiff's close and depasturing his herbage with his beasts, per Gery (for the defendant). The action is not maintainable, for the defendant says that all the men of D. had had common in 200 acres of moor from time whereof memory is not to the contrary, and that the plaintiff's land is adjoining to the 200 acres in which they were put, and that they entered into the

Hayes, Serjt., and Metcalfe, shewed cause. The se [252] could count alleges a trespass by the defendant's dog in the plaintiff's wood, and chasing and destroying game therein, not alleging them to be tame. [Williams, J. The count cautiously abstains from calling the pheasants *feræ naturæ* pheasants. The pleader evidently had the fear of the rabbit case, *Bailes v. Hogg*, 12 C. B. (N. S.) 501, in error, 13 C. B. (N. S.) 841, before his eyes.] In that case it was held, upon the authority of *King v. The Earl of Lauderdale*, 1 Hurlst. & N. 923, that the owner of land has a qualified property in game killed thereon by a stranger, *ratione sokæ*. This is the case of young game, in which the owner of the soil would have a property *propter impotentiam*: see the case of *Stones*, 7 Co. Rep. 15 b., 17 b., where Lord Coke says,—"There are three manner of rights of property, seil. property absolute, property qualified, and property possessory. A man hath not absolute property in anything which is *feræ naturæ*, but in those which are *domitæ naturæ*. Property qualified and possessory a man may have in those which are *feræ naturæ*; and to such property a man may attain in two ways, by industry, or *ratione impotentie et loci*; by industry, as, by taking them, or by making them mansuetæ, i.e. *manui assuetæ*, or domesticæ, i.e. *domui assuetæ*: but, in those which are *feræ naturæ*, and by industry are made tame, a man hath but a qualified property in them, seil. so long as they remain tame, for, if they do attain to their natural liberty, and have not *animum revertendi*, the property is lost, *ratione impotentie et loci*; as, if a man has young shovellers or goshawks, or the like, which are *feræ naturæ*, and they build in my land, I have possessory property in them, for, if one takes them when they cannot fly, the owner of the soil shall have an action of trespass *quare boscum suum fregit, et tres pullos espervor' suor' or ardear' snar' pretii tantum, nuper in eod' bosco nidificant'*, cepit et [253] asportavit: and therewith agreeth the Register and F. N. B. 86 L. and 89 K. 10 E. 4, fo. 14, 18 E. 4, fo. 8, 14 H. 8, fo. 1 b., Standf. 25 b. Vide 12 H. 8, fo. 4, and 18 H. 8, fo. 12. But, when a man hath savage beasts *ratione privilegii*, as by reason of a park, warren, &c., he hath not any property in the deer, or conies, or pheasants, or partridges: and therefore, in an action *quare parcum, warrenum, &c., fregit et intravit, et tres damas, lepores, cuniculos, phasianos, perdices*, cepit et asportavit, he shall not say '*suos*' for he hath no property in them, but they do belong to him *ratione privilegii* for his game and pleasure so long as they remain in the privileged place: for, if the owner of the park dies, his heir shall have them, and not his executors or administrators, because without them the park, which is an inheritance, is not complete (*a*): nor can felony be committed of them; but of those which are made tame, in which a man by his industry hath any property, felony may be committed." The second count here is clearly good, and is supported by the evidence. [Byles, J. Is it not enough for you to establish a trespass committed

land of the plaintiff without the defendant's knowledge, and immediately the defendant knew if he drove them out: wherefore he prays judgment, &c. Briggs: This is no plea, for, if he (the defendant) wish to prescribe, he ought to prescribe in a certain name, as of a corporation. Brian: As far as this is concerned, the plea seems good enough: but it appears to me that the plea is naught for another cause: for, when he put his beasts in the common, he ought to use his common so that they do no wrong to another man. And, if the land in which he ought to have this common is not inclosed, as it is here, he ought to keep his beasts in the common and out of the land of another. Littleton: I think so too: for, I understand that this is the law. If a common road lies over the land of divers men, and if a drover come with his beasts and some of them go out of the way, he shall be punished in an action of trespass: and so here. Townsend: Here we say that we put in our beasts, and they were driven out of the common by *wild beasts, to wit, dogs*. Brian: What is this to the purpose? Townsend: In that case he may have an action against the master of the dog. Nele: Have you in your country wild dogs? This is wonderful. Brian: Notwithstanding you may have an action against the dog's master, still the plaintiff may have an action against you: as, if I bail goods to a man to keep, and a stranger takes them out of his possession, I may have an action against him or against my bailee. Genny: We traverse generally, not guilty. Brian: That is right; for, you or the dogs [dogs' master?] should be punished, for the plaintiff is injured wrongfully."

(a) See *Morgan v. The Earl of Abergavenny*, 8 C. B. 768

upon the land?] Yes. In *Sutton v. Moody*, 1 Ld. Raym. 250, 2 Salk. 556, 3 Salk. 290, 5 Mod. 375, 12 Mod. 144, Comb. 458, Comyns, 34, Holt. 608, it was held that, where game is killed on the land of A., the property thereof in him is absolute. [Willes, J. *Started and killed.*] Holt, C. J., in giving judgment in that case, says: "A warren is a privilege to use his land to such a purpose: and a man may have warren in his own land, and he may alien the land and retain the privilege of warren. But this gives no greater property in the conies to the warrener, for the property arises to the party from the possession; and therefore, if a man keeps conies in his close [254] (as he may), he has a possessory property in them so long as they abide there: but if, they run into the land of his neighbour, he may kill them, for then he has the possessory property. If A. starts a hare in the ground of B., and hunts it and kills it there, the property continues all the while in B. But, if A. starts a hare in the ground of B., and hunts it into the ground of C., and kills it there, the property is in A., the hunter, but A. is liable to an action of trespass for hunting in the grounds as well of B. as of C. But, if A. starts a hare, &c. in a forest or warren of B., and hunts it into the ground of C., and there kills it, the property remains all the while in B., the proprietor of the warren, because the privilege continues." And this is followed in *Currington v. Taylor*, 11 East, 571, *Keeble v. Hickeringill*, 11 East, 574, n., and *Churchward v. Studdy*, 14 East, 249, and also by the Exchequer Chamber in *The Earl of Lonsdale v. Rigg and Blades v. Higgs*. [Byles, J. In *Blades v. Higgs*, it was conceded throughout that the rabbits were wild. Williams, J., referred to the judgment of Willes J., in *Cox v. Burbidge*, 13 C. B. (N. S.) 430, 440, where that learned judge expresses a doubt as to the correctness of the distinction taken by Lord Holt in *Mason v. Keeling*, 1 Ld. Raym. 606, 608, "between horses and oxen, in which a man has a valuable property, and which are not so familiar to mankind, and dogs."] There can be no real difference in the responsibility of the owner, between the case of an ox or a sheep and a dog. A man having a right of way over the close of another, can have no more right to permit his beasts or his sheep to eat of his herbage, than he has to discharge a gun near to his decoy. [Keating, J. Why should not a man have a right to have his game undisturbed on his land?] There can be no good reason why he should not. [Williams, J. You would not need these authorities if this were [255] alleged and proved to have been a wilful trespass.] No. The question is, whether the defendant, having notice of the propensity of his dog to chase and destroy game, was not bound to restrain it. There was abundant evidence of the scienter. [Byles, J., referred to Baron Wilde's judgment in *Blades v. Higgs*, 13 C. B. (N. S.) 852, as being a correct exposition of the law on the subject of game kept as here. [Keating, J. There was a similar case argued in the court of Criminal Appeal in Michaelmas Term last; but judgment was deferred. Williams, J. Is there any case of an action of trespass being maintained and damages recovered for killing the game?] The point was raised in *Hannam v. Mockett*, 2 B. & C. 934, 4 D. & R. 518; but it went off on the ground that the birds there (rooks) were not alleged to be an article of human food. Bayley, J., however, in delivering the judgment of the court, goes very fully into the subject of the property in game. "The plaintiff," said that learned judge, "does not state any special right in him to have the rooks resort to his trees; he relies upon that general right which all the King's subjects have, and he describes the profit to arise to him, not from the eggs, but from the killing the birds and their young. To maintain an action, the plaintiff must have had a right, and the defendant must have done a wrong. A man's rights are the rights of personal security, personal liberty, and private property. Private property is either property in possession, property in action, or property that an individual has a special right to acquire. The injury in this case does not affect any right of personal security or personal liberty, nor any property in possession or in action; and the question then is, whether there is any injury to any property the plaintiff had a special right to acquire. A man in trade has a right in his fair chances of [256] profit, and he gives up time and capital to obtain it. It is for the good of the public that he should. But, has it ever been held that a man has a right in the chance of obtaining animals *feræ naturæ*, where he is at no expense in enticing them to his premises, and where it may be at least questionable whether they will be of any service to him, and whether, indeed, they will not be a nuisance to the neighbourhood? This is not a claim *propter inpotentiam* because they are young, *propter solum* because they are on the plaintiff's land, or *propter industriam* because the plaintiff has brought them to the place or reclaimed

them, but *propter usum et consuetudinem* of the birds. They, of their own choice, and without any expenditure or trouble on his part, have a predilection for his trees, and are disposed to resort to them. But, has he a legal right to insist that they shall be permitted to do so? Allow the right as to these birds, and how can it be denied as to all others? In considering a claim of this kind, the nature and properties of the birds are not immaterial. *The law makes a distinction between animals fitted for food and those which are not*: between those which are destructive of private property and those which are not: between those which have received protection by common law or by statute and those which have not. It is not alleged in this declaration that these rooks were fit for food: and we know in fact that they are not generally so used. So far from being protected by law, they have been looked upon by the legislature as destructive in their nature, and as nuisances to the neighbourhood where they are. That being so, surely a party can have no right to have them resort to his lands, to the injury of his neighbours: and, consequently, no action can be maintainable against a person who prevents their so doing. It has been said that a man may acquire rights over [257] all animals *similis naturæ*, as affording him diversion, such as rabbits in a warren, or doves in a dove-cote. But first it is to be observed that rabbits and pigeons are not only subjects of diversion, but constitute an article of food. In 2 Inst. 199, it is said that 'the common law gave no way to matters of pleasure (wherein most men do excel), for that they brought no profit to the commonwealth: and therefore it is not lawful for any man to erect a *park*, *chase*, or *warren*, without a licence under the great seal of the King, who is pater patriæ and the head of the commonwealth:' but, in the same page, it is said that 'fish ponds, being a matter of *profit and increase of richials*, any man may erect.' And, even with respect to animals *feræ naturæ*, though they be fit for food, such as rabbits, a man has no right of property in them." He then refers to *Boulston's case*, 5 Co. Rep. 104 b., (*Boulston v. Hardy*), Cro. Eliz. 547, *Dwelling v. Sanders*, Cro. Jac. 490, *Arnold v. Jefferson*, 3 Salk. 248, and the case of *Monopolies*, 11 Co. Rep. 87, and to the statutes 24 H. 8, c. 10, 25 H. 8, c. 11, and 8 Eliz. c. 15, and concludes,—"*Keble v. Hockingill*, 11 East, 574, n., bears a stronger resemblance to the present than any other case: but it is distinguishable. There it was decided that an action on the case lies for discharging guns near the decoy-pond of another, with design to damnify the owner by frightening away the wild-fowl resorting thereto, by which the wild-fowl are frightened away and the owner damnified. But, in the first place, it is observable that wild-fowl are protected by the statute 25 H. 8, c. 11; that they constitute a known article of food: and that a person keeping up a decoy expends money and employs skill in taking that which is of use to the public. It is a profitable mode of employing his land, and was considered by Lord Holt as a description of trade. That case, therefore, [258] stands on a different foundation from this. All the other instances which were referred to in the argument on the part of the plaintiff, are cases of animals specially protected by acts of parliament, or which are clearly the subject of property. Thus, hawks, falcons, swans, partridges, pheasants, pigeons, wild-ducks, mallards, teals, widgeons, wild-geese, black-game, red-game, bustards, and herons, are all recognized by different statutes as entitled to protection, and consequently, in the eye of the law, are fit to be preserved. Bees are property, and are the subject of larceny. Fisheries are totally different. The fish can do no harm to any one, and constitute a well-known article of food. Upon the ground, therefore, that the plaintiff had no property in these rooks, that they are birds *feræ naturæ*, destructive in their habits, and not protected either by common law or statute, and that the plaintiff is at no expense with regard to them, we are of opinion that the plaintiff had no right to insist upon having them in his neighbourhood, and that he cannot maintain this action." [Willes, J. Some of the reasoning of Bayley, J., in that case is not very satisfactory. Williams, J. There was not any separate count for killing game.] No. But there was in *Rigg v. Lord Lonsdale*, 11 Exch. 654, a count in trover for carrying away game. [Williams, J. Dead game. Willes, J. It is not alleged here that the pheasants were good for food.] *Lex spectat naturæ ordinem*: they are called game. [Willes, J. A wolf is game.] The statute 1 & 2 W. 4, c. 32, s. 30, recognizes that there may be a trespass in pursuing game: and that even where the party charged does not actually enter upon the land. Sending a dog into a cover to drive out game, that the defendant might shoot it from the highway adjoining, was held to be a trespass: *The Queen v. Pratt*, 4 Ellis & B. 860. To the same effect is [259] *Dunmuck v. Allenby*, cited in *Dunne v. Clayton*, 2 Marsh. 577, 582. [Williams, J. The law as laid down in *Sutton v. Moody* must bind us, though

certainly the cases anterior to that are very difficult to reconcile. In *The Queen v. Pratt*, the offence was personally inciting the dog to go into the cover to drive out the game. This declaration is drawn upon the notion that negligence in not restraining the dog, knowing his propensity, was equivalent to inciting him to chase the pheasants.]

O'Malley, Q. C., and Keane, Q. C., in support of the rule. The jury were not asked there to consider whether there was involuntary negligence. No doubt, a man is responsible for damage done by an animal of a dangerous or ferocious nature: if he chooses to keep these, he must do so at his peril. But, in the case of a dog, the owner only becomes responsible where it has previously been brought to his knowledge that the animal has acquired a habit of doing the particular acts complained of. An action does not lie for an involuntary trespass: *Mitten v. Fawcett*, Popham, 161. Doderidge, J., there says: "A man is driving cows through a town, and one of them goes into another man's house, and he follows him: trespass doth not lie for this, because it was involuntary, and a trespass ought to be done voluntarily." In 2 Rolle's Abridgment, 566, pl. 1, it is laid down that, if cattle in passage on a highway eat herbs or corn raptim et sparsim, against the will of the owner, it will excuse the trespass (a)¹. In *Beckwith v. Shandike*, 4 Burr. 2092, the court lay down, [260] that, "if A. goes along a footpath, and his dog happens to escape from him and run into a paddock, and pull down a deer against his will, it is no trespass." And in *Brown v. Giles*, 1 Car. & P. 118, it was held that a dog jumping into a field without the consent of its master, is not a trespass for which an action will lie. The form of the declaration in *Sutton v. Moody*, in some measure accounts for the judgment. [Williams, J. We are bound by that case, confirmed as it has been by subsequent cases.] All the cases which have proceeded on the authority of *Sutton v. Moody*, have been decided upon the ground that what was taken was *dead game*. Where is this sort of liability to stop? Is a man to be held responsible for the act of his cat in killing his neighbour's canary bird, because he knows that the animal's natural propensity would lead it to do so?

Cur. adv. vult.

WILLES, J., now delivered the judgment of the court (a)² :—

We discharge the rule to enter a nonsuit, because the declaration was proved, and that in a sense in which there was a cause of action.

The question was much argued, whether the owner of a dog is answerable in trespass for every unauthorized entry of the animal into the land of another, as in the case of an ox. And reasons were offered, which we need not now estimate, for a distinction in this respect between oxen and dogs or cats, on account,—first, of the difficulty or impossibility of keeping the latter under restraint,—secondly, the slightness of the damage which their wandering ordinarily causes,—thirdly, the common usage of mankind to allow them [261] a wider liberty, —and lastly, their not being considered in law so absolutely the chattels of the owner, as to be the subject of larceny.

It is not, however, necessary in the principal case to answer this question: because it was proved at the trial that the dog which did the damage was of a peculiarly mischievous disposition, being accustomed to chase and destroy game on its own account, that that vice was known to its owner, the defendant, and that he notwithstanding allowed it to be at large in the neighbourhood of the plaintiff's wood, in which there were game: so that the entry of the dog into the wood, and the destruction of the game, was the natural and immediate result of the animal's peculiarly mischievous disposition, which his owner knew of, and did not control.

As to the property damaged being game, we think this is no answer to the action, because the law recognizes in the proprietor of land a qualified right to game whilst it is upon the land.

We also discharge the rule to arrest the judgment, because, after verdict, the declaration may be read as capable of being, and therefore must be taken to have been, as in fact it was, proved in an actionable sense.

Rule discharged.

(a)¹ "Si home ad un chemin oustre mon terre pur ses avers a passer, et les avers pasce les herbes per morsells en passant, ceo est justifiable. P. 15 Jac. B. R., *Reed and Downes*: per Curiam. Encontre son volent ceo esteant come est d'estre intend."

(a)² The judges present at the argument were, Williams, J., Willes, J., Byles, J., and Keating, J.

[262] HILL AND OTHERS, Administrator and Administratrix of the Estate of Mary Hill, Deceased, v. NUTTALL. June 17th, 1864.

[S. C. 33 L. J. C. P. 303.]

1. H & Sons being engaged, *under a contract in writing*, in the erection of certain engineer's work for N., for which iron and brass castings were required, and Hill, the founder from whom the castings were procured, having a claim against H. & Sons to the amount of 218l. for goods already supplied, and refusing to continue the supply without obtaining payment or security for that sum, N. consented to give Hill a guarantie in the following terms. "May 22, 1861. Mr. J. N. agrees to pay to Mrs. Hill, iron founder, on H. & Sons' account, the sum of 218l., being the amount owing to her by them, together with interest, in six months from the above date, *providing he has work done as security for the same.*"—In an action by the representatives of Hill against N. upon this guarantie:—Held, that it was a condition of N.'s liability thereon, that, at the end of the six months, work should have been done by H. & Sons for him in respect of which a debt should be due from him to them: and that the plaintiffs could not recover without producing the contract between H. & Sons and N. under which the work was done.—2. To induce Hill to go on with the castings in the meantime, the following memorandum was drawn up and signed by her, by H. & Sons, and by N.,—"May 22, 1861. M. Hill agrees to make and deliver casting required for N.'s shed, as usual, and N. to pay for the same in monthly payments on H. & Sons' account:—"—Held, that the representatives of Mrs. Hill were entitled to recover from N. the price of castings delivered to H. & Sons under this agreement, without shewing that they were used by them in the works done for N.

This was an action to recover money alleged to be due from the defendant to Mary Hill, deceased, under a guarantie.

The first count of the declaration stated that William Hanson, Richard Hanson, John Hanson, and Joseph Hanson (who were and are the persons referred to in the documents thereafter set forth as William Hanson & Sons) had been before the time when the agreement thereafter mentioned and when the said documents were made, and were at the said time, employed by the defendant in doing certain work at the defendant's shed thereafter referred to, and had before the said time provided certain materials for the said work: and the said Mary Hill had before the said time sold and delivered to the said William Hanson & Sons certain castings, which had been used and fixed by the said William Hanson & Sons in and about the said work so done by them for the defendant: and at the said time the said William Hanson & Sons were indebted to the said Mary Hill in certain money, to wit, 218l., being the money mentioned in the first of the said documents: and thereupon, in consideration that the said Mary Hill would forbear and give time [263] to the said William Hanson & Sons for the said money so due to her the said Mary Hill, for the period of six months mentioned in the first of the said documents, and, for the considerations thereafter appearing, it was agreed by and between the defendant (who was the person surnamed Nuttall in the said document), the said Mary Hill (named therein), and the said William Hanson & Sons, by the said Richard Hanson, respectively, as appears by certain documents of which the following are copies,—“Barnoldswick, May 22nd, 1861. Mr. James Nuttall, of Barnoldswick, agrees to pay to Mary Hill, iron-founder, Colne, on William Hanson & Sons' account, of Skipton, the sum of 218l., being the amount owing to her by them, together with interest for the same, in six months from the above date, with interest up to this time, Nov. 22nd, 1861, providing he has work done as security for the same. James Nuttall.” “Colne, May 22nd, 1861. Mary Hill agrees to make and deliver casting required for Mr. Nuttall's shed, of Barnoldswick, as usual, and Mr. James Nuttall to pay for the same in monthly payments on William Hanson & Sons' account, of Skipton, to which agreement we the undersigned agree too. Mary Hill. Richard Hanson. James Nuttall.” Averment, that everything had been done and happened, and all requisite times elapsed, to entitle the plaintiffs, suing as aforesaid, to be paid by the defendant the said 218l. with interest for the same as aforesaid, or any part thereof, and the said sum and the said interest are wholly due and unpaid, and further, although the said Mary Hill, in

pursuance of the said terms made and delivered casting required for the purpose in the said second document mentioned, as usual, and everything had been done and happened, and all requisite time elapsed, to entitle the plaintiffs, suing as aforesaid, to be paid for the said casting so [264] made and delivered as last aforesaid: yet the defendant had not paid for the said casting, and certain money, to wit, 50*l.*, was still due and unpaid for the same.

The second count stated that the defendant, in the life-time of the said Mary Hill, on the 22nd of May, 1861, in consideration that the said Mary Hill would forbear and give time to William Hanson & Sons, mentioned in the agreement thereafter stated, for payment of a certain debt of 21*l.* mentioned in the said agreement, then due by them to the said Mary Hill, agreed with the said Mary Hill on the terms contained in a document of which the following is a copy,—“Barnoldswick, May 22nd, 1861. Mr. James Nuttall of Barnoldswick agrees to pay to Mary Hill, iron-founder, Colne, on William Hanson & Sons' account, of Skipton, the sum of 21*l.*, being the amount owing to her by them, together with interest for the same, in six months from the above date, with interest up to this time, November 22nd, 1861, provided he has work done as security for the same. James Nuttall:” Averment, that everything had been done and happened, and all requisite times elapsed, to entitle the plaintiffs, suing as aforesaid, to be paid by the defendant the said 21*l.*, with interest as aforesaid: yet the defendant had not paid the said sum, with interest for the same as aforesaid, or any part thereof; and the said sum and the said interest were wholly due and unpaid.

The third count stated that the defendant agreed with the said Mary Hill in her life-time on the terms contained on the defendant's behalf in an agreement made between the said Mary Hill and William Hanson & Sons, by Richard Hanson, with their authority, and the defendant, in a document of which the following is a copy, — “Colne, May 22nd, 1861. Mary Hill agrees to make and deliver casting required for Mr. [265] Nuttall's shed, of Barnoldswick, as usual, and Mr. James Nuttall to pay for the same in monthly payments on William Hanson & Sons' account, of Skipton, to which agreement we the undersigned agree too. Mary Hill, Richard Hanson, James Nuttall.” Averment that, although the said Mary Hill, in pursuance of the said terms, made and delivered casting required for the purpose in the said document mentioned, as usual, and everything had been done and happened, and all requisite times elapsed, to entitle the plaintiffs, suing as aforesaid, to be paid for the said casting so made and delivered as last aforesaid: yet the defendant had not paid for the said casting, and certain money, to wit, 50*l.*, was still due and unpaid for the same.

There was also a count for money received, goods sold and delivered, work and materials, interest, and money found due upon accounts stated.

The defendant pleaded,—first, as to so much of the first count as related to the first breach in that count assigned, that he did not agree as in the said first document in the said first count mentioned,—secondly, as to so much of the said first count as related to the said first breach, that work was not done by the said William Hanson & Sons as security for the defendant's said guarantie,—thirdly, to the said first breach of the said first count, a denial of the said breach and every part thereof,—fourthly, to the second count, that the defendant did not agree as alleged,—fifthly, to the second count, that work was not done by the said William Hanson & Sons, as security for the defendant's said guarantie,—sixthly, to the second count, a denial of the alleged breach and every part thereof,—seventhly, to the money counts, except as to 9*l.* and 14*s.* parcel of the money claimed, never indebted, —eighthly, as to the second breach of the first count, and as to the [266] third count, and to 9*l.* and 14*s.* parcel of the money claimed under the money counts, that the money claimed under the second breach of the first count and under the third count was the same 9*l.* and 14*s.* as the said 9*l.* and 14*s.* parcel of the money claimed under the said money counts; and, as to the said 9*l.* and 14*s.*, the defendant brought into court the sum of 9*l.* and 14*s.*, and said that the said sum was enough to satisfy the claim of the plaintiffs in respect of the matter therein pleaded to,—ninthly, that there never was any account stated as alleged.

The plaintiffs joined issue on the first seven pleas respectively, and replied to the eighth by admitting the payment into court as alleged and joining issue as to the rest of the plea, and new-assigned as to the eighth plea that they sued in this action, so far as related to the second breach of the first count, and the third count, for money over

and beyond the sum of 9l. 14s. in the said plea admitted to be due as in the declaration mentioned

The defendant pleaded nunquam indebitatus to the new-assignment, and issue was joined thereon.

By the particulars of demand the plaintiffs claimed

"The sum of 218l. due under the document dated the 22nd of May, 1861, set out in the declaration, and purporting to be signed by the defendant	£218	0	0
Goods supplied under the document of the same date set out in the plaintiff's declaration, between the 22nd of May, 1861, and the 1st of October, 1861	23	2	11
	<u>£241</u>	<u>2</u>	<u>11 "</u>

The cause was tried before Blackburn, J., at the last Spring Assizes for the county of York. The facts which appeared in evidence were as follows:—The plaintiffs carried on the business of iron and brass [267]-founders at Colne, in the county of Lancaster, two of them being the personal representatives of Mary Fox, by whom the business had been carried on down to the time of her death in 1862. The defendant was a grocer at Barnoldswick, in the west riding of the county of York, and was also the owner of a weaving shed in the course of erection, and the occupier of a cotton-mill which he sub-let, at Colne, near Barnoldswick.

Prior to the 22nd of May, 1861, Mrs. Hill had furnished to certain persons carrying on the business of mechanical engineers at Skipton under the name of William Hanson & Sons, and they were at that time indebted to her for castings to the amount of 218l. 10s. 11d. These castings had been supplied to Messrs. Hanson for the purpose of enabling them to complete certain contracts which they had entered into for work to be done for the defendant at his shed and mill, and in reliance on their representations that the defendant was largely indebted to them upon those contracts. Being unable to obtain payment, Mrs. Hill declined to furnish Messrs. Hanson with any more castings, without security for the sum already due, and for any goods to be thereafter supplied. The parties accordingly met on the 22nd of May, 1861, when the two agreements declared upon were drawn up and signed.

Mrs. Hill went on supplying castings to Hanson & Sons; and there was a conflict of evidence as to whether these were used for the purpose of the works being done for the defendant; but ultimately it was established to the satisfaction of the jury that the three under-mentioned parcels were furnished for the defendant's shed and mill:—

"July 27, 1861.	Engine castings	£7	18	1
" "	Brass castings	3	1	10
Oct. 1, 1861.	" "	9	14	0 "

The last item was covered by the payment into court.

[268] It was proved that work had been done by Hanson & Sons for the defendant at the shed to the value of about 1050l., and at the mill to the approximate value of 40l.; and that there was something due from the defendant to the assignees of Hanson & Sons, who had become bankrupt; but it also appeared that the work was done under a written contract, which was not produced.

On the part of the plaintiffs it was insisted that, having proved work done by Hanson & Sons for the defendant to the amount of 1000l. and upwards, they (the plaintiffs) were entitled to recover from him the 218l. mentioned in the first agreement; and, as to the second agreement that, if the castings furnished subsequently to the 22nd of May, 1861, were destined for the defendant, and actually came to the hands of Hanson & Sons, it was immaterial whether or not they were used in the defendant's shed.

For the defendant, it was submitted that the plaintiff could not recover upon the first agreement without producing the agreement between Hanson & Sons and the defendant, and shewing that work had been done (and remained unpaid for) since the date of the memorandum of the 22nd of May, 1861, to that amount; and that

there was no evidence to warrant the jury in finding that the castings delivered on the 27th of July (amounting to 10l. 19s. 11d.) were applied to the defendant's work.

The learned judge ruled that there was no case as to the 21sl., the subject of the first memorandum. He thereupon directed a nonsuit, reserving leave to the plaintiffs to move to enter a verdict for the 10l. 19s. 11d. subject to all the objections appearing on his notes and the documents,—the court to have power to draw inferences: and neither party to appeal without the leave of the court.

[269] Overend, Q. C., in Easter Term last, obtained a rule nisi to set aside the nonsuit, and for a new trial, on the ground that, at the close of the plaintiffs' case, there was evidence to go to the jury of the plaintiffs' right to recover on the first agreement: or on the ground of the misdirection of the judge in ruling that the plaintiffs could not recover on the first agreement without putting in evidence the contract between Messrs. Hanson & Sons and the defendant: or why a verdict should not be entered for the plaintiffs (pursuant to the leave reserved) for the sum of 10l. 19s. 11d., in addition to the sum paid into court by the defendant, on the ground that there was sufficient evidence of the defendant's liability for the two items of 7l. 18s. 1d. and 3l. 1s. 10d. under the second agreement (a).

Digby Seymour, Q. C., shewed cause. As to the first memorandum, in the absence of evidence of any work having been done by Hanson & Sons to the shed after the 22nd of May, the defendant's promise did not attach,—the words "providing he has work done as security for the same," being evidently intended to apply prospectively, and not to work which had been already done and paid for: and this construction is fortified by the terms of the second agreement. And, unless the agreement under which the work was being done for the defendant by Hanson & Sons was produced, it was impossible to ascertain whether anything or what was due under it. [Willes, J. The obvious meaning of the memorandum, on the face of it, I conceive to be this,—I engage to pay the 21sl., provided I am at the end [270] of the six months indebted to Hanson & Sons in so much for work done by them at any time then preceding.] The whole object of the guarantie was that the work should proceed: and that would be frustrated by holding the proviso to apply otherwise than to work to be done in future. Then, as to the second branch of the rule,—there was no evidence to shew that the castings in respect of which it is now sought to enter the verdict were ever used or wanted for the defendant's shed: and the goods sent to the mill were covered by the 9l. 14s. paid into court. All that was proved as to those two items was, that the castings were sent to Hanson & Sons, and they said they were wanted for the shed.

Overend, Q. C., *contra*. The plaintiffs were improperly nonsuited: they were no parties to the contract between Hanson & Sons and the defendant, and could not be aware of its existence. [Williams, J. The learned judge held that the amount of work done and its value could not be ascertained without having recourse to the contract under which Hanson & Sons were to do it, in other words, that such proof was a condition precedent to the right of the plaintiffs to recover upon the first memorandum of guarantie.] The substance of that agreement was that, if Mrs. Hill would stay her hand and not sue Hanson & Sons for the 21sl. then due to her, for six months from that time, the defendant would pay the debt, provided he had work done as security for the same. The evidence was, that work had been done exceeding the value of 1000l. There was no evidence of payment: and the plaintiffs had no notice of the existence of any contract. [Byles, J. For anything that appeared, the whole of the work done had been already paid for: or it might have been that the work was to be paid for two years hence.] [271] The question is, upon whom was the burthen of proof? [Williams, J. You assume that this was a proviso, and therefore that the burthen of proof lay upon the defendant. But if, on the other hand, it was a condition, it was for the plaintiffs to shew that work had been done to the amount mentioned.] The object evidently was, that Hanson & Sons' establishment should not be broken up during the six months which it was anticipated would be required for the completion of the works at the defendant's shed: and, in considera-

(a) These two sums formed two of the items which composed the sum of 23l. 2s. 11d. mentioned in the particulars of demand, and were for castings delivered to Messrs. Hanson & Sons on the 27th of July, 1861, for work which was being done by them for the defendant.

tion of that forbearance, the defendant was to pay Hanson & Sons' debt, provided they had at any time done work at the defendant's shed to that amount. [Williams, J. "As security for the same." That is, if I have work done which will be a security to me for such payment.] The second memorandum relates to the work to be done thereafter. The words relied upon for the defendant were introduced by way of defeasance or restriction of the liability imposed upon him by the earlier part of the document, and therefore the burthen of proof lay on him. [Williams, J. There was evidence that *some* work was done posterior to the date of the memorandum,—to a small amount, not at all commensurate to the plaintiffs' claim under the first count. If your argument be good, it would be equally so if no work at all had been done since the date of the agreement by Hanson & Sons for the defendant.] Whether the work was done before or after the date of the agreement, the defendant was bound to pay Mrs. Hill to the extent of 218l. The consideration was forbearance. "A proviso is properly the statement of something extrinsic of the subject-matter of a covenant, which shall go in discharge of that covenant by way of defeasance: an exception is a taking out of the covenant some part of the subject matter of it:" 1 Wms. Saund. 233 b. n. (*ch*) to *Tinsley v. Pland*. In [272] *Chappell v. Bray*, 6 Hurlst. & N. 145, the plaintiff, part-owner of a ship, and who acted as ship's husband, being authorized by the other part-owners (of whom the defendant was one) to repair and lengthen the ship, gave verbal orders for the repairs, and *entered into a written contract with a ship-builder for lengthening the ship*. Afterwards, the plaintiff received a notice from the defendant that he would not be answerable for any alterations in the ship. The work was completed and the plaintiff paid for it, and, on telling the defendant the amount, he said that "the ship had better have been sold." The plaintiff having sued the defendant for his proportion of the money paid, it was held that he need not produce the written contract, since the work was done, the money paid under it, and the defendant, on being told the amount, did not deny his liability. [Willes, J. The decision in that case turned mainly upon the case of *Slatterie v. Pooley*, 6 M. & W. 664. At least three of the judges so put it. Byles, J., referred to *Dawson v. Wrench*, 3 Exch. 359.]

WILLIAMS, J. With respect to the claim made by the plaintiffs in the first count of the declaration, founded upon the guarantie of the 22nd of May, 1861, I am of opinion that the conclusion the learned judge came to was right, and that no case is made out under which the plaintiffs could maintain that claim. The terms of the guarantie are these,—"May 22nd, 1861. Mr. James Nuttall, of Barnoldswick, agrees to pay to Mary Hill, iron founder, Colne, on W. Hanson & Sons' account, of Skipton, the sum of 218l., being the amount owing to her by them, together with interest for the same, in six months from the above date, with interest up to this time, Nov. 22, 1861, *providing he has work done as security for the same*." And this memorandum was signed by the defendant. The first question [273] which arises upon this guarantie is, whether the concluding clause, "providing he has work done as security for the same," is either part of the consideration or at all events a condition precedent to any liability on it, because the effect of my Brother Blackburn's ruling was to throw the burthen of proof on the plaintiffs. On the part of the plaintiffs, it had been insisted that that clause was merely in the nature of a defeasance, and therefore that the burthen of proof lay on the defendant. On the part of the plaintiffs, it was contended that the only consideration for the defendant's entering into the guarantie was, the implied undertaking on the part of Mrs. Hill not to sue Hanson & Sons for six months. But it does not follow that it was not also part of the consideration that the defendant was to have work done as a security for the money to be paid by him under the guarantie: in which case the burthen of proof would be cast upon the plaintiffs; and the only question would be whether the evidence sustained it. I am clearly of opinion that it was either a partial consideration or a condition precedent that work should be done. The circumstances under which the guarantie was given were these:—Hanson & Sons were under a contract to perform certain engineering work for the defendant, the execution of which required castings which it was Mrs. Hill's business to furnish. There was a debt of 218l. due to Mrs. Hill for castings which she had already supplied, and she refused to go on unless her claim was satisfied, and pressed for payment. Hanson & Sons were unable to pay. If Mrs. Hill declined to furnish the castings, it was plain that the defendant would be much inconvenienced, inasmuch as his building would remain unfinished. The solution of the difficulty which the parties arrived at

was in substance this:—To satisfy Mrs. Hill's claim, the defendant undertook to guarantee the [274] payment. But it was necessary that he should have some security for the liability he thus incurred. The way in which that was arranged was this:—The time for payment of the debt due from Hanson & Sons to Mrs. Hill was to be extended six months; it being expected that at the end of that time the works in question would be completed, or at all events so far advanced that there would then be money due from the defendant to Hanson & Sons, which would form a security for the money he was contracting to pay to Mrs. Hill. In other words that, instead of then paying Hanson & Sons any money which might have become due from him to them, the defendant should pay Mrs. Hill to the extent of the 218l. The defendant would thus have full security for any payment he might be called upon to make under the guarantie. A part of the agreement necessarily was, that the defendant was not to become liable unless he had work done as a security. If that were so, what the plaintiffs had to prove was, that at the end of the six months the defendant was under a liability to her by reason of work done by Hanson & Sons under their contract with him for which money to the extent of 218l. was payable to them. The question is, whether the learned judge was right in holding that the evidence at the trial was not sufficient, without producing the contract between Hanson & Sons and the defendant. I am of opinion that he was right. The evidence given was, that work to the extent of 1050l. had been done under the contract prior to the date of the guarantie, but none since beyond what would be covered by the money paid into court. The learned judge ruled that, unless the contract was put in, it was impossible to say that there was any legal evidence out of which the defendant's liability could arise: but that it must depend upon the terms of the [275] instrument. I am clearly of opinion that the learned judge was right in so holding. So much for the first guarantie. Then it seems that, as to the future supplies, Mrs. Hill was not content to get security for her existing debt, but required further security for future castings. Accordingly, the second document was given to provide for those. The terms of the second guarantie were these,—“Colne, May 22nd, 1861. Mary Hill agrees to make and deliver castings required for Mr. Nuttall's shed at Barnoldswick, as usual, and Mr. James Nuttall to pay for the same in monthly payments on W. Hanson & Sons' account, of Skipton; to which agreement we the undersigned agree too.” And this was signed by Mrs. Hill, by one of the Hansons, and by the defendant. There was evidence that, in the way in which castings had been previously supplied by Mrs. Hill for Nuttall's shed, castings to the amount of 10l. 19s. 11d. beyond the 10l. 14s. paid into court, had been supplied by her to Hanson & Sons, and for the purpose of completing the work at the defendant's shed. It was not necessary that it should be proved that those castings had actually been forwarded to the defendant's shed. The terms of the second memorandum were satisfied by proving that they were delivered to Hanson & Sons. To the extent, therefore, of 10l. 19s. 11d., a verdict will be entered for the plaintiffs, pursuant to the leave reserved.

WILLES, J. I am of the same opinion. With respect to the first guarantie, it seems to me that my Brother Blackburn put the correct construction upon it at the trial. The question turns entirely upon the proviso at the end of that document,—“providing he has work done as security for the same.” Now, the doing of work by Hanson & Sons for Nuttall could hardly be a security for a payment by the latter to [276] Mrs. Hill in the ordinary sense. The true meaning of the proviso evidently is, “provided Nuttall at that time owes Hanson & Sons so much for work done by them for him;” so that, in the event of an action being brought by them against him for the work so done, he would have a right to set off the money he had paid to Mrs. Hill on their account. It is not an ordinary guarantie; but an agreement by which Mrs. Hill is subrogated into the place of Messrs. Hanson & Sons,—to have all the rights of Hanson & Sons, and to be paid (to the extent of 218l.) what might be due from Nuttall to them. It is evident, therefore, that, when she seeks to enforce the agreement, she must shew that the persons in whose place she stands would have had a claim to the extent to which she seeks to recover. To do this, she must produce the ordinary evidence. If Hanson & Sons had brought an action for the price of the work done, the first question would have been, —what is the nature of your claim? The answer to which would have been, that it arose upon a written contract: and the plaintiffs would have been nonsuited if they failed to produce the contract or to account for its non-production. The same result must follow here. According to all

ordinary notions, a claim which depends upon a written contract cannot be enforced without producing the writing. To put a case as an illustration, suppose an agreement between A. and B. by which A. promises to pay B. any debt which he may owe to C. If an action is brought by B. against A. upon that agreement, and it is proposed to prove that A. is indebted to C. upon an over due promissory note, B. could not recover in that action without producing the promissory note. Nor is there any hardship in putting such a construction upon this contract. The argument urged by Mr. Rew was founded mainly upon the plaintiffs' supposed [277] ignorance of the existence of a written contract between Hanson & Sons and the defendant. It is impossible, however, to rest the decision of the case upon any speculation as to whether or not the plaintiffs knew that the work done by Hanson & Sons for the defendant was done under a written contract. The law provides ample means of getting rid of any inconvenience of that sort by the service of a subpoena duces tecum: and, after all due and reasonable means have been taken to procure the production of the contract, if any existed, it would have been competent to the plaintiffs to give parol evidence of its contents. It has been said that there is authority for holding that it was unnecessary to produce the written contract in question: and for this *Chappell v. Bray*, 6 Hurlst. & N. 145, was relied on. But, when that case comes to be examined, it appears that the decision turned not on the ground that the non production of the written contract, simpliciter, was no bar to the plaintiff's right to recover, but upon the ground that the defendant had made an admission which rendered it unnecessary for the plaintiff to put in the agreement at all. The question here is widely different from that. It is, whether it was competent to the plaintiffs to prove a liability on the part of the defendant under a written contract, without producing the contract or accounting for its absence. I will take the judgment of each of the learned judges seriatim, for the purpose of shewing that that case is no decision on the point now before the court. The Lord Chief Baron says: "The third objection is, that the contract ought to have been in evidence. I am not prepared to decide whether it ought or ought not, for on the present occasion it is unnecessary, because, when the work was done, and the defendant was told the amount, he made no complaint that the sum with which he was charged was [278] not strictly correct, nor did he make any inquiry about it, but merely said that it would have been better to have sold the vessel. His conduct is evidence from which a jury might come to the conclusion that the claim was correct: and it is now too late for him to dispute it." With respect to Bramwell, B., he expressly founds his judgment upon *Slatterie v. Pooley*, 6 M. & W. 664; for he says,— "It was argued on the part of the defendant that his obligation was to pay a proportion of that money for which he was liable under the contract, and, since the contract was in writing, it must be produced. But *Slatterie v. Pooley* established that the necessity of proving a written agreement may be superseded by an admission of the defendant." Then comes Baron Channell, who observes upon this point,— "It is said that the order was given by a written agreement, which ought to have been produced. No doubt, its production would have been one mode, and the most convenient mode, of proving the plaintiff's claim: but I am not prepared to admit that it is the only mode. It was objected that no question as to the written agreement could be asked without producing it: but I think the agreement was not a necessary element in the plaintiff's case: for, there was proof that the work was done under it, the amount paid, and that it was not unreasonable: and there were circumstances from which the court, sitting as a jury, might infer that the defendant adopted the payment." It is true that Baron Wilde's judgment gives some colour for the argument which has been urged here. He says, "It appeared that the work was done and had been paid for, and, when the plaintiff told the defendant what it cost, he did not make any objection, but merely said 'the vessel had better have been sold.' If the question had arisen, whether independently of that conver-[279]-sation, it was necessary to put in the written agreement, I should not be prepared to hold that the plaintiff was bound to do so, seeing that there was evidence of an authority to enter into the agreement, and that it was executed." But, when we read what follows, it is impossible to hold that to have been the deliberate opinion of the learned Baron: for, he adds,— "Upon that, however, it is not necessary to give an opinion, for the point does not arise." No one member of the court, therefore, adopts or sanctions the notion that where the nature and extent of the defendant's liability is to be ascertained from the terms contained in a written contract, the production of the contract can be dispensed

with. It appears to me that the ruling of my Brother Blackburn was quite right. So far as to the first guarantie. With respect to the second, I need say no more than that I entirely agree with what has been said by my Brother Williams. The plaintiffs are entitled to have the verdict entered for them upon so much of the record as relates to the second agreement, for 10l. 19s. 11d.

BYLES, J. I am of the same opinion. Mr. Overend laid great stress upon the form of the stipulation at the end of the first guarantie, "providing he has work done as security for the same," which he insisted amounted to a proviso, and therefore cast the burthen of proof upon the defendant. I doubt, however, whether the doctrine as to a proviso which applies in the case of a covenant under seal, has any application to contracts of this nature. I entirely agree with all that has fallen from my Brother Williams. I think that the having work done as a security was a condition precedent, and that there is good reason also for holding it to be part of the consideration for the defendant's promise, though it is found at the end of the document. I also [280] agree that, as Mrs. Hill was to have the benefit of what might be due from the defendant under his contract with Hanson & Sons, she put herself in the place of Hanson & Sons; and, as they could not have sued the defendant upon that contract without producing it, neither could she or her representatives. As to the second memorandum, I also agree that the delivery of the castings to Hanson & Sons was a compliance with that agreement, and that there was evidence to go to the jury that castings were delivered under that agreement to the amount of 10l. 19s. 11d. beyond the amount paid into court.

KEATING, J., concurring,
Rule absolute accordingly.

EDMONDSON v. NUTTALL. June 17th, 1864.

[34 L. J. C. P. 102; 13 W. R. 53. Referred to, *Johnson v. Lancashire and Yorkshire Railway Company*, 1878, 3 C. P. D. 506.]

1. In an action for the conversion of goods of which the plaintiff has the immediate right of possession, the true measure of damages is the full value of the goods at the time of the conversion.—2. The plaintiff had certain looms in the defendant's mill, and demanded possession of them, the defendant having no right to detain them. The defendant, however, having obtained a judgment against the plaintiff in the county-court, in respect of which he would be entitled to issue execution against him on the next day, refused to deliver them up: and the looms were taken in execution on the following morning, and sold. In an action for this wrongful conversion, — Held, that the liability of the looms to the county-court process, and the fact that by the wrongful seizure the plaintiff's debt was (apparently) satisfied, were not circumstances which the jury could take into consideration in estimating the damages.

This was an action brought by the plaintiff, a weaver, against the defendant, the owner of a mill at Coates, in the county of Lincoln, to recover damages for the breach of an agreement to provide power for the working of the plaintiff's looms. There was also a count for the conversion by the defendant of seven looms belonging to the plaintiff. To this latter count,—to which alone it is necessary to advert,—the defendant pleaded not guilty and not possessed.

The cause was tried before Blackburn, J., at the [281] last Spring Assizes for the county of York, when the following facts appeared in evidence:—In July, 1860, the plaintiff agreed with the defendant for standing and power for twelve looms in the defendant's mill, for which he was to pay 9³/₄d. per week for each loom (a). After the looms had been at work for about two years, the plaintiff being in arrear with his weekly payments, and being unable to pay, it was agreed that the defendant should take five of the looms in satisfaction. The plaintiff becoming again in arrear for the standing of his remaining looms, the defendant sued him in the county-court, and on Friday the 29th of January, 1864, obtained judgment against him for 28l. debt, and

(a) See *Hancock v. Austin*, 14 C. B. (N. S.) 634, where it was held that these weekly payments could not be distrained for as "rent."

11l. 15s. costs; and the judge made an order on the plaintiff to pay these sums on the following Monday.

On Saturday the 30th, the plaintiff went to the mill for the purpose of removing his looms. The defendant did not then refuse to allow him to take them away, but desired him to come on the following Monday. On the Monday, the plaintiff made a formal demand of the looms, and the defendant said he could not have them then, as he (the defendant) was going out: and on Tuesday the looms were seized (and subsequently sold for 24l. 17s.) under an execution from the county-court at the defendant's suit. The writ in this action was issued on the same day.

The jury negatived the plaintiff's claim in respect of the breach of the agreement: and the learned judge reported that he was not dissatisfied with the verdict.

As to the count for the conversion, the learned judge told the jury that there was evidence of a conversion of the looms on the Monday, which he would leave to [282] them: but that, the goods detained being lawfully seized on the Tuesday, and the plaintiff having had the benefit of the proceeds in reduction of his debt, they *might* take that into account in estimating the damages. He also asked them to say what damages they found for the conversion, if in point of law they were bound to give the value of the looms, without reference to the county-court proceedings.

The jury returned a verdict for the plaintiff on the trover count, damages ¼d.; and they found the value of the looms to be 35l.

The learned judge thereupon reserved leave to the plaintiff to move to increase the damages to 35l., if the court should be of opinion that he ought to have directed the jury to find for the value of the looms seized, - neither party to appeal without the leave of the court.

Overruld, Q. C., accordingly, in Easter Term last, obtained a rule nisi to increase the verdict to 35l., pursuant to the leave reserved, on the ground that the plaintiff was entitled to recover the value of the looms at the time of the conversion, and on the ground that the judge misdirected the jury in telling them that they might take into consideration the probability of the looms being taken in execution.

Digby Seymour, Q. C., now shewed cause. The direction of the learned judge was perfectly correct. At the time this action was brought, the goods were actually in the custody of the law. [Willes, J. The defendant has possession of the goods on Monday, and he refuses to give them up, hoping that he will have an execution upon them on the Tuesday. The single question is, whether that reduces the plaintiff's claim in respect of the wrongful conversion on Monday to [283] nominal damages.] If the plaintiff had succeeded in obtaining the looms on the Monday, the defendant might have seized them on the following day: and therefore the plaintiff has really lost nothing by the conversion. In *Brerly v. Kendall*, 17 Q. B. 937, by indenture of sale, A. assigned all his household goods, &c., to secure a debt due from him to the assignees, subject to a proviso that the deed should become void upon payment of the said sum on a certain day, or on some earlier day to be appointed by the assignees by a notice in writing, to be served on A. twenty-four hours before the day of payment so appointed: interest to be paid in the meantime. It was also agreed by the deed that, after default made in payment, contrary to the said proviso, it should be lawful for the assignees to enter and take possession of the goods, and to sell them, and reimburse themselves out of the proceeds, accounting to A. for any surplus: and that, until such default, it should be lawful for A. to hold, use, and possess the said goods without hindrance from the assignees. The assignees served A. with a notice to pay on a day earlier than that named in the deed, and afterwards entered and took, and sold the goods assigned: but the notice was bad, having been served less than twenty-four hours before the day of payment appointed by the assignees. It was held, that A. had under the deed the right of possession of the goods, defeasible only by default in payment after due notice, and that he might therefore sue the assignees in trespass for having wrongfully entered and sold; but that, in such action, the measure of damages should be, not the value of the goods, but the value of the plaintiff's interest in them at the time of the trespass. So, here, the proper measure of damages was, the value of the plaintiff's interest in the looms at the time of the conversion. [Williams, J. Which was [284] 35l. In the case cited, the plaintiff had a partial and limited interest in the goods at the time of the seizure. Here, the plaintiff was the absolute owner of the looms at the time of their conversion.] The value of that interest was a question for the jury. They thought that the execution pending was

so certain that $\frac{1}{4}$ d. covered the value. The principle laid down by this court in *Johnson v. Stear*, 15 C. B. (N. S.) 330, is precisely applicable. There, A. deposited a dock-warrant for certain goods with B. as a security for a loan to be re-paid on a certain day, it being agreed that in default of payment B. should be at liberty to dispose of the pledge. A. became bankrupt, and B., *before the day of payment*, entered into an absolute contract for the sale of the goods, and *on the day named* handed over the dock-warrant to the vendee, who took actual possession of the goods on the following day. It was held that this was a wrongful conversion by B. of the goods of A.; and the majority of the court (Williams, J., dissenting) held that the proper measure of damages was, not the full value of the goods, but the actual damage incurred by A. by the premature sale, which, seeing that he had no intention to re-pay the loan,—was merely nominal. Erle, C. J., in delivering the judgment of the majority, there says: "It is clear that the actual damage is merely nominal. The defendant by mistake delivered one of the dock-warrants a few hours only before the sale and delivery by him would have been lawful; and by such premature delivery the plaintiff did not lose anything, as he had no intention to redeem the pledge by paying the loan. If the plaintiff's action had been for breach of contract in not keeping the pledge till the given day, he would have been entitled to be compensated for the loss he had really sustained; and that would be a nominal sum only. The plaintiff's action here is in name for the [285] wrongful conversion: but, in substance, it is the same cause of action: and the change of the form of pleading ought not to affect the amount of compensation to be paid. There is authority for holding that, in measuring the damages to be paid to the pawnor by the pawnee for a wrongful conversion of the pledge, the interest of the pawnee in the pledge ought to be taken into the account. On this principle the damages were measured in *Chinery v. Full*, 5 Hurlst. & N. 288. There, the defendant had sold sheep to the plaintiff, and, because there was delay in the payment of the price by the plaintiff, the defendant re-sold the sheep. For this wrong the court held that trover lay, and that the plaintiff was entitled to recover damages: but they also held that, in measuring the amount of those damages, although the plaintiff was entitled to be indemnified against any loss he had really sustained by the re-sale, yet the defendant, as an unpaid vendor, had an interest in the sheep against the vendee under the contract of sale, and might deduct the price due to himself from the plaintiff from the value of the sheep at the time of the conversion." [Willes, J. Suppose the looms had been destroyed by an accidental fire on the Monday night, who would have borne the loss?] The plaintiff, doubtless. The jury might fairly infer here that the plaintiff had no intention to pay the judgment-debt. [Byles, J. The consequence of entering a verdict for the plaintiff for the full value now would be, to pass the property in the looms to the defendant: and thus he will have taken in execution his own goods (a).] In *Chinery v. Full*, Bramwell, B., [286] says: "The cases on this subject are well put together in Mayne on Damages, 215, and shew that in this action it is not an absolute rule of law that the value of the goods is to be taken as the measure of damage. There are several cases which may be mentioned as illustrative of this. For instance, where a defendant, after having been guilty of an act of conversion, delivers the goods back to the plaintiff, the actual damage sustained, and not the value, is the measure of damages. So, where a man has temporary possession of a chattel, the ownership being in another, the bailee no doubt may maintain an action; but only for the real damage sustained by him in the deprivation of the possession. Other cases might be cited to shew that there is no such absolute rule of law as to the damages in trover as that suggested." [Williams, J. Suppose a man were charged with the conversion of fowls by eating them, would it be any answer to the claim for full damages to say that, if he had not taken them, per adventure a fox would have come and eaten them?] The danger of seizure in the

(a) "By a former (?) recovery in trover, and payment of the damages, the plaintiff's right of property is barred, and the property vests in the defendant in that action: see *Adams v. Broughton*, 2 Stra. 1078, Andrews, 18, and Jenkins, 4th Cent. Ca. 88, where it is laid down,—'A., in trespass against B. for taking a horse, recovers damages: by this recovery, and execution done thereon, the property in the horse is vested in B. 'Solutio pretii emptiois loco habetur.'" Per Tindal, C. J., in *Cooper v. Shepherd*, 3 C. B. 272.

case supposed would not be so imminent as it was here. In *Cameron v. Wynne*, 2 Car. & K. 264, in an action of trover, where the plaintiff had been endeavouring to baffle his creditors by a merely ostensible transfer of the goods to another, and where they were seized upon premises in which the plaintiff's tenancy had expired, it was held,—first, that there was a sufficient possession as against a wrong-doer, without regard to the question of ownership,—and, secondly, that the measure of damages was the value of the plaintiff's real and bona fide interest in the goods, and not the full value. These authorities [287] ties clearly shew that the question is one of interest, not of title. If the jury were justified in coming to the conclusion, from all the facts before them, that the plaintiff could not have got his looms away so as to have escaped the impending execution, the learned judge was right in telling them that they might take that into consideration in estimating the damages.

Overend, Q. C., and Rew, in support of the rule. There was nothing to warrant the jury in awarding the plaintiff less than the full value of the goods, for their wrongful conversion. *Attkin v. Bramwell*, 9 Jurist, N. S. 892, is almost identical with the present case. There, the landlord, who had distrained the goods of his tenant for rent in such a manner as to render himself a trespasser ab initio, was made to pay in the shape of damages the full value of the property seized. The same arguments were urged there which have been urged upon the present occasion, but without avail. Cockburn, C. J., said: "I think it must be taken that, where a man, under colour of legal authority, as in the case of a distress for rent, does that which makes him a trespasser ab initio, he is in the same position as a total stranger acting without authority. The defendant, then, being in the position of a stranger, and having broken into the plaintiff's house and seized his goods, it certainly does not lie in his mouth to say he has applied the goods for the benefit of the party bringing an action for the trespass." Crompton, J., said: "I can regard the defendant in no other light than as a trespasser without justification. The goods have been lost to the plaintiff, and, by the ordinary rule, nothing in such case can be taken to reduce their value,—that is to say, the measure of damages must be the full value of the goods." And, adverting to the case, which had been suggested in argument, of [288] the goods converted being in the hands of the defendant subject to a lien, he adds: "There, it is clear, all that is recoverable is, the value of the goods detained, minus the debt the foundation of the lien: here, however, there is no lien in existence, the defendant being, under the circumstances, nothing more than a stranger, who had no right whatever to interfere with the goods. The only ground upon which it is said that the plaintiff's interest was less than the actual value of the goods is, that the goods having been seized and sold, the rent was satisfied: but this is too remote; and *Keen v. Priest*, 4 H. & N. 236, is an authority to shew the fallacy of such a proposition. A man who enters the house of another, and wrongfully seizes his goods, has no right to avail himself of such a defence: and I think the case I put in the course of the argument, of a landlord entering upon the premises of his tenant, and distraining for rent not accrued due, and afterwards attempting to palliate the act by saying, 'I put the proceeds of this unjustifiable proceeding against the rent when it becomes due,' is entirely applicable to the present case." And Blackburn, J., who had directed the jury there substantially as he did here, intimated that he had no doubt but that he should have told the jury that the proper measure of damages was the value of the goods seized. Here, the defendant had no lien, nor any interest whatever in the goods, at the time of the seizure. [Byles, J. Do you contend that, if the goods were converted for a minute, and then given back to the owner, he would be entitled to recover the full value as damages for the conversion?] No. [Byles, J. The contingency of the goods being taken under the county-court execution was converted into a certainty before the commencement of the action. Willes, J. A return of the goods after action brought goes in mitigation of damages: see [289] *Moon v. Raphael*, 2 N. C. 310 (a).] The probability of his having an execution next day was no justification for the fraudulent act of the defendant, and ought not to be taken into account. The facts which happened subsequently have nothing to do with the value of the plaintiff's goods at the time of the conversion. If *Keen v. Priest*, 4 Hurlst. & N. 236, be good law, the direction of the learned judge here was clearly wrong. There, the owner of sheep seized and sold under a distress for rent

(a) And see the authorities cited in *Williams v. Archer*, 5 C. B. 318.

which was unlawful, because there were other goods on the premises belonging to him which might have been distrained for the same rent, was held to be entitled to recover from the distrainer, not merely nominal damages, but the full value of the sheep so seized. "It is a general rule," said Martin, B., "that, if a man does an illegal act, he is responsible for the consequences of it. It is no answer to say that the defendant might have seized other goods. The plaintiff's sheep having been sold, he is entitled to recover their value." So, here, it is no answer for the defendant to say that he might have seized these goods upon another day. And Bramwell, B., contents himself with saying, that, "in trespass for taking goods, the measure of damages is the value of the goods." In *Johnson v. Starr*, 15 C. B. (N. S.) 330, Williams, J., differed from the rest of the court. [Williams, J. No doubt, I was wrong.] It is submitted not (*b*). The whole court agreed that, in a case like this, the measure of damage was the value of the goods to the plaintiff at the time of the conversion. [Willes, J. Suppose the looms had been delivered up on the Monday and taken to the plaintiff's house, and the bailiff had broken open the outer door and taken the looms away and sold them, could the now plaintiff have recovered, either against the bailiff, or against the execution-creditor, if party to the trespass, the full value of the looms? The goods would have been equally got at there by means of a wrongful act.] In the case put, the plaintiff, it is submitted, would be entitled to recover the full value, or at all events the difference between the real value and the sum which the bailiff sold the goods for. As between the two parties, the writ may have bound the goods. [Willes, J. That is the answer. The act of entering would be unlawful,—so held from *Scutney's case*, 5 Rep. 91 a., Cro. Eliz. 908, Moor, 668, downwards: but the execution would be good (*a*). The true solution may be, that there was a lien by force of the writ. It is an apparent exception from the rule that no man shall take advantage of his own wrong.] In the cases where the distress was held to be unlawful, though the full value was recovered, the rent remained undischarged. [Williams, J. Apparently the judgment was satisfied here: yet the execution-creditor has taken his own goods.] That might have been set right by an application to the county-court. [Byles, J. In *Harvey v. Poole*, 11 M. & W. 740, it was held that, where a landlord distrains for rent, amongst other things, goods which are not distrainable in law (as, looms in work, there being sufficient without them to satisfy the rent), and the tenant pays the amount of the rent and the costs of distress, upon which the distress is withdrawn altogether, the [291] tenant is entitled, in an action of trespass, to recover only the actual damage sustained by the taking of those particular goods, and not the whole amount paid by him,—the distrainer, in such a case, being a trespasser ab initio only as to the goods which were not distrainable. Does the form of action make any difference? It is submitted not. [Williams, J. Until the case of *Faulds v. Willoughby*, 8 M. & W. 540, it was always said that where trespass would lie trover would. One of the reasons for denying that proposition is that, in trover, the jury must give the full value.] In that case, the thing complained of was, a wrongful interference with the plaintiff's horses, without any claim of property, or conversion of them to the defendant's use. It was clearly a misdirection on the part of the learned judge to tell the jury that they might take the county-court process into their consideration in estimating the amount of damages. As a matter of law, the defendant had no right to interfere with the plaintiff's goods: and, having done so, he must, as Erle, C. J., says, in *Hamcock v. Austin*, 14 C. B. (N. S.) 639, pay the value of them.

WILLIAMS, J. I am of opinion that the rule must be made absolute to enter a verdict for the plaintiff for 35l. My Brother Blackburn reserved leave to the plaintiff to move to that effect, if the court should be of opinion that he ought to have directed the jury to find for the value of the looms seized. I am of opinion

(*b*) The learned judge puts the right of the plaintiff there to recover the full value of the goods converted, upon the technical ground that, "the bailment having been terminated by the wrongful sale, the plaintiff might have resumed possession of the goods freed from the bailment, and might have held them rightfully when so resumed, as the absolute owner against all the world." And see *Pigot v. Oakes*, 15 C. B. (N. S.) 701.

(*a*) See *Percival v. Stamp*, 9 Exch. 167. And see the notes to *Scutney's case* in 1 Smith's Leading Cases, 5th edit. 96.

that he ought to have done so. The substance of the transaction was this:—The defendant committed a wrong by seizing goods of the plaintiff under circumstances which the jury found to be a conversion of them to his own use. It was clearly established that the goods were wrongfully seized by the defendant. But it is contended that the rule, which is before [292] you, is a *prima facie* rule, that for an act of this sort the plaintiff is entitled to recover as damages the full value of the goods seized, ought not to prevail here, because the defendant shews mitigating circumstances, viz. that, after he had been guilty of wrongfully converting the goods of the plaintiff, he caused them to be applied so as to be apparently a satisfaction of a judgment debt due to himself. In other words, the defendant insists that, because with the proceeds of the plaintiff's goods which he so wrongfully converted, he has satisfied his own debt, that fact must be taken into consideration by the jury in ascertaining what measure of damages the plaintiff ought to receive for the wrong done to him. I utterly decline to acknowledge the soundness of that argument. There is nothing unlawful in a man's withdrawing his goods for the purpose of avoiding an impending execution. He may choose to apply them in satisfaction of the claim of another creditor; and this he has a perfect right by law to do, apart from any question arising upon the bankrupt or insolvency law. It is clearly no ground for mitigation of damages for the defendant to say that he has chosen to detain the plaintiff's goods in order that he may seize them and apply the proceeds in satisfaction of his own debt. If he might do this, what is there to prevent his doing so for the purpose of satisfying his friend's execution, which he knows to be outstanding? The case has been likened to that of the re-delivery of the thing converted, which is allowed to go in mitigation of damages; as in *The Countess of Rutland's case*, cited in Rolle's Abridgement, *Action sur Case* (L.), where it is said,—“If a man take my horse and ride him, and then re-deliver him to me, still I may have an action against him; for, it is a conversion, and the re-delivery is no bar to the action, and only goes in mitigation [293]-tion of damages.” So, in *Moon v. Raphael*, 2 N. C. 310, where the defendant, a sheriff, who held goods taken in execution, delivered them to the plaintiff's assignees of a bankrupt, after an action of trover had been commenced by them, and the plaintiff's accepted them without condition,—it was held that they could not recover in the action more than nominal damages; at all events, not without alleging special damage in the declaration. The only other case in the books which I am aware of, in which a re-delivery after action brought has been allowed to go in mitigation of damages, is that of *Williams v. Archer*, 5 C. B. 318. There, in detinue for railway-scrip which had been delivered up to the plaintiff, after action brought, under a judge's order, it was held by the Exchequer Chamber that, inasmuch as the scrip had already been re-delivered, the verdict and judgment had been properly confined to an assessment of damages for the detention; by analogy to the case of the re-delivery of charters (17 E. 3, fo. 45 b., pl. 1,) being rendered impossible by reason of their having been burnt. Here, however, the goods were never re-delivered to the plaintiff. He never had power to do as he pleased with them. There is no ground whatever for saying that the defendant ever restored to the plaintiff the control over his goods. Contrary to the plaintiff's wishes, he devoted them to the payment of his own debt. Then comes the main argument. It was said that, if the plaintiff were allowed to recover by way of damages in this action the full value of the goods, the consequence will be that the goods will be by virtue of the judgment and execution regarded as having been the property of the defendant from the time of the conversion. The obvious answer to that is, that, in the result, the seizure of these goods will not have operated in satisfaction of so much of the debt due to the [294] defendant upon his judgment in the county court. The execution, having been satisfied so far out of what turn out to have been the execution creditor's own goods, is no satisfaction at all, and the now defendant may go to the county-court and obtain leave to issue fresh process. There is no ground for urging what has been done in mitigation of damages: and therefore the rule must be made absolute.

WILLES, J. I am of the same opinion. The measure of damages for the conversion of goods is *prima facie* their value. The direction, therefore, of my Brother Blackburn to the jury in this case was wrong, unless there were circumstances to make some other principle applicable. Such circumstances may exist either where the plaintiff has only a limited interest in the goods at the time of the conversion, or where the defendant

has a lien upon them, or, as in *Brierly v. Kendall*, where the plaintiff had a defeasible right to the possession of them. There is nothing to make this case an exception from the general rule, that the plaintiff is entitled to recover all he has lost by the defendant's wrongful act. Then, there is the case in which the goods wrongfully seized have been afterwards returned. The cases of *Fauldes v. Willoughby*, 8 M. & W. 540, and *Harvey v. Pooch*, 11 M. & W. 740, afford a familiar illustration of the rule. The circumstances I have referred to have from very early times been considered admissible in mitigation of damages, because the plaintiff has had part satisfaction for the wrong. If the goods have been restored, and the plaintiff has consented to take them back in discharge of the claim, that might perhaps be pleaded by way of accord and satisfaction: if not, it would go in reduction of the amount of damages to which the plaintiff would be entitled for the wrongful conversion. There [295] is also another case in which a mitigation of damages is allowed upon a very peculiar ground,—the case of one who, as executor de son tort, has dealt with the goods of the deceased in a due course of administration, and relies on that as an answer to an action brought against him by the real executor appointed under the will. There, the character of the act of wrong is determined at the time it is done. The law, however, regards it with so much favour that, if the real executor would have done the same, no recovery is allowed against the executor de son tort in respect of damages for that part of the estate which has been so applied. In all these cases, the damages are allowed to be mitigated, either in respect of the interest of the plaintiff in the goods being less, or of his having already received a partial satisfaction of the damages, or of the act being an act having a rightful character in respect of the persons towards whom it is done and in whose favour it operates at the time. But that principle cannot apply here, where the plaintiff had an unqualified right at the time to do as he liked with the goods, and the act of the defendant was wrongful and without any justification. I cannot help thinking that we should be violating the rule of law which prohibits a man from taking advantage of his own wrong, if we were to hold that the defendant's execution was to have a greater advantage or be more beneficial to him by reason of his wrongful act in seizing and detaining the plaintiff's goods for the purpose of making them amenable thereto. There clearly was nothing like a re-delivery of the goods to the plaintiff here. So long as law shall endure, parties cannot be allowed to be judges or bailiffs in their own cases. In all cases save the exceptional one of a distress, the final process of the law is to be executed by the officers of the law. A person who has in violation of the law taken upon himself to seize goods which he has no right to, ought [296] not to be allowed to come and ask for any favour or encouragement,—which we should in effect be allowing if we held that the subsequent seizure under the county-court process could qualify the defendant's wrongful act of detaining the goods on the previous day. I observe that my Brother Blackburn did not express any opinion on the point of law at the trial. He left the matter to the jury, not with a direction such as he would have given them in the case of a plaintiff having but a limited interest in the goods, or of a defendant having a lien, or in the case of a re-delivery: but he simply told them that they *might* take the fact of the plaintiff having the benefit of the proceeds in reduction of his debt into account in estimating the damages. He evidently felt the difficulty of stating that as a proposition of law. To hold that the defendant is entitled to have the fact of the goods being liable to the county-court process taken into consideration in estimating the damages in this action, would be giving him a greater advantage than the law would give him in the ordinary case of a lien, or in the other cases which I have put. Considering what violence might ensue if a creditor were allowed, for the purpose of securing his debt, to resort to an act unlawful at the time, and to justify it afterwards by something which did not then exist, I think we are not warranted in allowing the inchoate right of the defendant to have execution against the goods in question to operate in reduction of the damages which the plaintiff is entitled to for the wrongful seizure. There is a case where this doctrine was attempted to be carried to a very great length. I allude to the case of *Gillard v. Brittan*, 8 M. & W. 575. There, the seller of goods which had not been paid for, re-took them by violence from the buyer, and, in an action brought against him by the buyer for the trespass, insisted that the jury might, in estimating the damages to which the plaintiff was [297] entitled, allow the value of the goods so unpaid for in mitigation. But the court of Exchequer took a different view of the matter, and

held, for reasons which are equally applicable here, that the defendant must pay by way of damages for his unlawful act the full value of the goods seized. For these reasons, I am of opinion that the rule must be made absolute to increase the damages to 35l., the value contingently assessed by the jury.

BYLES, J. I am of the same opinion, though I must confess I at first entertained considerable doubts. He who wrongfully converts goods of another is *prima facie* liable in damages to the full value of the goods converted; and it is no answer to say that the wrongful act of the defendant has operated to relieve the plaintiff from a debt. As, if a man were to convert a bag of money belonging to A, it would be no answer for him to say that with the contents he had satisfied a debt due from A. to B: the full value of the money converted would still be the true measure of damages for the defendant's wrongful act. The present case is very distinguishable from the case of goods re-taken, or of goods returned and the restoration accepted in satisfaction. Another difficulty which occurred to me in the course of the argument was this,

The debt is paid, and the party has lost his goods,—but he gets 35l. by the transaction. That, however, I apprehend, is not so. The effect of the judgment and execution in this action is, that the property is changed. The result is, that probably the defendant may now go to the county court and get new process upon his judgment there. I am clearly of opinion that the jury ought to have been directed to find for the plaintiff for the full value of the looms seized.

KEATING, J., had gone to Chambers.

Rule discharged.

[298] HEYWORTH AND OTHERS v. KNIGHT. June 4th, 1864.

[S. C. 33 L. J. C. P. 298; 10 Jur. N. S. 866.]

1. The defendant authorized his brokers by letter to buy for him a cargo of bone-ash at a certain price per ton,—"on a basis of 70 per cent. mean of two London chemists: usual London terms, viz. cash in twenty-eight days, less $2\frac{1}{2}$ per cent." This offer was communicated by the defendant's brokers to the sellers' brokers by letter as follows,—"We can take the cargo at, &c., cash in twenty-eight days from last day of landing, less $2\frac{1}{2}$ per cent: to be analyzed by two London chemists." The sellers accepted the offer, and sent a bought-note to the buyer's brokers, describing the terms of payment thus,—"Payment, cash before delivery, allowing a discount of $2\frac{1}{2}$ per cent. equal to cash in Liverpool within twenty-eight days from last day of landing:"—Held, that there was no substantial difference between the offer and the acceptance, and consequently that there was a binding contract between the parties. —2. Where a complete contract (through brokers) for the sale of goods is to be gathered from a written offer on the one side and a written acceptance on the other, such contract is not the less binding on the buyer because bought and sold-notes are subsequently exchanged between the brokers, containing terms not warranted by the authority given to the buyer's broker, at all events, in the absence of evidence of a custom in the particular trade to contract by bought and sold-notes, or of a distinct understanding between the parties to that effect. —3. Remarks upon *Cowie v. Remfry*, 5 Moore's P. C. 232.

This was an action by the sellers against the buyer, for refusing to receive a cargo of bone-ash, alleged to have been sold by the plaintiffs to the defendant through their respective brokers.

The declaration stated that the plaintiffs bargained and sold to the defendant, and the defendant bought from the plaintiffs, certain goods, that is to say, 284 tons of ash, at 5l., on a basis of 70 per cent. mean of two London chemists, and 5 tons of bones and 25 tons of piths at 5l. 5s. per ton, upon usual London terms, viz. payment by cash in twenty-eight days, less 2l. 10s. per cent. discount: Averment, that all conditions were fulfilled, and all things happened, and all times elapsed, necessary to entitle the plaintiffs to maintain the action and to have the said goods accepted by the defendant: Breach, that the defendant did not accept the said goods from the plaintiffs or pay them the said prices for the same; whereby the plaintiffs incurred expenses in keeping the said goods and re-selling the same, and also incurred a loss upon such re-sale.

The defendant pleaded a denial of the contract as alleged: whereupon issue was joined.

The cause was tried before Willes, J., at the last Spring Assizes at Liverpool. The question was whether [299] there had been any contract made in accordance with the authority given by the defendant to his brokers; and it depended upon the construction to be put upon certain letters, telegrams, and bought and sold-notes. The correspondence commenced with a letter from the brokers to the defendant, dated the 5th of November, 1863, as follows:—

“Henry Knight, Esq., London.

“Liverpool, 5th November, 1863.

“Dear Sir,—We are offered a small cargo now at sea about sixty days, as follows: about 284 tons ash,

“5l. on 70 per cent.

“5 tons bones } 5l. 5s
“25 tons piths }

“Let us know if it will suit, and your extreme limits, and we will do the best we can for you.

“JOHN BECKWITH, JUN. & CO.”

On the following day the defendant wrote to Beckwith & Co., his brokers, the letter which was relied upon as the authority, and which was as follows:—

“Messrs. John Beckwith, jun. & Co.

“London, 6th November, 1863.

“Dear Sirs,—I had your favour of yesterday, and note contents. I would take the cargo referred to,—ash at 100s. on a basis of 70 per cent. *mean of two London chemists*, and bones and piths at 105s. (though it is 10s. too dear for piths), *usual London terms, viz. cash in 28 days, less 2½ per cent.* I have no doubt you will be able to carry it through on these terms. I always buy ‘28 days,’ and declined a cargo the other day at 100s. because these terms were not agreed to. This offer is made, presuming the cargo can go to any safe port, and that your brokerage is 2½ per cent.

“HENRY KNIGHT.”

On the 7th of November, Beckwith & Co. tele-[300]-graphed to the defendant, as follows:—“Price will be accepted for cargo, but terms must be *cash in fourteen days, usual discount. Liverpool conditions. Telegraph.*”

The defendant being from home, no answer was returned to this telegram; and on the same day Beckwith & Co. wrote to Martin & Co., the plaintiffs’ brokers, as follows:—

“Messrs. G. F. Martin & Co.

“Liverpool, 7th November, 1863, 3 p.m.

“Dear Sirs,—Our friends have not answered our telegram; therefore we may reasonably presume they will not take the cargo on your terms; more especially as they say in their letter,—‘We always buy at 28 days, and declined a cargo the other day at 5l. because these terms were not agreed to.’

“We can take the cargo at 5l. per ton 70 per cent. ash, and 5l. 5s. bones and piths, *cash in twenty-eight days from the last day of landing, less 2½ per cent. To be analysed by two London chemists.* To go to any safe out port. An early answer will oblige.

“JOHN BECKWITH, JUN. & CO.”

On the same day the plaintiffs’ brokers sent to the defendant’s brokers the following memorandum:—

“‘Vasco di Gama.’

“We accept your offer: payment 28 days. Please confirm.”

To this the defendant’s brokers replied on the same day,—

“We confirm your acceptance of our offer for the cargo bones and ash per ‘Vasco di Gama.’ Contract, we presume, in due course: say on Monday.”

The defendant’s brokers on the same 7th of November wrote to the defendant as follows:—

[301] "Henry Knight, Esq.

"Liverpool, 7th November, 1863.

"Dear Sir, — We telegraphed to you to the effect that the importer of the cargo bones and ash would accept the price but not the conditions offered in your favour of yesterday's date. However, late this afternoon we induced his brokers to close; so have now the pleasure of advising the purchase on your own terms, viz. 5l. per ton on 70 per cent. ash, and 5l. 5s. for bones and piths. (Cash in 28 days from last day of landing, less 2½ per cent. discount. *Ash to be analyzed by two London chemists.* The contract shall be forwarded by Monday's post: being mail-day, and very late, it is not likely to be sent in. [Some remarks followed about the amount of brokerage.] Name of vessel, 'Vasco di Gama.' Can go to any safe port.

"JOHN BECKWITH, JUN. & Co."

To this the defendant replied, "I am in receipt of your favour, and note contents. I could have bought a week ago on the terms you mention, and therefore must decline to purchase on *Liverpool conditions*. I have refused offers on the same terms." And on the 9th he sent his brokers the following telegram,—"I do not confirm till I see contract. Conditions must be those of a London contract. 2s. 6d. a ton allowed for weighing and port-charges."

On the same day Beckwith & Co. sent the following telegram to the defendant,—"Accepted contract on Saturday according to definition in your letter of London terms."

On the 9th of November, Beckwith & Co. wrote to Martin & Co., the plaintiffs' brokers, as follows:—

"Messrs. G. F. Martin & Co.

"Liverpool, 9th November, 1863.

"Dear Sirs, —The contract for cargo ash, &c., per [302] 'Vasco di Gama' appears to be all correct, except in regard to the clauses referring to the analysis. We cannot ourselves say that our friends will assent to a third chemist being called in, should there be a difference of more than 3 per cent. between the two originally named; neither that they will agree to have the samples ground and passed through a 20-holed sieve. Such being the case, we must return the contract until we receive his reply, which no doubt will be perfectly satisfactory.

"JOHN BECKWITH, JUN. & Co."

The sold-note, which, though dated the 7th of November, was not delivered to the defendant's brokers until the 9th, was as follows:—

"Messrs. John Beckwith & Co.

"Liverpool, 7th November, 1863.

"We have this day sold to you, per account of Messrs. Heyworth, Pearce, & Balman, a cargo of about 280 tons ash, 5 tons bones, and 25 tons piths, more or less, expected to arrive per 'Vasco di Gama' from River Plate, to discharge at any safe port in the United Kingdom, at 5l. per ton for bone-ash, on a basis of 70 per cent. of phosphate; the price to rise or fall as the ash may deviate from that standard; the bones and piths at 5l. 5s. per ton. The ash to be analyzed by J. C. Nesbitt, Landsell, & Co., on behalf of the sellers, and by _____ of London on behalf of the buyer: *the two results to be added together*, and the ash invoiced at the mean given: but, in the event of a difference of over 3 per cent. between the results received from the above named chemists, a third sample to be sent to _____, and the mean of the two nearest results to be taken: the third sample to form part of the original, to be sealed and kept in the possession of the selling brokers or their agents. A fair sample of the ash to [303] be taken from time to time in each day's discharge (the weight not to be less than 5 cwt.), and to be ground so as to pass through a 20-holed sieve: and at the completion of the discharge, the same to be under the supervision of both sellers and buyer on their agents, who shall forward the samples to the respective chemists, with instructions to furnish both parties with results.

"The cargo to be weighed in the usual manner, and to be taken with all faults and defects from over the ship's side as fast as the captain can deliver it; failing which, to be re-sold at the sellers' discretion, and the buyer to be liable for any loss, demurrage, or other expenses arising therefrom. The ship-damaged (if any) to be taken at the selling brokers' valuation.

"The buyer to advance money to pay freight on the entire cargo, and any other charges to which the sellers may be liable, without making any charge for so doing; the amount of such payments to be deducted from invoice.

"In case of non arrival, this contract to be void: and, should the vessel, from any unforeseen circumstances, be prevented from delivering the whole of the cargo originally shipped, this contract to be void as regards the undelivered portion. In the event of any dispute arising in the completion of this contract, the same to be settled by arbitration in Liverpool.

"*Payment, cash before delivery*, and the weighing of the whole or delivery of part not to be considered a delivery of the whole, *allowing a discount of 2½ per cent. equal to cash in Liverpool within 28 days from last day of landing.*

"G. F. MARTIN & Co."

On the same 9th of November, the defendant's brokers wrote to him, as follows:—

[304] "Henry Knight, Esq.

"Liverpool, 9th November, 1863.

"Dear Sir,—We duly received your telegram as follows,—'I do not confirm till I see contract. Conditions must be those of a London contract: 2s. 6d. a ton allowed for weighing and port-charges.' We telegraphed in reply,—'Accepted contract on Saturday according to definition in your letter of London terms.' If you will refer to what you wrote us on the 6th instant, you will perceive that you yourself defined the usual London terms, authorizing us at the same time to make the purchase, which we were enabled to do late on Saturday afternoon. We have since applied on your behalf for an allowance of 2s. 6d. per ton for weighing and port-charges: but the brokers refuse, on the ground that they never admit it, and always deliver the cargoes themselves. The contract we trust you will find to be perfectly correct. The clauses relative to sampling and analysis are what are now usual; and we ourselves are of opinion they are decidedly for better protection of both buyer and seller.

"We are offered another cargo, sailed end of August: 290 tons ash and 60 tons bones. Ash at 5l. per ton 70 per cent., bones at 5l. 10s. per ton. Something less might be accepted for the latter. Will it suit you?

"JOHN BECKWITH, JUN. & Co."

On the same day, Beckwith & Co. sent the defendant a bought-note,—

"We have this day bought for your account, of Messrs. Heyworth, Pearce, & Balman, per Messrs. G. F. Martin & Co., a cargo of about 280 tons ash, 5 tons bones, and 25 tons piths, more or less, expected to arrive per 'Vasco di Gama,' from River Plate," &c., &c., as in the sold-note.

On the 10th of November, the defendant sent the following telegram to Beckwith & Co.,—

[305] "Your terms respecting sampling, analysis, and payment, are Liverpool, not London terms, and are very objectionable. I decline the cargo altogether."

Messrs. Beckwith & Co. immediately communicated this telegram to the plaintiffs' brokers, and wrote to the defendant, as follows:—

"Liverpool, 10th November, 1863.

"Dear Sir,—We are in receipt of your telegram, viz., 'Your terms respecting sampling, analysis, and payment, are Liverpool, not London terms, and are very objectionable. I decline the cargo altogether.' This we communicated to the sellers, who say in reply that the clauses relating to analysis and sampling are acknowledged to be the best that have yet been framed, to protect both buyer and seller. Nevertheless, though holding you bound by the contract, they are willing to meet you in these respects: also as to the payment being made equal to cash in Liverpool. The contract has been framed on your letter of the 6th instant, which distinctly specifies what are 'usual London terms.'

"JOHN BECKWITH, JUN. & Co."

On the same day the defendant replied, as follows:—

"London, Nov. 10th, 1863.

"Dear Sirs,—If you refer to my letters of the 6th and 7th instant, you will find

that I distinctly stated my objections to Liverpool terms. I have never entered into a contract that contained such a stipulation as to sampling and analysis, nor do I intend; nor have I been asked for cash before delivery, when I have bought through a London house. Moreover, there is always an allowance made to the buyer to cover weighing, port-charges, &c. If I am to treat for the cargo, the basis must be that of a usual London contract.

"HENRY KNIGHT."

[306] It was proved that the analysis always was made in London, and that it was the invariable custom to take the mean of the two chemists.

On the part of the defendant it was submitted that the correspondence did not shew a contract between the parties upon the only terms upon which the defendant was willing to contract, viz. those contained in his letter of the 6th of November; the plaintiffs' acceptance thereof differing from the offer in two important respects,—first, in respect of the analysis, which was to be the "mean of two London chemists,"—secondly, in respect of the sellers requiring cash before delivery, the defendant's offer being "cash in twenty-eight days."

On the other hand, it was insisted that the letters of the 6th and 7th of November contained a complete contract, and that there was no substantial difference between the terms contained therein respectively.

In answer to a question put by the learned judge to one of the defendant's witnesses (Mr. John Beckwith), that gentleman said that there was no difference between "cash" and "prompt."

Under the direction of the learned judge, a verdict was found for the plaintiffs, leave being reserved to the defendant to move to enter a nonsuit or a verdict for him, if the court should be of opinion that there was no evidence of any contract made in accordance with his letter of the 6th of November, 1863.

Mellish, Q. C., in Easter Term last, obtained a rule nisi accordingly.

Edward James, Q. C., and McCulloch, now shewed cause. They submitted that the letters of the 6th and 7th of November, constituted a complete contract,—an offer on the one side and an acceptance on the [307] other: and that there was no substantial variance between the terms of the two documents, either in respect of the period of payment or in the mode of analysis. *Gregson v. Ruck*, 4 Q. B. 737, was referred to.

Mellish, Q. C., and Littler, in support of the rule. The first question is, which is the binding contract, the letters or the sold-note? It is clear that the correspondence was mere negotiation, and that the contract which was to bind the parties was that contained in the sold-note. That being rejected by the buyer, and properly rejected, because it contained terms differing from and inconsistent with the offer he had made through his brokers, it was not competent to the sellers afterwards to fall back upon the letters. [Willes, J. As far as it goes, *Corrie v. Remfry*, 5 Moore's P. C. 232, seems rather in your favour.] This is even a stronger case than that. [Byles, J. All the terms are agreed on in the letters of the 6th and 7th of November: and there is no plea of rescission.] The defendant could not have gone on with the contract without being bound by all the conditions contained in the bought and sold-notes, and these differed materially from the terms proposed on the part of the defendant as well in the mode of payment as in the way in which the analysis was to be made.

ERLE, C. J. The question is, whether the letters of the 6th and 7th of November, 1863, which passed between the respective brokers constituted a contract within the authority given by the defendant to his brokers. The authority was, to buy the ash "at 100s. on a basis of 70 per cent. mean of two London chemists: usual London terms, viz. cash in twenty-eight days, less $2\frac{1}{2}$ per cent." The terms in which that was communicated by the defendant's brokers to the plaintiffs' brokers were as follows,— "cash in twenty-[308] eight days from last day of landing, less $2\frac{1}{2}$ per cent.: to be analyzed by two London chemists;"—omitting the mention of the "mean." And this was in terms accepted. I am of opinion that the contract was within the authority. The words, as to the analysis, are,— "To be analyzed by two London chemists." I am very clear that this was to be performed in London; and there was evidence that it was the known usage in London to take the mean of the two. Then, as to the other alleged variance between the authority and the contract,—the declaration is framed upon a contract "upon usual London terms, viz. payment by cash in twenty-eight days, less $2\frac{1}{2}$ per cent. discount:" and that is in words as well as in substance

within the authority given. Something was said by Mr. Mellish about the letters not constituting a binding contract between the parties, because a more regular and extended contract was contemplated. That notion, however, is totally at variance with the law as laid down by many cases in the court of Queen's Bench, where the broker's book has been allowed to be resorted to for evidence of the contract, though the parties intended to contract by means of bought and sold-notes, where there has been a variance between those documents (a)¹. And there is no case that I am aware of to the contrary. The letters here would certainly constitute a sufficient contract to satisfy the Statute of Frauds.

WILLES, J. (b). I am of the same opinion. The authority given by the defendant to his brokers was to enter into a contract upon terms which have been adhered to, and which therefore I need not specify. It is said that that authority was departed from in two [309] respects. In the first place, the defendant writes that he will take the ash at the price mentioned "on a basis of 70 per cent mean of two London chemists," and on "usual London terms, viz. cash in twenty-eight days, less 2½ per cent." It is said that in both these respects the brokers departed from the authority which was delegated to them, in the contract which they entered into. After the discussion which has taken place, it is evident that the extended contract of the 9th of November contained in the bought and sold-notes did in the first particular materially depart from the authority; and therefore it is clear that no reliance can be placed upon that extended contract so as to bind the principal. "Mean of two London chemists," according to the usage of the trade in London, means that each party should appoint one to make an analysis, and, if they agree, their analysis is to be deemed satisfactory and conclusive; but, if they should differ, the mean between the two analyses is to be held binding. The extended contract-note, however, which was delivered by the sellers' brokers, differed in this, that it superadds that, in the event of a difference of over 3 per cent. between the results received from the two chemists named, a third sample should be sent to another chemist, who was to act as a sort of umpire, and the mean between the two nearest results should be taken (a)². The contract-note of the 9th of November, therefore, is to be rejected; and we must look at the letters of the 6th and 7th to see what the parties were contracting for. Now, to charge the defendant, there must not only be a contract, but a [310] contract within the authority of the brokers. The question is, whether these two letters were intended to constitute a binding contract, or whether the contract by which the parties were to be bound was a formal contract to be afterwards drawn up. The only ground upon which it could be held that a subsequent formal contract was necessary to complete the bargain is, either that there is some usage in this particular trade to buy by means of bought and sold-notes, or there was a desire to that effect in the expression contained in Beckwith & Co.'s letter of the 7th of November, confirming Martin & Co.'s acceptance of their offer,—"Contract, we presume, in due course: say on Monday." As to custom to contract by bought and sold-notes in this trade, there was no evidence: the case, therefore, does not fall strictly within that of *Cowie v. Henfrey*, 5 Moore's P. C. 232, to which I referred in the course of the argument (a)³. Had it done [311] so, I

(a)¹ See *Sievwright v. Archibald*, 17 Q. B. 103.

(b) Williams, J., was at the Central Criminal Court.

(a)² Thus, if the chemist named by the sellers found 72 per cent. of phosphate, and the chemist named by the buyer 68 per cent., and a third chemist was called in who found only 66 per cent., the result arrived at would be 67 per cent. Surely this was not the intention.

(a)³ There, *Cowie & Co.* and *Hamilton & Co.* were merchants at Calcutta. *Hamilton & Co.* sold to *Cowie & Co.* a large quantity of indigo, through the medium of a broker, who drew up a sold-note addressed to *Hamilton & Co.*, and submitted it to *Hamilton* for his approval, when, *Hamilton* having objected to a particular word remaining, the broker took the sold note to *Cowie* and informed him of *Hamilton*'s objection. *Cowie* struck his pen through the word objected to by *Hamilton*, placing his initials over that erasure, and returned it to the broker, who thereupon delivered it, so altered, to *Hamilton & Co.* The broker delivered to *Cowie & Co.* on the following day a bought-note which differed in certain material terms from the sold-note. In an action brought by *Hamilton & Co.* against *Cowie & Co.* for non-performance of the contract contained in the sold-note,—the Supreme Court at Calcutta was of opinion that the sold-note alone formed

should have been prepared to say that I agree with the dissenting judge, and not with the other members of the judicial committee who pronounced that judgment (a). I apprehend that, if that case had come before a common-law court, it would have been decided in conformity with the decision of the Supreme Court. It never could have been held by a court accustomed to deal with commercial matters, where a document in writing had been assented to by the seller and corrected and initialled by the buyer, that, because a subsequent note was delivered somewhat differing from the former, therefore there was no contract between the parties. I cannot consent, with all respect for so high a tribunal, to be bound by that decision. Then, with respect to the expression in Beckwith & Co.'s letter, "Contract, we presume, in due course," does that mean that the buyer's acceptance of the bargain is to depend upon a subsequent formal contract to be drawn up between the parties? I think not. The contract was finally accepted by Beckwith & Co.'s letter to the sellers' brokers of the 7th of November, which amounts to this,—"We confirm your acceptance of our offer; but it would be better that we should by a more formal instrument extend the terms of our contract, which of themselves are sufficient, construed by mercantile usage and the course of dealing." That [312] clearly does not prevent the sellers from shewing that the terms of the contract had already been definitely agreed on. I speak not without authority. I may refer to a long series of cases which arose prior to the 8 & 9 Vict. c. 106, s. 3, which requires leases to be by deed under seal. Questions were often raised as to whether an instrument amounted to a lease or only to an agreement; and one argument in favour of the latter construction was founded upon the existence of a provision that a more formal lease should be drawn up. That argument, however, was not allowed to prevail. Nor ought the same line of argument to be permitted to influence our decision here. It seems to me, therefore, that the letters of the 6th and 7th of November constitute a valid and binding contract. Then, was it a contract within the terms of the brokers' authority? Now, with regard to the time and mode of payment, the terms of Beckwith & Co.'s letter of the 7th are,—"Cash in twenty-eight days from last day of landing, less 2½ per cent." The terms of the authority (the letter of the 6th) are,—"Usual London terms, viz. cash in twenty-eight days, less 2½ per cent." The words "from last day of landing," are supplied both by the custom of Liverpool and that of London. Prompt means the same in both. There remains only the objection as to the analysis. In the letter of authority, it was to be the "mean of two London chemists;" but, in Beckwith & Co.'s offer of the 7th it was, "To be analyzed by two London chemists," not saying what was to happen if the two differed,—whether the contract was to drop, or whether an umpire was to be called in, or the mean of the two to be taken, does not appear. That might very likely lead to disputes, because in the document of the 9th of November you find something else than a mean of the two represented as what is to happen if the two first-named [313] chemists should differ to an extent exceeding 3 per cent., viz. a third sample is to be sent to another chemist, and the mean of the two nearest results to be taken. But I cannot help thinking that there is a mode of putting a construction upon the contract contained in the letters which is in strict accordance with the authority given: and that is to be found in this, that the analysis is to be that of two *London* chemists, and there was evidence that the practice in London is to take the mean of the two. It seems to me that it will be no straining of the language of the contract, to hold that the result of the analysis is to be in accordance with the custom of the place where the analysis is to be made. I must add, though that is by no means a satisfactory argument,—that I cannot help thinking it is quite clear what was intended; for, the expression "*mean of two London*

the contract, and found for the plaintiffs. Upon appeal, held by the judicial committee (reversing such finding), that the transaction was one of bought and sold-notes, and that the circumstances attending C.'s alteration of the sold note and affixing his initials were not sufficient to make that note alone a binding contract; and that, there being a material variation in the terms of the bought-note from the sold-note, they together did not constitute a binding contract.

(a) The judgment was delivered by Dr. Lushington,—the other members of the judicial committee present being, the Duke of Buccleuch, Lord Brougham, the Vice-Chancellor Knight Bruce, and the Hon. Pemberton Leigh: Sir E. H. East and Sir Edward Ryan being assessors. The dissentient judge was the Hon. Pemberton Leigh.

chemists" is used, not by the persons representing the sellers, but by the broker, and a London buyer. I do not press that argument: but at the same time it is satisfactory to know that the result we have arrived at was obviously the meaning of the parties. For these reasons, I am of opinion that the verdict for the plaintiffs ought not to be disturbed.

BYLES, J. I am of the same opinion. After having listened attentively to the arguments which have been urged on the part of the defendant, I can see no principle, nor am I aware of any authority, for saying that a contract in writing which is sufficient within the Statute of Frauds can be invalidated or affected by a subsequent abortive attempt to put it in a more formal shape. The mere fact of an agreement providing for a more complete and formal development of the intention of the parties, cannot of itself prevent the operation of the preliminary contract: it has been repeat-[314]-edly so held in the cases of contracts for leases. As to the analysis, I entirely agree with what has fallen from my Brother Willes: and, if the construction of the contract between these parties had been even more doubtful than it is, I think we should be bound so to construe it *ut res magis valeat quam pereat*. The ash was to be analyzed by two London chemists. What was to be done if they should differ? What so obvious as to take the mean? I am not, perhaps, very perfectly acquainted with all the facts: but I should say that, where a merchant deals with a broker, he has a right to assume that the broker has authority to do all that is within the ordinary scope of the authority of a broker.

Rule discharged.

BRIDGES v. POTTS AND ANOTHER. June 10th, 1864.

[S. C. 33 L. J. C. P. 338; 11 L. T. 373; 10 Jur. N. S. 1049. Followed, *Soames v. Nicholson*, [1902] 1 K. B. 159.]

1. By an agreement for a lease of mines and ironworks between A. and B., the former agreed to grant and the latter to accept a lease of the ironworks and premises for twenty-one years from the 19th of August, 1861, subject to the stipulations therein-after contained: such lease to contain, in addition to anything specially provided for in the agreement, proper covenants for the effectual working of the minerals, for the repair, &c., of the works, for keeping proper accounts, and for permitting A. or his agents to inspect such works and accounts, and all other usual and customary clauses: and it was further agreed that B. should pay to A. during the continuance of the agreement or the lease to be granted thereunder certain royalties on coals and minerals obtained,—that if, in the first and second years, the royalties should not amount to 500l. each year (or in the third and any subsequent year 1500l.), then B. should advance and pay to A. for each of those years such sum as with the royalties for that year would make up the full sum of 500l. or 1500l.,—that, if any sum of money should be so advanced to make up "the said respective minimum *rents*" in any one year, the amount of such advance might be deducted out of the excess of royalties above such minimum *rent* accruing during any succeeding year,—that B. should pay to A., by way of *rent* for the plant, &c., the yearly sum of 7000l. during the continuance of the demise, B. to have the right, in any year in which the profits arising from the works should not amount to 21,000l., to pay so much only of the said rent as should be equal to one third of the profits of such year,—that B. should forthwith commence operations, and within three months expend such sum as might be required for the erection of machinery, &c., and would, so long as the agreement or lease should subsist, use all diligence to work the minerals effectually and profitably: and that, in consideration of such expenditure, no royalties or sum in lieu thereof should be payable in respect of such three months' workings,—that, in case, within the second three months from the date of the agreement, the royalties did not amount to 125l., and B. did not pay that sum in anticipation of future royalties, A. should be at liberty, at the end of one month from the expiration of such second three months, by notice in writing to annul and determine the agreement: or if, within any six months after the expiration of such second three months, B. did not pay A. in royalties or in money the sums thereby respectively made payable, or if B. should cease to carry on the works with due diligence and effect for three months, A. should be at liberty, at the end of one month from the

expiration of any such six months, or of any such three months' cessation or want of diligence in working, by three months' notice in writing, to annul and determine the agreement or the lease thereby agreed to be granted, — and that B. was to be at liberty, *at any time thereafter*, to determine the agreement, or the lease thereby agreed to be granted, and to abandon the works, on giving A. *six months' notice* in writing of his intention so to do. — B. entered under this agreement : and no lease was ever granted. The 125l. dead rent was paid for the second quarter, ending on the 19th of February, 1862 : and a further sum of 250l. was paid for the half-year ending on the 19th of August, 1862. No further payment was made in respect of rent or royalties until the 21st of November, 1863, when B. paid 500l. for the rent accruing for the year ending on the 19th of August. — On the 10th of August, 1863, B. gave A. a *six months' notice* to determine the agreement on the 13th of February, 1864 : — Held, — *dubitante Williams, J.* — that, regard being had to the various provisions of the agreement and the nature of the property demised, it was competent to B. to put an end to the agreement by a six months' notice, to expire *at any time*, — without regard to the ordinary rule for determining a tenancy from year to year at the expiration of a current year : and that A. was only entitled to recover the proportion of the dead rent accruing between the 19th of August, 1863, and the 13th of February, 1864. *Quare*, per Williams, J., whether the Apportionment Act of 4 & 5 W. 4, c. 22, s. 2, is applicable to such a case? — *Scindle*, per Byles, J., that it is.

This was an action brought by the plaintiff against the defendants for the recovery of 1500l. for money payable by the defendants to the plaintiff for the de-[315]-fendants' use by the plaintiff's permission of lands, tenements, and hereditaments of the plaintiff ; and by the consent of the parties and by a judge's order, according to the Common Law Procedure Act, 1852, the following case has been stated for the opinion of the court, without pleadings : —

1. On the 19th of August, 1861, the following agreement in writing, but not being under seal, was made between the plaintiff, hereinafter called the lessor, of the one part, and the defendants and one Charles Thomason Thompson, hereinafter called the lessees, of the other part, that is to say, —

“Memorandum of agreement made this 19th day of August, 1861, Between John Bridges, of, &c., Esq., (hereinafter called the lessor), of the one part, and Charles Thomason Thompson, of, &c., Joseph Tromperant Potts, of, &c., and Frederick George Hely, of, &c. (hereinafter called the lessees), of the other part.

Article 1. The lessor agrees to grant, and the lessees [316] agree to accept, a lease of certain works known as the Creevelea Iron Works, situate in the county of Leitrim, in Ireland, comprised in a lease dated the 24th of January, 1853, and of which lease the lessor is now owner, being a lease of minerals, &c., within the town lands of Gowlane and Tullynamoyle, in the barony of Dromahaire, in the said county of Leitrim, containing 1105 statute acres, with powers and facilities for working same, together with workmen's cottages and buildings adjoining the said premises comprised in such lease. The term to be twenty-one years from the 19th day of August, 1861, subject to the stipulations hereinafter contained : and such lease shall contain, in addition to anything specially provided for herein, proper covenants for the effectual working of the said minerals, for the preservation, protection, and keeping in repair the said works, for keeping proper accounts, and for permitting the lessor or his agents to inspect such works and accounts, and all other usual and customary clauses : such lease to be settled, in case of difference, by some counsel agreed upon by the parties, and to be prepared by the lessor at the expense of the lessees.

Article 2. The lessees to pay to the lessor during the continuance of this agreement, or the lease to be granted thereunder, the following royalties, namely 1s. per ton on ironstone, 6d. per ton on coal raised from the said town lands of Gowlane and Tullynamoyle, with a drawback of 3d. per ton on all such coal as shall be used for the purpose of the said ironworks, 6d. per ton on fire-clay, 2d. per ton on dry peat, and 1s. 2d. per ton on limestone obtained from the said town lands.

Article 3. If in the first and second years the royalties above provided for shall not amount to the sum of 500l. each year, then the lessees shall advance and [317] pay to the lessor for each of those years such sum of money as, with the amount of the royalties for that particular year, will make up the full sum of 500l. If in the

third and any subsequent year of the said term the said royalties do not amount to the sum of 1500l. each year, the lessees shall pay to the lessor such a sum as with the royalties will make up the full sum of 1500l.

Article 4. If any sum of money be so advanced to make up the said respective minimum rents in any one year, the amount of such advance may be deducted out of the excess of royalties above such minimum rent accruing during any succeeding year.

Article 5. The lessees to pay to the lessor by way of rent for the plant, furnaces, and engines situate on the said premises, the yearly sum of 7000l. during the continuance of the said demise: the lessees to have the right in any year of the said demise in which the profits made by them from the said works shall not amount to the sum of 21,000l., to pay only so much of the said rent as shall be equal to one third of the profits of such year: and, in the lease hereby agreed to be granted, due provision shall be made for securing the payment of the said rent (reducible as aforesaid) to the said lessor; but so as not to constitute any partnership in respect of the said works between the lessor and the lessees.

Article 6. The lessees will forthwith commence operations at the said works, and will within three months from the date hereof expend such a sum of money as shall be required for the erection of machinery and the further developing the minerals, and will thenceforth so long as this agreement or lease thereunder subsists use all diligence to work the same effectually and profitably: and, in consideration of such expenditure, no royalties or sum of money in lieu thereof shall [318] be payable in respect of such three months' workings.

Article 7. In case within the second three months from the date hereof the royalties payable do not amount to 125l., and the lessees do not pay that sum in anticipation of future royalties, then the lessor shall be at liberty, at the end of one month from the expiration of such second three months, by notice in writing, to annul and determine this agreement: or if, within any six months after the expiration of such second three months, the lessees do not pay to the lessor in royalties or in money the sums of money hereby respectively made payable, allowing for any set-off under the average clause hereinbefore contained; or if the lessees shall cease to carry on the said works with due bonâ fide diligence and effect for a period of three months, then and in any or either of such cases the lessors shall be at liberty, at the end of one month from the expiration of any such six months as aforesaid, or of any such three months' cessation or want of diligence in working as aforesaid, by three months' notice in writing, to annul and determine this agreement or the lease hereby agreed to be granted in case the same shall then have been executed, but without prejudice to the lessor's rights thereunder for rent or otherwise.

Article 8. The lessor, being also owner of certain collieries in the counties of Leitrim and Rosecommon for certain terms of years unexpired, agrees that, on the first lease being granted or sale made of any one of such collieries, it shall be stipulated that the lessees under this agreement shall be at liberty to purchase for the use of the Creevelea Iron Works so much coal from such colliery so first leased or sold as aforesaid as they may require, at a price not exceeding at the pit's mouth 10l. per cent. profit to the colliery over and above the cost of production.

[319] Article 9. The lessees to be at liberty at any time hereafter to determine this agreement, or the lease hereby agreed to be granted, and to abandon the said iron-works, on giving to the lessor six months' notice in writing of their intention so to do."

2. Possession of the said premises under the said agreement was delivered by the lessor to the lessees on the same 19th day of August immediately after the making of the said agreement; and the lessees then entered into such possession, and occupied the said premises until the expiration of the notice hereinafter mentioned, when an arrangement was made between the lessor and the lessees as hereinafter mentioned.

3. The lessees forthwith commenced, and during the first three months and afterwards carried on certain preparatory operations at the said works, and expended certain moneys, but did not during the said three months, or at any time afterwards during their said occupation of the said premises, raise or get any iron-stone, coals, or other minerals, and never paid any royalty whatever: but, nevertheless, the lessor waived all claim to royalty or rent in respect of such three months ending on the 19th of November, 1861, and none was paid.

4. After the expiration of one half-year next after the making of the said agreement, that is to say, upon the 24th of February, 1862, in consequence of no rent or royalty

whatever having been paid by the lessees, the lessor caused the following letter relating to the said previous agreement and occupation to be written, addressed, and delivered to the said Charles Thomason Thompson, as such lessee:—

“23 Red Lion Square,
“February 24th, 1862.

“Dear Sir,—I may remind you that six months [320] have now elapsed since the agreement was signed with yourself and co-lessees: and, though I am aware that you have been expending a good deal of money at Creevelea, I cannot but feel (and so does Mr. Twells) that both from what passed with yourself and what is expressed in your agreement, the manufacture of iron ought long ere this to have commenced; and I think some explanation of the delay and the future intentions of the lessees is due to us.

“There being of course as yet no royalties, I have simply to ask you to procure my father a cheque for 125l. due under article 7; and I might, perhaps, in strictness, urge that there should be two such payments, as the waiver of payment during the first three months was in consideration of ‘workings’ to be done which have not been done.

“We have recently heard from Mr. Johnstone, the agent, that there is a quantity of bar-iron and calcined iron at Creevelea, which is certainly not included in the agreement. If the lessees wish to make use of it, they should pay for it at a valuation; if not, we should be glad to sell it, as there are some claims which might properly be paid from the proceeds. I address yourself as the only one of the lessees whom I have had the pleasure of seeing, not doubting that you will put these matters forward in the proper quarter.

“NATHANIEL BRIDGES.”

5. On the 6th of March, 1862, the lessees paid to the lessor the said sum of 125l. as and for rent payable in respect of their said occupation of the premises under the said agreement for one quarter of a year ending on the 19th of February, 1862.

6. Upon the 28th of October, 1862, in consequence of no further payment having been made by the lessees, the lessor caused the following letter relating to the previous agreement and occupation to be written, [321] addressed, and delivered to the said Joseph Tromperant Potts, as such lessee as aforesaid:—

“35 North Cumberland Street, Dublin,
“28th October, 1862.

“Sir,—We have been directed to apply to you professionally on the part of Mr. John Bridges, of Red Lion Square, London, in respect of the rents and royalties now due by you and your co-partners, Messrs. Thompson and Hely, for the Creevelea Iron Works, in the county of Leitrim, under your agreement of the 19th of August, 1861. By the second article of that agreement, you are bound to pay certain royalties for certain ores, minerals, and products raised from the lands of Tullynamoyle and Gowlane, the lands whereon said iron works are situate; and by the third clause it is provided that, in case such royalties shall not amount to the specified sums of 500l. for the first and second years, and 1500l. for the third and subsequent years of the term mentioned in the said agreement, then that you should pay such sums as with the royalties would make up said sums of 500l. and 1500l. per annum respectively; and by the fifth article of said agreement, you also bound yourself to pay by way of rent for the plant, furnaces, and engines situate on said premises, the yearly rent of 7000l., or such sum as should be equal to one third of the profits of the said concerns in each year. Now, in order to ascertain the sum now due and payable to the said John Bridges for royalties and rents under the said articles 2, 3, and 5 of said agreement before referred to, we have to require that you furnish us within one week from this date with a statement in writing of the quantity of iron-stone, coal, fire-clay, peat, and limestone obtained from said town lands since the date of said agreement, as also with a return of the profits realized in respect of the working of the said concern. And we [322] have to inform you that, in case you shall neglect or refuse to furnish us with such statement and particulars, we shall proceed to recover against you and your co-partners such sums as Mr. Bridges is entitled to recover under said articles: and this application will be made such use of hereafter as counsel may advise.

“GALLAWAY & CONNOR.”

7. On the 3rd of November, 1862, the lessees paid to the lessor the said sum of 250l. as and for rent payable in respect of their said occupation of the said premises under the said agreement, for one half-year ending on the 19th of August, 1862.

8. No further payment was made by the lessees until the payment of 500l. on the 21st of November, 1863, as hereinafter mentioned.

9. On the 10th of August, 1863, the lessees served on the lessor the following notice in writing relating to the said previous agreement and occupation :—

“To John Bridges, Esq.

“Take notice that we do hereby, in pursuance of the power contained in the memorandum of agreement dated the 19th of August, 1861, and made between yourself of the one part and ourselves of the other part, determine the agreement for a lease of the minerals and premises therein comprised, on the 13th day of February, 1864, or on such other day thereafter as the six months' notice contemplated by the 9th clause of the said memorandum of agreement shall legally expire on. Dated this 10th day of August, 1863.

“CHARLES T. THOMPSON.

“J. T. POTTS.

“FREDERICK GEO. HELY.”

10. The said notice was accompanied by the following letter of the same date, addressed to the lessor by the lessees, through their solicitors :—

[323] “10 Tokenhouse Yard, London,
“10th August, 1863.

“Sir,—I send you herewith by bearer a notice from Messrs. Thompson, Potts, and Hely, to yourself, to determine the agreement of the 19th August, 1861, for a lease of the Creevelea Iron Works; and I shall be obliged by your acknowledging the receipt of it.

“CHARLES WILKIN.

“John Bridges, Esq.”

11. The lessor on the same day returned to the lessees through their solicitor the following answer to the last-mentioned letter :—

“23 Red Lion Square,
“August 10th, 1863.

“Sir,—We have received your letter of this date addressed to Mr. John Bridges, inclosing a notice from Messrs. Thompson, Potts, and Hely, of same date, and accept service thereof for Mr. Bridges, saving and without prejudice to all and every his rights under the agreement of 19th August, 1861, therein referred to.

“Charles Wilkin, Esq.

“BRIDGES & SON.”

12. Upon the 10th of November, 1863, in consequence of no further payment having been made by or on behalf of the lessees, the lessor caused to be issued a writ of summons out of Her Majesty's court of Queen's Bench in Ireland, in an action of debt against the said Joseph Tromperant Potts,—the other two of the said lessees then being out of the jurisdiction of the said court,—for the recovery from him as such lessee of the sum of 500l. for one year's rent ending on the said 19th of August, 1863; and, under the pressure of the said writ, the said Joseph Tromperant Potts, on the 21st of November, 1863, paid on behalf of the said lessees to the lessor the said sum of 500l. (of which sum the said Frederick George Hely contributed one [324] third), as and for rent payable in respect of the said occupation by the lessees of the said premises under the said agreement, for one year ending on the said 19th of August, 1863.

13. The lessees contend that the said tenancy was determined on the said 13th of February, 1864, by virtue of the said notice; and that they are only liable to pay an apportioned part of the said rent of 1500l. up to the said 13th of February, 1864; but the lessor contends that it continued until the end of the current year of the said tenancy, that is to say, the 19th day of August, 1864, and that the lessees are liable to pay the whole rent of 1500l.

14. The lessor and lessees have agreed to submit the above case for the opinion of

this court, and have arranged for the occupation of the premises in the meantime without prejudice to the rights of either of the said parties.

The question for the opinion of the court is, whether the said tenancy was determined by the said notice on the 13th of February, 1864, or whether the said tenancy continued until the end of the then current year, that is to say, the 19th of August, 1864.

If the court should be of opinion that the said tenancy was determined by the said notice in February, 1864, then judgment was to be entered for the plaintiff for a proportionate part of the sum of 1500l. as the court might direct, but without costs; and the judgment was to be entered for the defendants for the costs. If the court should be of opinion that the said tenancy was not determined by the said notice until the end of the current year of the said tenancy, in August, 1864, then judgment was to be entered for the plaintiff for the sum of 1500l., together with costs; but, if the judgment of the court be delivered before the said 19th day of August, 1864, then with a stay of execution until after that day.

[325] G. R. Clarke, for the plaintiff (*a*). The instrument being void as a lease by force of the statute 8 & 9 Vict. c. 106, s. 3, it operates to create a tenancy from year to year upon the terms therein contained so far as they are applicable to a tenure of that description, one of which is that the tenancy shall be determinable by a six months' notice expiring with a current year: and this would be the obvious import of the 9th article, but for the introduction of the words "at any time hereafter," which are relied upon as raising an ambiguity. There is nothing in the general scope of the agreement to shew that that article is to be understood in any other than the ordinary sense. The parties evidently must have contemplated a yearly tenancy with all its incidents. No rent becomes payable until the end of the year. The notice which the lessor was empowered under article 7 to give, is with a totally different object. In *Doe d. Pitcher v. Dunscombe*, 1 Taunt. 555, where by the terms of the tenancy the tenant was to be at liberty to quit at a quarter's notice, it was held that the notice must expire with a year of the tenancy. Sir James Mansfield, in giving judgment, says: "At the time of the trial, it was a question what was meant by the quarter's notice. I [326] thought it meant a quarter of a year ending at any time: but that interpretation certainly admits of the question raised by the defendant's argument, whether it shall be a quarter of a year's notice ending, not at one of the four most usual days of payment in the year, but in the middle of what is usually called a quarter. The evidence given was of a quarter's notice, leaving it entirely to the law to ascertain the meaning of the expression: and, as there is no satisfactory explanation that this contract for a quarter's warning had any other meaning than that which the general law gives it, we think it better to hold (and certainly it is the most rational interpretation) that the notice to quit was intended to expire at the end of the year." [Erle, C. J. Chambre, J. however observes that that rule is applicable only to the case of a tenancy from year to year.] In *Dod v. Manger*, 6 Mod. 215, Holt, 416, where the contract was for a tenancy for a year, and so from year to year as long as both parties should please, with a stipulation that the lessee should not go away without giving a quarter's warning, Holt, C. J., said: "If at the year's end the lessee had given up the possession without any warning, he would be liable to pay a quarter's rent by virtue of this agreement; but, if he had given a quarter's warning, he might quit without more ado: but, if he once entered upon the second year, he would be bound for all that year, and to the quarter's warning, and so on." *Doe d. King v. Grafton*, 18 Q. B. 496, is an authority to the same effect. Indeed, the rule is so well known that it can scarcely be necessary to cite cases to support it.

(*a*) The points marked for argument on the part of the plaintiff were as follows:—

"1. That a yearly tenancy has been created upon the terms of the agreement of the 19th of August, 1861, so far as applicable to such yearly tenancy:

"2. That such yearly tenancy is only determinable at the end of a current year:

"3. That the six months' notice in writing mentioned in the ninth article of that agreement, means a notice to determine the tenancy at the end of a current year:

"4. That the lessees are bound to pay the full sum of 1500l. for the year, whether they hold the premises to the end of the current year, or abandon them in the midst of the year."

Mackeson, for the defendants (*a*). The question is [327] what is the meaning of the parties, having regard to the general scope of the instrument. Though the agreement be void as a lease, it must regulate the terms of the holding in all respects save the duration of the term: per Lord Kenyon, in *Doe d. Regge v. [328] Bell*, 5 T. R. 471; *Branthwaite v. Hitehook*, 10 M. & W. 494. The holding can only be put an end to upon the terms the parties have agreed upon. The 7th article points out the manner of determining it by the lessor on non-payment of the royalties or omission to carry on the works with due diligence: and by article 9 it is distinctly provided that "the lessees are to be at liberty *at any time hereafter* to determine this agreement, or the lease hereby agreed to be granted, and to abandon the said iron works on giving to the lessor six months' notice in writing of their intention so to do." The dry rule of law laid down in the cases cited is altogether inapplicable here. The words in Article 9, "at any time hereafter" must have some meaning. The rent provided for is a dead rent. *Doe d. Landseil v. Gower*, 17 Q. B. 589, comes very near the present case. There, the tenant was let into possession of a cottage, parochial property, by the parish officers of P., on which occasion the following memorandum was made in the vestry-book, and signed by the tenant and by an overseer,—“We, the churchwardens and overseers of P., do hereby agree to let to J. B., of, &c., the newly erected cottage, &c., situate, &c., at the rent of 1s. 6d. per week; and the said J. B. doth hereby agree to quit and give up the said cottage into the hands of the parish officers *at any time* on a months' notice from the churchwardens and overseers for the time being, or [329] one of them, or by their order:” and this was treated as a holding that might be determined by a month's notice given at any time. The general scope

(*a*) The points marked for argument on the part of the defendants were as follows:—

“That the tenancy of the lessees under the agreement of the 19th of August, 1861, was determined in February, 1864, by the notice dated the 10th of August, 1863, and that the lessees are only bound to pay a proportionate part of the sum of 1500l. calculated up to the 13th of February, 1864, or at all events calculated only up to the 19th of February, 1864,—

“1. Because there is no rule of law which requires every notice for determining a tenancy to end at the period corresponding with the commencement of the term:

“2. Because the rule that a notice to quit must expire with some year of the tenancy, only applies to a tenancy from year to year:

“3. Because there is a special stipulation in the agreement that the six months' notice may be given *at any time*, and the parties to the agreement framed it with the express purpose of taking the case out of the general rule, if any would have been applicable:

“4. Because the words in the ninth clause of the agreement, ‘at any time hereafter,’ are wholly unlimited:

“5. Because the sole power of fixing that limit is in the lessees:

“6. Because the words ‘at any time hereafter,’ unless they bear the construction put on them by the defendants, have no meaning, and must be struck out as surplusage,—a conclusion at which the court will not arrive:

“7. Because there is nothing in the agreement, either express or implied, to shew that any particular six months' notice was contemplated:

“8. Because the lessor had by the agreement the power in certain cases of determining the agreement by notice ending at some break in a quarter, thereby shewing that the determination of the agreement at the end of some current year, or even at any half or quarter of some current year, was not in the contemplation of the parties:

“9. Because the agreement, being for a lease for mining purposes, was in its nature, and by its very terms, of an experimental character, and the intention manifestly was that if in the working of the mine it should appear that no profit was likely to arise, the lessees were upon any probability of failure to be at liberty to determine the agreement by immediate notice of six months commencing from such period of failure, as the lessees might determine:

“10. Because a notice to quit need not mention the particular day on which the tenancy is intended to determine:

“11. Because the notice sufficiently points out the time when the agreement and tenancy is to determine.”

of this agreement is, to create an indefinite tenancy which should subsist until a six months' notice was given. [Byles, J. It is stipulated by the 1st article of the agreement that a lease shall be granted for the term of twenty-one years. Suppose a lease had been executed, would it have been determinable by a six months' notice?] It is submitted that it would. The 9th article is express. It is not to be lost sight of that this was an experimental mining lease: with an option to the lessees to put an end to the experiment at any time if it should turn out to be an unprofitable speculation; and it is no objection that the option to determine (except for the causes of forfeiture mentioned in article 7) should be confined to the lessees: *Dann v. Spurrier*, 3 Bos. & P. 399, *Doe d. Webb v. Dixon*, 9 East, 15. As to the argument that the rent is only payable at the end of the year, that is clearly a fallacy. [Willes, J. The agreement provides that the lease should contain, in addition to anything specially provided for therein, proper covenants for the effectual working of the minerals, &c., and all other usual and customary clauses. It is not usual to covenant for payment of rent *yearly*.] The 7th article clearly contemplates half-yearly payments.

Clarke, in reply. The words "at any time hereafter" in article 9 cannot be allowed to control the general effect of the contract, which is, to create a yearly tenancy, at a yearly rent. The words of the instrument in *Doe d. Landsell v. Gower*, 17 Q. B. 589, are altogether different; and there was no decision upon the point. *Doe d. Rigg v. Bell*, 5 T. R. 471, is in favour of the plaintiff's contention. It was there held [330] that, if a landlord lease for seven years by parol, and agree that the tenant shall enter at Lady day and quit at Candlemas, though the lease be void by the Statute of Frauds as to the duration of the term, the tenant holds under the terms of the lease in other respects, and therefore the landlord can only put an end to the tenancy at Candlemas. The words "usual and customary clauses," in article 1, only mean such clauses as are usual and necessary to carry out the intention of the parties; not to introduce a new term into the lease (a).

Cur. adv. vult.

ERLE, C. J. The question argued before us in this case has been, whether the interest of the tenants under the agreement set out in the special case has been determined by a six months' notice delivered by them to the landlord. I am of opinion that it has. The interest of the tenants was in reality a tenancy from year to year, subject to the terms of the agreement so far as they are applicable to a tenancy from year to year. The agreement was for a lease for twenty-one years from the 19th of August, 1861, and the parties contemplated and particularly provided that a formal lease should be executed, and that such lease should contain all usual covenants. The instrument (which is a lease of mining property) contains a provision for certain royalties on the minerals obtained, and then it provides, in case the royalties should not amount to that sum, for that which I consider to be in the nature of a dead rent, such dead rent to be 500l. in the first and second years of the term, and 1500l. in each subsequent year. These sums are spoken of as the "yearly rent:" but I take it to be clear, from article 7, that these sums are to be payable at less spaces of time than from year to year: because that article provides that, in case, within the second three months from the date of the agreement, the royalties payable should not amount to 125l., and the lessees did not pay that sum in anticipation of future royalties, then the lessor should be at liberty at the end of one month from the expiration of such second three months, by notice in writing to annul and determine the agreement; or if within any six months after the expiration of such second three months the lessees did not pay to the lessor in royalties or in money the sums of money thereby respectively made payable, the lessor should be at liberty at the end of one month from the expiration of any such six months, by three months' notice in writing, to annul and determine the agreement, and so re-enter as for a forfeiture. It is clear, therefore, to my mind that the formal lease would have described the rent as payable at less intervals than a year. It would certainly be a most unbusiness-like arrangement to make it payable only yearly: and the stipulation is that 125l., the aliquot part of 500l., should be paid in the second quarter of the first year. I think that created a duty on the part of the lessees to pay oftener than once a year, and that the expanded

(a) After the close of the argument, Mr. Makeson referred to the following cases, — *Cotton v. Arnold*, 1 Johnson & H. 651, and *St. Aubyn v. St. Aubyn*, 1 Dr. & Smale, 611: and Mr. Clarke referred to *In re Markby*, 4 Mylne & Cr. 484.

lease would have provided for that. Then comes article 9, which contains the power of determining the agreement which we are called upon to construe. It provides that the lessees are to be at liberty "at any time hereafter" to determine the agreement, or the lease hereby agreed to be granted, and to abandon the works, on giving to the lessor six months' notice in writing of their intention so to do. Now, had the lessees a right under that article, according to the [332] ordinary meaning of the words, to abandon the premises and so to put an end to their liability under the agreement by a six months' notice to expire at any period, or to expire only at the end of a current year of the tenancy? I am of opinion that the true construction is, that the six months' notice may expire at any time. All contracts are to be construed according to the intention of the parties; and, in construing a contract, you must take the words of the instrument and the surrounding circumstances existing at the time it is made. It seems to me to be a very material circumstance to consider in construing this contract, that it relates to the working of a mine. In such a case, the making of any profit from the mine depends entirely upon the continuance of the lode under ground. Every day's experience teaches us that the most reasonable expectations may be baffled by events which could not be anticipated; and so the adventurers are sometimes compelled to carry on the working at great loss. By this agreement, the lessees bind themselves to pay a dead rent of 1500l. a year for nineteen years: and to my mind it seems to be extremely probable that a person entering upon so hazardous a speculation in a new mining country would stipulate for a power to relieve himself at any time from so onerous an outlay, in the event of the ore failing. It is unnecessary to say that it is only in the event of failure that the lessees would be desirous of exercising this privilege; for, it stands to reason that this like any other commercial speculation would not be abandoned if it yielded a profit commensurate with the outlay. All these are matters which it is most material to consider in putting a construction upon this instrument: the landlord was to have a dead rent of 500l. a year for the first two years, and 1500l. a year afterwards, if the royalties produced no more; but the [333] tenant was to have the option of putting an end to his liability by a six months' notice, that is, by paying 250l. or 750l., as the case might be. The interests of the parties in mining adventures are not affected by the seasons, and therefore there is no analogy between a lease of mines and a lease of the surface: the ore is as accessible in winter as in summer. That being so, I can very well understand why the words "at any time hereafter" were introduced in the article which provides for the determination of the term and the abandonment of the works. Several cases have been cited where, subject to occasional exceptions, the general rule has been sanctioned, that, in the case of a tenancy from year to year, nothing being said about determining it, the holding can only be put an end to by a six months' notice expiring with a current year of the tenancy. Whatever is the usual course of business is tacitly understood and implied in all contracts. It is competent to the parties to make special terms, - to make the tenancy determinable at a three months' or a six months' notice, to expire at any time: but, in the absence of such special arrangement, the general presumption holds. Premises are let for one year and so on for any number of years the parties may mutually agree: either party is at liberty to give the other a six months' notice that he will not let or take the land for the ensuing year. That is the meaning of the ordinary six months' notice to quit. Now, here, the parties never contemplated the creation of a tenancy from year to year, but a term of twenty-one years under a lease which was to contain, in addition to anything specially provided for therein, proper covenants for the effectual working of the said minerals, for the preservation, protection, and keeping in repair the said works, &c., and all other usual and customary clauses. No formal lease was ever executed, [334] but the proposed lessees entered, and paid rent: and, under these circumstances, if this had been the case of a lease of ordinary premises, they must be supposed to have agreed to hold as tenants from year to year subject to all the terms of the agreement so far as they might be applicable to a tenancy from year to year: and such an agreement would be a perfectly legal one if it contained a stipulation for the determination of the term by a notice expiring *at any time*, instead of in the usual manner, at the end of a current year of the tenancy. I think such an agreement may fairly be implied from the words of the instrument here: and, this being, as I before observed, an agreement for a lease of mining property, I see nothing unreasonable in such a stipulation. I would refer to the case of *Right v. Flower v. Durbly*, 1 T. R. 159, where

the subject was much discussed. It was contended on the one side that, if the rule I have mentioned was to prevail in any instance, still there is a great difference between land and houses; that the same reasons which might induce the court to extend it to the former were not applicable to the latter: but, with respect to lands, there might be a hardship in suffering the landlord to oust the tenant in the middle of the year, by which he would be put to the inconvenience and expense of carrying the crops from off the premises, but no such reason could apply in the latter case, from the nature of the thing itself; and that, on the contrary, more inconvenience would ensue both to landlords and tenants from adopting the strict rule attempted to be imposed, than by adhering to that which seems originally to have prevailed, viz. of giving half a year's notice to quit, without reference to any particular period of the term (a). But the whole court [335] repudiate the distinction. Lord Mansfield says: "If there be a lease for a year, and by consent of both parties the tenant continue in possession afterwards, the law implies a tacit renovation of the contract. They are supposed to have renewed the old agreement, which was, to hold for a year. But then it is necessary for the sake of convenience that, if either party should be inclined to change his mind, he should give the other half a year's notice before the expiration of the next or any following year: now, this is a notice to quit in the middle of the year, and therefore not binding, as it is contrary to the agreement." Ashhurst, J., says: "There is no distinction in reason between houses and lands, as to the time of giving notice to quit. It is necessary that both should be governed by one rule. There may be cases where the same hardship would be felt in determining that the rule did not extend to houses as well as lands; as in the case of a lodging-house in London being let to a tenant at Lady-Day, to hold as in the present case: if the landlord should give notice to quit at Michaelmas, he would by that means deprive the lessee of the most beneficial part of the term, since it is notorious that the winter is by far the most profitable season of the year for those who let lodgings." And Buller, J., says: "It is taken for granted by the counsel for the plaintiff, that the rule of law which construes what was formerly a tenancy at will of lands into a tenancy from year to year, does not apply to the case of houses; but there is no ground for that distinction. The reason of it is, that the agreement is a letting for a year at an annual rent; then, if the parties consent to go on after that time, it is a letting from year to year. This reason extends equally to the present case: an annual rent is reserved here; and upon such a holding it has been determined that half a year's notice to quit is [336] necessary. This doctrine was laid down as early as in the reign of Henry the Eighth (13 H. 8, fo. 15 b.). The moment the year began, the defendant had a right to hold to the end of that year: therefore there should have been half a year's notice to quit before the end of the term." For the reasons I have before stated, I think there is no such presumption in the case of a mining lease, which is not affected by changes of season, but on the successful exploration of the underground strata, which may be carried on at any period of the year. Mr. Clarke's main argument was, that the rent was payable yearly, and that there was no power of apportionment. I am of opinion, however, that the 7th article does contemplate the apportionment of the sums payable under the agreement, because it expressly provides that, in the event of certain sums not being paid in anticipation of royalties, at certain periods of three months and six months, the lessor may by a month's notice or a three months' notice put an end to the agreement, without prejudice to his rights thereunder for rent or otherwise. The parties, therefore, plainly contemplate the possibility of an abrupt determination of the term. There is no stipulation fixing the payment of rent by specific gales. It would seem to stand to reason that, if the lessor had a right to determine the agreement under article 7, and chose to exercise that right, he would be entitled to an aliquot part of the 500l. or the 1500l. rent, as the case might be. If, therefore, an apportionment could be made in case of the determination of the tenancy by the lessor, I see no insurmountable difficulty in making it, if the determination is brought about by the act of the lessees. The royalties are payable *de die in diem*. The agreement provides for the payment of a dead rent of a given amount provided the royalties do not amount [337] in the course of the year to so much; and a provision is also contained therein for applying the surplus royalties of one year to

(a) See *Parker d. Walker v. Constable*, 3 Wils. 25, and *Throquarton d. Wandle y. v. Whelpdale*, Hil. 9 G. 3, Bul. N. P. 96.

any deficiency that might happen in the next : but all that would be specially provided for by the more expanded instrument which was contemplated between the parties ; and I do not see that any light would be thrown upon the question now before the court by raising a discussion upon this part of the agreement. For these reasons, I am of opinion that the plaintiff is entitled to judgment.

WILLIAMS, J. I have arrived at the same conclusion, but I am bound to say not without considerable doubt and difficulty. The first question to be determined is, whether the tenancy from year to year which is to be implied from the occupation of the premises by the lessees and the payment and acceptance of rent, is subject to the stipulation in the 9th article of the agreement of the 19th of August, 1861, that the lessees shall be at liberty at any time hereafter to determine the agreement, or the lease thereby agreed to be granted, and to abandon the iron-works, on giving to the lessor six months' notice in writing of their intention so to do,—whether that means an absolute period of six months to expire at any time, and not with reference to the expiration of a current year. I do not think that question is altogether free from doubt, because I apprehend the rule as to the determination of the tenancy by notice is common to demises of mining property as well as to demises of land or houses or any other description of property. Although it has been judicially intimated that the rule originated in the notion of favouring agricultural tenants, I think similar inconveniences might follow in the case of other descriptions of tenants, if a different rule were held to prevail as to them. This seems to me to [338] be the result of the ruling of the court of King's Bench in the leading case of *Right v. Flower v. Derby*, 1 T. R. 159, to which my Lord has referred. Lord Mansfield and Buller, J., put it on the footing, that, where the old agreement is renewed, it is for a year, because it was a yearly tenancy before. “If,” says Lord Mansfield, “there be a lease for a year, and by consent of both parties the tenant continue in possession afterwards, the law implies a tacit renovation of the contract. They are supposed to have renewed the old agreement, which was, to hold for a year.” And Buller, J., says the reason of the rule is, “that the agreement is a letting for a year at an annual rent : then, if the parties consent to go on after that time, it is a letting from year to year.” That being the principle, it may well be questioned whether the term contained in the 9th article of this agreement, that the lessees are to be at liberty to determine the tenancy on a six months' notice absolutely, is not inapplicable to a tenancy from year to year. However, I am inclined to think there is no real difficulty in that, because it evidently was in the contemplation of the parties to go on for a time under the agreement without having any more formal instrument : the language of the article is,—“The lessees to be at liberty at any time hereafter to determine this agreement or the lease hereby agreed to be granted,” &c. Upon the whole, I am of opinion that the words “at any time hereafter” are to be taken in the sense contended for by the lessees. If so, it follows that we must construe the 9th article in the same way as if the words had been inserted in a lease which we were called upon to construe. What, then, is the meaning of the words, “The lessees to be at liberty at any time hereafter to determine this lease, on giving to the lessor six months' notice in writing of their intention so to do?” Are they to be taken in their literal [339] sense? If so, they are satisfied by a six months' notice to be given at any time. I take it to be clear, upon principle as well as on authority, that, if the court is able to ascertain from the context and the general scheme of the lease that the parties by “six months' notice” meant a notice to expire at the end of the current year, they would be bound to ascribe that meaning to it, but that they would not be justified in so doing unless the context makes it clear that the parties so intended.

The question, then, resolves itself into this,—whether there is sufficient on the face of the agreement to demonstrate that it was the intention of the parties that the more enlarged construction should be given to the words “six months' notice.” I think there is strong evidence that that was the construction intended. Many of the articles of the agreement seem to be framed in the contemplation that there never will be a broken year, except in the event of the landlord's taking advantage of the clause of forfeiture, article 7. In that case, no doubt, there would be a broken year : but, with that exception, it seems to me that there is strong evidence that the parties contemplated a tenancy which should go on to the end of the year. The reason I think so is this :—By article 2, certain royalties are to be paid by the lessees to the lessor. By article 3, in case the royalties should not amount to 500l. in each of the first and

second years, or to 1500*l.* in the third or any subsequent year of the term, the lessees were to pay such a sum as with the royalties would make up those respective sums. So that, though the royalties are payable *de die in diem*, yet, if they should prove insuflerent to cover the minimum rent, an account would have to be taken at the end of the year, and the lessees would have to make up such minimum rent. It may well be supposed that the [340] parties really thought there would be sufficient royalties to cover the whole amount of the stipulated payments: but it must be borne in mind, in construing this agreement, as in construing wills and other documents, that the court is bound to look not only at what has actually happened, but also at what might have arisen, and to construe the instrument with reference to that. If the lessees, as they are called, were allowed to determine the agreement by a six months' notice at any time, there would be considerable difficulty in making up the accounts of the royalties to be paid and the allowances to be set off, so as to ascertain what was due to the lessor in respect of royalties or dead rent. So, as to the sleeping rent of 7000*l.* a year reserved for the use of the plant, &c., which by article 5 is subject to reduction if the profits realized should be less than 21,000*l.* per annum. Of course, no difficulty of that sort arises here, there having been no profits: but it might have happened that it was necessary to enter into minute calculations as to what was payable to the lessor with reference to the profits and other circumstances, and there might be great difficulty if the lessees were to be at liberty to determine the agreement by a six months' notice expiring at any undefined period of the year. But, as my Lord has said,—and I do not wish to dissent from the view he has taken,—that difficulty might be met by the insertion of proper covenants and stipulations in the formal lease when that lease came to be drawn up: and I think that is the only way in which it could be done; for, it is clear to my mind that the Apportionment Act of 4 & 5 W. 4, c. 22, does not apply to a case of this kind, there being no determination of the interest of the landlord within the 2nd section of that act (a).

[341] As far as the authorities go, I would only observe that *Doe d. Pitcher v. Donoran*, 1 Taunt. 555, does not appear to me to be in point, because the tenancy there was a tenancy from year to year, and the case was decided with reference to that state of things. Assuming, as we must do upon this part of the argument, that this was a qualified tenancy from year to year by reason of the provision in the 9th article, the case does not appear to me to be governed by *Doe d. Pitcher v. Donoran*. That decision, however, is not without importance in reference to this case, inasmuch as it establishes that the construction of the words "quarter's notice" was to be governed by the intention of the parties as it was to be gathered from the agree-[342]-ment and the surrounding circumstances. *Doe d. King v. Grafton*, 18 Q. B. 496, has no application whatever to this case. The court there held, in effect, that there was no yearly tenancy at all. "Every case," says Wightman, J., "of an express agreement, as this was, must be decided on its own terms. 'At the yearly rent of 42*l.*, payable quarterly,' would

(a) This section enacts "that *all rents service reserved on any lease by a tenant in fee or for any life-interest, or by any lease granted under any power (and which leases shall have been granted after the passing of this act), and all rents charge and other rents, annuities, pensions, dividends, moduses, compositions, and all other payments of every description, in the united kingdom of Great Britain and Ireland, made payable or coming due at fixed periods under any instrument that shall be executed after the passing of this act, or (being a will or testamentary instrument) that shall come into operation after the passing of this act, shall be apportioned so and in such manner that on the death of any person interested in any such rents, annuities, pensions, dividends, moduses, compositions, or other payments as aforesaid, or in the estate, fund, office, or benefice from or in respect of which the same shall be issuing or derived, or on the determination by any other means whatsoever of the interest of any such person, he or she, and his or her executors, administrators, or assigns, shall be entitled to a proportion of such rents, annuities, pensions, dividends, moduses, compositions, and other payments, according to the time which shall have elapsed from the commencement or last period of payment thereof respectively (as the case may be), including the day of the death of such person, or of the determination of his or her interest, all just allowances and deductions in respect of charges on such rents, annuities, pensions, dividends, moduses, compositions, and other payments, being made."*

indicate a yearly tenancy: but what follows is inconsistent with this: provision is made for paying the portion of a quarter to 24th June,—the premises being let from the 19th of April,—“and then it is added, ‘until one of the said parties shall give unto the other six calendar months’ notice.’ These are the effective words, and decide the construction of the agreement.”

I would only add that I do not feel at all pressed by the words of article 9, “at any time hereafter.” Suppose the parties had agreed in so many words that, at any time during the currency of the lease, the tenancy might be determined by the tenant’s giving the *usual* notice, could any doubt have arisen? I see nothing inappropriate or anomalous in the reservation of a liberty at any time hereafter to determine the lease, if it was understood that the lessees were to give such a notice as a tenant from year to year is bound to give, but were to be at liberty to give it at any time during the term of twenty-one years for which the lease was to run.

The question still remains, whether, reading the words of the 9th article simpliciter, there is in the contents of the agreement enough to shew that the more enlarged meaning should be given to the words “six months’ notice,” as Mr. Clarke suggests. I think we are bound to come to the conclusion, though I think there is strong evidence to shew that the parties intended to use those words in the wider sense I have indicated, that the words were used in their ordinary [343] sense: and upon these grounds I agree with the rest of the court that our judgment should be in accordance with the contention of the defendants.

WILLES, J. I am of the same opinion. The words upon which we are called upon to put a construction are these,—“the lessees to be at liberty at any time hereafter to determine this agreement, or the lease hereby agreed to be granted, and to abandon the said iron-works, on giving to the lessor six months’ notice in writing of their intention so to do.” Now, considering that it is the tenant who is to give notice, he is, of course, *prima facie* to elect the time at which to give it: and, as the words are “at any time,” he is, *prima facie* to elect the time out of all time during the currency of the lease. Taking that clause alone, there is no doubt the lessees would be entitled to give notice of their intention to abandon the works at any time of the year, or on any day of the month or week, or at any hour of the day at which he could find the lessor to give him notice. On the other hand, it is equally clear that the general words may be cut down by the language which is used in other parts of the instrument: and this is aptly illustrated by the case supposed by my Brother Williams, of the words “at any time hereafter” being followed by the words “as *usual* in the case of a tenancy from year to year,” or such-like words. In that case, the generality of the words “at any time hereafter” would be limited by the condition imposed by the subsequent words, and construed to mean such a notice as could ordinarily be given by a tenant from year to year, viz. a notice of six months to expire at the end of the current year. I entirely agree with my Brother Williams that the question to be determined here is, whether we can find upon the face of this document words to which we can and ought to [344] give the same construction as the words the effect of which I have been considering. I do not think much weight is to be attributed to the suggestion that we should give the words of this agreement their ordinary, or, as it is sometimes called, their natural meaning, as that the six months’ notice should end with the year. The character of the agreement being so speculative, one would naturally expect that the lessees should stipulate for the option of putting an end to it at the expiration of any six months after they should have discovered that they were likely to make nothing by the mines: and, looking at its various provisions, I find it not to be contrary to the general scope and nature of them, that the notice should be one expiring at any period, at the tenant’s option, rather than at the end of the current year: for the 7th article contemplates a notice being so given by the landlord under certain circumstances.

No doubt, the general object and intention of the parties to an agreement are important to be considered in arriving at the true construction of it: we must, therefore, look through the several clauses in order to see whether we can discover any such qualification of the general words as is contended for. In the first place, it is suggested that there is a difficulty by reason of the absence of any provision for the payment of royalties or rent for a broken part of a year, and therefore, it is said, there is no mode of ascertaining the amount to be paid in that case. As to the first difficulty suggested, I must own I do not think it can arise: because, if article 9 is to be read, according to the ordinary meaning of the words, as applying to a notice to

put an end to the lease in the middle of a quarter, there is in my opinion abundant language in the agreement to shew the intention of the parties that the royalties or the substituted payments in article [345] pation of royalties, and the rent for the plant, &c., are to be paid for such broken portion of a year or quarter. The reasons applicable to the payments on account of royalties and the rent for the plant, are somewhat different. By article 2, royalties are to be paid in respect of all ironstone, coals, and other minerals. Therefore, as soon as any minerals were raised, there would be royalties due in respect of them, the amount of which could be ascertained by reference to that article. Then comes article 3, which provides that, for the first two years of the term, the lessees shall pay at the rate of 500*l.* a year, notwithstanding the royalties on the minerals obtained should fall short of realizing that sum. Construing that article conjointly with the 7th, it would seem that a fourth part of that sum, viz. 125*l.*, was to be payable each quarter: and it is clear from the facts stated in the special case, that that is the construction which the parties themselves put upon it. After the expiration of the second year, the payments on account of royalties were to be not less than 1500*l.* per annum. Then comes the average clause, article 4, by which the excess of royalties in one year was to be set against any shortcoming of the preceding year. The result of these three articles is this,—royalties are to be paid according to the quantity of minerals raised, so that they should not amount to less than the annual sums mentioned; but the lessees were to have the benefit of any excess in the royalties in one year to make up for a deficiency in the subsequent year. Nothing, as it seems to me, can be more easy than to apply that. The only possible difficulty which I see in making the calculation, in the event of the term being put an end to at any other time than the end of the year, would be with reference to the claim of the lessees under the average clause. They might have gone on paying dead rent in excess of royalties for [346] several years, and by putting an end to the holding, they would lose the chance of recouping themselves out of the increasing royalties of subsequent years. But that would be their business and their loss; and that is the only uncertain quantity in the calculation that I can discover. It seems to me, therefore, that there is no difficulty in applying this agreement, so far as regards the royalties and payments in anticipation of royalties, to a broken portion of a year.

Then, as to the rent payable for the plant. That, at first sight, would seem to present more difficulty. At one time it occurred to me that the only way of making an apportionment in respect of that rent of 7000*l.*, a year, was by reference to the express provision in article 5, that the lessees are to have the right in any year of the demise in which the profits made by them from the works shall not amount to 21,000*l.*, to pay only so much of the said rent as shall be equal to one third of the profits of such year, and that, in the lease agreed to be granted, due provision should be made for securing the payment of the rent so reducible. But we cannot speculate as to what provisions a conveyancer would insert in the lease in reference to that object; and I think there is another mode of arriving at the conclusion that the fact of the 7000*l.* being paid yearly does not present any difficulty in the way of our adopting the construction we have arrived at of article 9, because, if article 5 is carefully looked at, it will be found that it is not a provision for a fixed rent of 7000*l.* a year: 7000*l.* is mentioned as the maximum; but it is to be reducible to a third of the profits in case they should be less than 21,000*l.* per annum. I could not at first account for the absence of any mention of the 7000*l.* a year in the case. But I presume that is the explanation of it. The parties did not think it worth while to raise the question as to a third of the [347] profits. Profits, like royalties, distribute themselves: and the account might be taken just as in the ordinary case of a partnership. That being so, none of these clauses appear to me to present any difficulty in putting upon the words of article 9 the construction which generally they seem to require. Therefore we must construe the words "six months' notice," to mean either an absolute period of six months to expire at any time, or a six months' notice to expire at the end of a current year. In the latter case, it will be necessary to interpolate the words, "expiring at the end of one of the years of the tenancy," which we have no right to do, unless we can clearly see that it was the intention of the parties that it should be done.

I at one time thought that the meaning of article 9 might possibly be, that the notice contemplated was to be a notice expiring on some quarter-day corresponding with the day of the commencement of the demise, so as to make this a good notice for the 19th of February, though not for the 13th; and so one difficulty might be recon-

ciled, inasmuch as the apportionment would have been made more simple. If, instead of "six months," the words had been "two quarters," it may be that we might have been justified in putting such a construction upon the agreement. But I do not see that we have any right to alter the language the parties have thought fit to use. We must take the words "six months' notice" as representing an absolute period of six months during any period of the currency of the lease. There are cases in which provisions have been introduced into agreements specially conferring upon one of the parties benefits which could not accrue to him unless the agreement were held to endure to the end of a year, and it has been insisted, therefore, that the engagement could only be put an end to at the expiration of the year. I do not, [348] however, refer to these as having any very great bearing upon the question now before us. One of these was the case of *Parker v. Whitson*, 4 C. B. (N. S.) 346. There, there was an agreement by which the plaintiff engaged to serve the defendant as agent or representative at a salary of 150*l.* per annum, and there was a proviso that, in a given event, the plaintiff was to have at the end of the year a donation of 30*l.* to make up the salary to 180*l.* A yearly hiring being by the custom of the trade determinable by a month's notice at any time, this court held that there was nothing in the proviso to exclude the application of the custom to the particular case. Another case of that class was the more recent one of *Nicholl v. Greaves*, ante, p. 27, where the plaintiff, a huntsman, sought to withdraw himself from the general rule applicable to the determination of the hiring of a menial servant, by the fact that a premature ending of his service would deprive him of certain contingent advantages stipulated for in his agreement, which could only accrue to him provided he were permitted to serve for the whole year. Taking the words here used in their ordinary and grammatical sense, I am of opinion that the defendants' construction is right. The result will be, according to the agreement of the parties in the question they have put to us, that the plaintiff will have judgment for the proportionate part of the 1500*l.* down to the 13th of February, 1864, and the defendants will be entitled to the costs.

BYLES, J. I am of the same opinion. Originally, I must confess, I entertained considerable doubts: but, having considered the matter carefully, and heard the judgments of my Lord and my two learned Brothers, my doubts are removed. The question is, what is the meaning of the words "at any time hereafter," in the [349] 9th article of the agreement of the 19th of August, 1861. Now, they are susceptible of three meanings,—first, their literal meaning, any month, day, or hour,—secondly, at any time which is usual in contracts between landlord and tenant: which interpolates the word "usual,"—thirdly, at any time which will end at a time when the rent becomes due: which would be to interpolate the word "convenient." Now, it seems to me that we are not at liberty to interpolate any words, but must construe the agreement according to the ordinary and grammatical sense of the words which the parties have used. The 7th article having provided for the events in which the lessor may determine the agreement or the lease thereby agreed to be granted, the 9th article provides that "the lessees shall be at liberty at any time hereafter to determine this agreement, or the lease hereby agreed to be granted, and to abandon the said ironworks, on giving to the lessor six months' notice in writing of their intention so to do." Now, that obviously cannot be read with reference to the ordinary notice applicable to a tenancy from year to year. That applies to a notice to be given by either party: whereas, this is a provision for a notice to be given by the tenant only. Further, it is a notice which is to put an end to the lease itself, which is to be for a term of twenty-one years, and not a mere tenancy from year to year. It seems to me, therefore, that, unless it will lead to some great and obvious inconvenience, the only construction we can put upon the words which the parties have used is their ordinary literal construction.

The difficulty which more especially oppressed me was this, that, if the notice might be given at any time, without reference to the period of the commencement of the demise, it might be given so as to expire just one day before the rent became due, and thus [350] (as I at one time apprehended) the lessor might run the risk of losing his rent. But, on reference to the agreement, it will be found that there are two provisions which would make an apportionment a matter of contract between the parties. In the first place, there is the stipulation in article 1, that, "the lease shall contain, in addition to anything specially provided for herein, proper covenants for the effectual working of the minerals, &c., and all other usual and customary

clauses," and it may be that under the peculiar circumstances of this lease such a clause would be usual and customary. In addition to this, in article 6, which provides for the reduction of the 7000l. rent, it is declared that, in addition to the lease agreed to be granted, due provision shall be made for securing the payment of the said rent to the lessor. Now, this would be a very ineffectual provision if it failed to provide for an apportioned rent. There is one point upon which I cannot quite agree with my Brother Williams. I am not quite satisfied that the Apportionment Act, 4 & 5 W. I. c. 22, does not apply to this case. The 2nd section enacts that all rents, &c., and all other payments of every description, shall be apportioned, on the determination of the interest by any means whatever. I must confess I should have thought this case fell within those very general words. *Littledale, J.*,—whose opinions, even when obiter, are always entitled to the highest respect,—says in *Oldershaw v. Holt*, 12 Ad. & E. 590, 4 P. & D. 307, "I doubt if the statute as to apportionment applies in any case where the landlord ceases to be so by his own act," implying, as it seems to me that, where the tenancy is put an end to by the act of the tenant, there would be a right of apportionment. I am, therefore, by no means satisfied that there could be no apportionment here. There is but one more remark which I wish to make, and that [351] is with reference to the 7000l. rent. It is true, the payment of that is to depend upon and be measured by the amount of the profits. If the profits be nil, the rent for the plant is to be nil. But, nevertheless, it is to be observed that this is a mining-lease, and leases of that kind of property necessarily contain very stringent and onerous provisions to bind the tenant; and therefore it is more necessary that he should have special provisions in order to relieve himself from the burthen of an adventure which turns out profitless to him.

On these grounds, and giving to the considerations which have been presented by my Brother Williams all the weight which anything that falls from him so eminently deserves, I now entertain no doubt that our decision ought to be (substantially) for the defendants.

The formal judgment will be in favour of the plaintiff for the rent due down to the expiration of the six months' notice, without costs, and for the defendants for the costs.

Judgment accordingly.

[352] PEARSON v. GOSCHEN AND OTHERS. June 23rd, 1864.

[S. C. 33 L. J. C. P. 265; 10 L. T. 758; 10 Jur. N. S. 903; 12 W. R. 1116.

Referred to, *McLean v. Fleming*, 1871, L. R. 2 H. L. (Sc.) 132. Discussed, *Gray v. Carr*, 1871, L. R. 6 Q. B. 529.]

1. M'C., B., & Co. chartered the plaintiff's ship "Hooyland" for a voyage from Glasgow to Porto Rico, and back to a port in the united kingdom with a full and complete cargo, —freight to be paid at the rate of 4l. 10s. per ton on the homeward cargo, as follows, viz. 350l. by four months' bills on London on the sailing of the vessel from Glasgow, and the balance half in cash and half by bills on delivery of the homeward cargo; and it was provided that, "for the security and payment of all freight, *dead freight*, and demurrage and other charges, the master and owners should have an absolute lien and charge on the said cargo and goods laden on board," and that "*bills of lading should be signed by the master as presented to him, and at any rate of freight, without prejudice to the charterparty.*" Arrived at Porto Rico, the "Hooyland" received from the agents of the charterers, L., C., & Co., 498 hogs-heads of sugar, for which the master signed a bill of lading making the goods deliverable to M'C., B., & Co., or their assigns, they paying freight at the rate of 40s. per ton.—L., C., & Co., having received notice that M'C., B., & Co. had stopped payment, refused to ship any more goods, and demanded a return of the 498 hogs-heads already shipped or a fresh charter. The master, on appeal to the British vice-consul, was informed that by the Spanish law he was compellable to restore the cargo to the shippers or to sign a fresh charter; and, acting under this advice, he consented to sign a new charter for the whole cargo at a freight of 30s. per ton. The bills of lading for the 498 hogsheads were then destroyed, 108 hogsheads more put on board, and a fresh bill of lading given for the whole, making them deliverable to the defendants or their assigns on payment of the 30s. per ton freight, one

half in cash on delivery, the remainder by four months' bills. The master did all this under protest. The ship was not fully loaded.—On the arrival of the "Hooyland" in London, the plaintiff claimed a lien upon the entire cargo for the freight mentioned in the original charterparty:—Held, that the 498 hogsheads having been shipped by L., C., & Co., under the first charterparty, as agents and on account of M'C., B., & Co., the charterers, and the master having no authority to alter that contract, the plaintiff was entitled to the full amount of the charter freight upon these: but that, as to the 108 hogsheads shipped by L., C., & Co., after the notice of the failure of M'C., B., & Co., the master, acting in the interest of his owner, was authorized to enter into the new contract, and consequently the plaintiff was only entitled to the stipulated rate of freight (30s. per ton) upon them.—2. And held, that the plaintiff could not claim, as "dead freight," the difference between the sum he would be entitled to, calculated on the above principle, and the sum which the vessel would have earned if a *full cargo* had been put on board at the freight originally stipulated for.

This was an action brought by the plaintiff to recover from the defendants the sum of 1265l. 16s. 5d., alleged to be owing for freight and demurrage of the plaintiff's ship the "Hooyland."

The declaration stated that, before and at the time of the making by the defendants of the promise thereafter mentioned, the plaintiff was the owner of a certain ship called the "Hooyland," and the plaintiff had theretofore chartered the said ship to certain persons carrying on business under the firm of M'Cormick, Ball, & Co., to load a cargo at Glasgow, and therewith proceed to a safe port in Porto Rico, and there deliver the said cargo: after which the said ship was again to be made ready, and there, or at any other safe port in [353] the same island, load from the said freighters or their factors a *full and complete cargo* of sugar or other lawful merchandise, and return therewith to a port of discharge in the united kingdom, as provided in the charterparty, and deliver the same to the said freighters or their assigns, freight for the same being paid at and after the rate and in the manner provided by the said charterparty: and it was also by the said charterparty agreed that, for the security and payment of all freight, dead freight, and demurrage and other charges, the master and owners should have an absolute lien and charge on the said cargo and goods laden on board: That, afterwards, the said ship sailed from Glasgow aforesaid under the said charterparty with a certain cargo, and delivered the same at a certain port in Porto Rico, and thence proceeded to another port in the said island according to the said charterparty, and there loaded from the factors of the said charterers a large quantity of sugar, and, being so loaded, sailed and proceeded therewith to a port of discharge in the united kingdom, and was there ready to deliver the same pursuant to the terms of the said charter, and upon payment to the plaintiff of the freight for the same, and also a certain sum of money due for dead freight and demurrage according to the said charter, amounting to a large sum of money, for security and payment of which the plaintiff had according to the aforesaid provisions a lien on the said cargo: and the plaintiff had put a stop on the said goods for the said amount of his said claim: That thereupon the defendants, claiming to be entitled to have the said goods delivered to them as the consignees thereof upon payment of a much smaller sum of money than the said amount claimed by the plaintiff as due to him as aforesaid, and disputing the right of the plaintiff to have a lien on the said goods as against them the de-[354]-fendants for the said large amount of money, in consideration of the plaintiff delivering the said goods to the defendants, the defendants promised and undertook to pay to the plaintiffs such further sum (if any) as the plaintiffs might by law be entitled to a lien for on the said goods as against them the defendants, over and above the said smaller amount admitted by the defendants to be due as aforesaid: And that all conditions were fulfilled necessary to entitle the plaintiff to be paid by the defendants a large sum of money on account of the said freight, dead freight, and demurrage, according to the said promise and undertaking, being a sum over and above the said smaller amount: yet that the defendants had not paid the same.

There was also a count for money payable by the defendants to the plaintiff for money promised and agreed to be paid by the defendants to the plaintiff in consideration of the plaintiff delivering to the defendants out of a certain ship of the plaintiff

certain goods then carried in the said ship, and for the freight of which goods the plaintiff had a lien thereon. (Claim, 3000l.)

The defendants pleaded, —first, as to the first count, that the plaintiff had not chartered the said ship upon the terms alleged, —secondly, to the first count, that the said ship did not load from the factors of the said charterers any sugar as in the said count alleged, —thirdly, to the same count, that the plaintiff was not by law entitled to a lien on the said goods as against the defendants for any further sum beyond the amount for which the plaintiff accepted the defendants' cheque as in the first count alleged, —fourthly and fifthly, to the money counts, never indebted, and payment. Issue thereon.

The cause came on for trial before Erle, C. J., at the sittings in London after Hilary Term last, when a [355] verdict was taken by consent for the plaintiff, for the amount claimed, subject to the opinion of the court upon the following case:—

1. The plaintiff is a ship-owner residing and carrying on business at Glasgow; and the defendants carry on business as merchants in London, under the style or firm of Frühling & Göschén.

2. On the 17th of October, 1862, the plaintiff chartered the ship "Hooyland" to Messrs. Charles Thorburn & Co. of Glasgow, for a voyage for the round from Glasgow to any safe port at Porto Rico and thence back to a port in the united kingdom. According to the terms of the charterparty, the freight for the voyage was to be at the rate of 4l. 10s. per ton upon the homeward cargo delivered, and to be paid as follows, viz. 350l. by approval bills at four months' date, payable in London, on sailing of the vessel from Glasgow, and the balance, one half in cash on right delivery of the homeward cargo at port of discharge, and one half by approved bills on London at four months' date at the same time. The disbursements of the vessel at Porto Rico were to be paid by the charterers' agents, in full of which 100l. was to be deducted from the freight: forty-five working days were to be allowed for discharging and loading at Porto Rico and waiting orders at Queenstown or Falmouth, and twenty-five working days for loading at Glasgow, to commence on the 27th of October then current, and ten days on demurrage over and above the said laying days, at 6l. per day, to be paid day by day as the same should become due: And it was agreed that, for security and payment of all freight, dead-freight, demurrage, and other charges, the master and owners were to have an absolute lien and charge on the said cargo or goods laden on board: Bills of lading to be signed by the master as presented to him, and at [356] any rate of freight, without prejudice to the charterparty.

3. This charter was made by Messrs. Thorburn & Co. as agents for Messrs. McCormick, Ball, & Co., of Porto Rico.

4. The "Hooyland" received her outward cargo at Glasgow, and, on the 1st of December, 1862, set sail for the port of Arecibo in Porto Rico, having been kept on demurrage at Glasgow five days, which at 6l. per day would amount to 30l.

5. The "Hooyland" arrived at Arecibo on Saturday, the 10th of January, 1863; and, after some delay in unloading, owing to bad weather, the discharge of the cargo was completed at another port called San Juan on the 13th of March.

6. At San Juan, the captain of the "Hooyland" was directed by the charterers to proceed to the port of Ponce, another port in Porto Rico, for his homeward cargo, and to address himself there to the charterers' agents, Messrs. Lohse, Cortada, & Co., who would ship the homeward cargo.

7. The captain proceeded accordingly to Ponce; at which place he arrived on the 23rd of March, and at once reported himself to Messrs. Lohse, Cortada, & Co., according to his instructions from the charterers: and he put into their hands a copy of his charter, which they read. He also inquired of them how soon the homeward cargo would be ready, and they replied that the cargo was then ready.

8. As soon as the discharge of the ballast then in the vessel was completed, the shipment of the homeward cargo was commenced. Four hundred and ninety-eight hogsheads and forty-nine barrels of sugar marked M. C. B., were loaded on board, and a bill of lading for the same signed and delivered by the captain to Messrs. Lohse, Cortada, & Co., at a freight of 2s. per cwt. payable on delivery in the united kingdom.

[357] 9. The further shipment of cargo then ceased; and, after a delay of some days, during which the captain was applying for the remainder of the cargo, Messrs. Lohse, Cortada, & Co., informed him that Messrs. McCormick, Ball, & Co., had suspended payment, and that they could not ship any more cargo on account of their

failure; and they also required him to discharge and return to themselves the cargo already shipped, and for which he had signed a bill of lading as above stated.

10. The captain refused to discharge or return any part of the cargo which he had received on board. Messrs. Lohse, Cortada, & Co. thereupon told him that he would be compelled to discharge his cargo or sign another charter. They then again required him either to sign a new charter with them, or to discharge the cargo, and threatened in the event of his refusal to compel him to do so.

11. At this stage of the proceedings, the captain attended with one of the firm of Lohse, Cortada, & Co., before the British vice-consul, in order to obtain his opinion; who told him that by the Spanish law he would be obliged to sign a new charter or to discharge his cargo, and advised him to sign a fresh charter.

12. The captain had in the meantime written, at the request of Lohse, Cortada, & Co., to M'Cormick, Ball, & Co., stating what had taken place, and received from them the following reply:—

“Arecibo, P. R., April 10th, 1863.

“Sir,—We regret to be compelled to inform you that we have declared our suspension of payments, and are in consequence unable to provide you with your return cargo of produce or assume any further responsibility in the matter. You are therefore at liberty to act as you please, and consider most to the benefit of your owner's interest. We hope, however, [358] you will be able to effect some arrangement in Ponce, which may diminish as much as possible the very heavy loss which will unfortunately fall upon our friends concerned in this affair. In doing this, we feel assured that you will meet with the best advice and every assistance from Messrs. Lohse, Cortada, & Co.

“M'CORMICK, BALL, & CO.”

13. Thereupon the captain, after protesting against the proceedings of Messrs. Lohse, Cortada, & Co., entered into a new charterparty with them, by which the “Hooyland” was chartered for a voyage from Ponce to Queensland or Falmouth for orders, to a port of discharge in the united kingdom, at a freight of 30s. per ton.

14. All the parts of the bill of lading signed under the first charter were destroyed by Messrs. Lohse, Cortada, & Co.

15. Messrs. Lohse, Cortada, & Co. then proceeded with the loading, and shipped a further quantity of sugar, viz. one hundred and eight hogsheads and eight barrels, making the whole amount six hundred and six hogsheads and fifty-seven barrels. The loading was finally completed on the 21st of April, 1863, and a bill of lading signed for the whole quantity, at 30s. per ton, payable on delivery in London.

16. On the 22nd of April, 1863, the captain addressed the following letter to the plaintiff:—

“Barque ‘Hooyland,’ Ponce, Porto Rico,
“22nd April, 1863.

“Adam Pearson, Esq.

“Sir,—I am sorry to inform you that, after all the delay and trouble we have had in this Island, that M'Cormick, Ball, & Co., have stopped payment. I got notice from the agents here that they were unable to provide a homeward cargo for the ‘Hooyland.’ I [359] having on board at the time four hundred and ninety-eight hogsheads and forty-nine barrels of sugar shipped by Messrs. Lohse, Cortada, & Co., of this port, as soon as they get notice of M'Cormick, Ball, & Co.'s failure, they claimed the cargo, and wanted me to discharge it or sign a fresh charter. I refused to do either. I went to the British consul, and he told me I would be obliged to discharge the cargo or comply with their request. I would do nothing until I heard from M'Cormick. An express was sent to Arecibo, which took six days to go there and back. The letter I inclose: so, what could I do rather than discharge the cargo? I noted a protest against the charterers for non-performance of the agreement, and had to accept a charter at 11. 10s. per ton, to call at Falmouth for orders.

“We are now loaded, and will sail to-morrow morning. We have on board six hundred and six hogsheads and fifty-seven barrels; we could have stowed about one hundred more barrels, but they had no more to give me. We have to pay all our expenses here, drogherage of this cargo, and port-charges. I had to buy some beef and bread here. I was afraid of being short on the passage.

“JOHN M'ALLEY.”

17. With the above cargo, the ship was not fully loaded: there being space for not less than one hundred barrels of sugar in addition: and there was a deficiency of ninety-three barrels upon the quantity guaranteed to be shipped by the original charterparty: the freight of which, at the rate of 4l. 10s. per ton, would have been 35l. 13s. 8d.

18. The ship was detained at Porto Rico in discharging her outward cargo and loading her homeward cargo eight days beyond the time allowed by the original charterparty, which at 6l. per day makes a claim of 48l. for demurrage there.

[360] 19. Previously to the suspension of McCormick, Ball, & Co., as above mentioned, they had expended 140l. according to the following account:—

“Port charges and ordinary disbursements of the ship at Aquadilla, San Juan, and Arecibo, up to the 24th of March, 1862, \$492. 50 £100 0 0	
Cash to captain, about	\$103
Provisions	64
Fine on account of error in manifest	26
<hr/>	
Up to the 24th of March	\$195 = 40 0 0”

The above sums were paid by Messrs. McCormick, Ball, & Co., who signed at foot of the accounts an order of transfer to Messrs. Lohse, Cortada, & Co., in the following terms, —

“Pay to Messrs. Lohse, Cortada, & Co., value in account.
“M'CORMICK, BALL, & Co., Arecibo.
“March 24, 1863.”

The captain subsequently, at Ponce, on the 15th of April, 1863, certified these accounts as correct, and to be deducted from his homeward freight.

20. Messrs. Lohse, Cortada, & Co., after the ship arrived at Ponce, paid the following sums:—

“For lighterage and loading the whole of the sugar	about 50l.
For ship's disbursements	about 26l.
Cash to captain, and provisions	about 35l.—£111 19 0.”

To this they added the two first-mentioned accounts transferred to them as above stated, and took the captain's receipt for the whole 251l. 19s. referred to in the next paragraph of the case.

21. On the back of the bill of lading finally signed by the captain as above mentioned, he was required to sign and did sign the following receipt,—

“Received from Messrs. Lohse, Cortada, & Co., on account of the within freight, the sum of 251l. 19s. sterling: and furthermore declare that my vessel is dispatched within the time agreed, and that I have [361] no claim whatever for demurrage, dead freight, &c.
“JOHN M'ALLEY.

“Ponce, 22nd April, 1863.”

22. The ship sailed on her homeward voyage on the 22nd of April, 1863, and called in due course for orders at Falmouth, where she was detained one day on demurrage, waiting for orders. The captain then, having received orders from the defendants, proceeded to London as his port of discharge, where he arrived on the 6th of May, 1863.

23. At this time, the plaintiff had received the sum of 350l. payable on the sailing of the vessel from Glasgow according to the provisions of the original charterparty.

24. The freight upon the 498 hogsheads and 49 barrels shipped in the first instance at Ponce, and for which the bill of lading afterwards destroyed was given, would amount at the rate of freight in that bill of lading to the sum of 520l. 1s. 6d.; and the freight for the residue of the cargo afterwards shipped, at the rate of the original charterparty, namely at 4l. 10s. per ton, would amount to the sum of 235l. 6s. 3d., and at the rate of 40s. would amount to the sum of 112l. 11s. 8d., and at the rate inserted in the bill of lading for the same, namely 30s. to the sum of 84l. 8s. 9d.

25. The freight for the whole cargo shipped, namely the 606 hogsheads and 57 barrels, at the rate of freight mentioned in the first charter, would amount to 1423l. 18s. 7d.; and, at the rate of freight mentioned in the second charter and in the bills of lading held by the defendants, would amount to the sum of 474l. 9s. 10d.

26. The above cargo was consigned by Messrs. Lohse, Cortada, & Co., to the defendants as their agents for the sale of the same on their account; and they forwarded the bills of lading to the defendants for that purpose.

[362] 27. The defendants were holders of the bills of lading as agents for Messrs. Lohse, Cortada, & Co., and for the above purpose, when the plaintiff, having received intelligence of the above circumstances, and before the arrival of the cargo, caused the following letter to be sent to the defendants:—

“Messrs. Frühling & Göschen.

“London, 16 May, 1863.

“Gentlemen,—Being advised that the cargo of the barque ‘Hooyland,’ from Porto Rico, is consigned to you, we hereby give you notice that we hold a lien upon the same for amount of freight, dead-freight, and demurrage, in terms of charterparty made in Glasgow the 22nd October, 1862, between the owner of the said vessel and the agents of Messrs. McCormick, Ball, & Co., of Porto Rico; and further give you notice not to part with said cargo until same is released from the claim now made by us above.

“SPYER & HAYWOOD, agents for the owner
of the barque ‘Hooyland.’”

28. The cargo was afterwards landed into the docks, and a stop put upon the same by the plaintiff for his claim on account of freight and demurrage.

29. The defendants were willing to pay the amount of the freight according to the bill of lading held by them, less the above-mentioned sum of 257l. 19s., which appeared by the indorsement at the back of the bill of lading to have been paid on account of the freight, amounting with such deductions to 225l.; and they have since paid this amount into court, and no question arises upon it. The plaintiff, however, refused to give up the cargo upon the payment of such sum.

30. The defendants wrote to the plaintiff the following proposition:—

[363] “London, 4th Nov. 1863.

“If you will be good enough to withdraw your stop on the cargo per ‘Hooyland,’ we undertake to hold ourselves responsible to you for your claim, in the event of your being able to establish your lien on the cargo for the freight and demurrage due under the original charterparty; and any proceedings at law or equity which would be competent to you while the sugars were on ship-board or under stop shall be equally competent against us. We are, of course, ready to pay the 30s. freight under the new charterparty.”

31. The plaintiff acceded to this proposition, and the stop was accordingly withdrawn, and the cargo delivered to the defendants.

32. It was agreed that the court should draw such inferences of fact as a jury might draw.

The questions for the opinion of the court were, —First, whether the plaintiff was entitled to recover against the defendants any further sum of money than the said sum of 225l. paid into court: —secondly, if so, which of the above-mentioned sums of money the plaintiff was entitled to recover beyond the said sum of 225l.

If the court should answer the first question in the negative, judgment was to be entered for the defendants; but, if in the affirmative, then judgment was to be entered for the plaintiff for such sum as the court should find, in answer to the second question, the plaintiff was entitled to over and above the said sum of 225l.

Watkin Williams (with whom was Lush, Q. C.,) for the plaintiff (a). The facts are

(a) The points marked for argument on the part of the plaintiff were as follows:—

“1. That the captain had no authority to substitute a fresh charterparty and bills of lading, and that the freight, &c., is to be calculated according to the original charterparty and bills of lading:

“2. That, so far as relates to the cargo shipped before the failure of McCormick, Ball, & Co., the freight is according to the bills of lading signed for that cargo:

“3. That, if the plaintiff is bound by the second charterparty, the defendants cannot claim the benefit of any advances made under the first charterparty.”

shortly these. The [364] plaintiff chartered the "Hooyland" to M'Cormick & Co., of Porto Rico, for a voyage from Glasgow to Porto Rico and back to England, at a freight of 4l. 10s. per ton on the homeward cargo (no freight being payable for the voyage out), the freight to be paid 350l. by a four months' bill on London on the sailing of the vessel from Glasgow, and the balance on delivery of the homeward cargo at the port of discharge, one half in cash, the other half by approved bills on London at four months' date, and it was agreed that the master should sign bills of lading at any rate of freight, without prejudice to the charterparty. Arrived at Areibo, the captain was directed by the charterers to proceed to Ponce, there to receive his homeward cargo from Lohse, Cortada, & Co., their agents. At Ponce the captain received from Lohse, Cortada, & Co. 498 hogshheads and 49 barrels of sugar (about four fifths of a full cargo), for which he signed bills of lading at 40s. per ton, payable on delivery in London. The charterers, M'Cormick, Ball, & Co., having stopped payment, Lohse, Cortada, & Co., not only refused to ship any more cargo, but demanded the unshipment of that already on board: and ultimately the captain, acting under a species of duress, consented to sign a fresh charterparty to Lohse, Cortada, & Co., and at the same time, cancelling the former bill of lading, to give them a new bill of lading making the whole cargo deliverable to their assigns, the now defendants, on payment of freight at 30s. per ton. On the arrival of the ship [365] in London, the plaintiff claimed the entire chartered freight: and the defendants offered to pay the freight stipulated for by the bills of lading which they held. The defendants also claimed a right to deduct 251l. 19s. in respect of advances and disbursements before and after the second charterparty was signed. This they clearly are not entitled to. [Williams, J. How would the matter stand if you succeeded in establishing that the plaintiff is entitled to the freight under the original charterparty to the extent of the sugars put on board before the notice of M'Cormick, Ball, & Co.'s insolvency?] The plaintiff claims 4l. 10s. per ton upon these, or, failing that, 40s. per ton, and 30s. per ton for the sugars subsequently shipped by Lohse, Cortada, & Co. on their own account. As to the original freight, the charterers were clearly liable: for their convenience, the charterparty contains a stipulation that the master may sign bills of lading at any rate or freight, but without prejudice to the charterparty. The result is that, unless the bills of lading are in the hands of a bona fide holder for value, that provision has no operation at all. So long as they remain in the hands of the charterers or their agents, the original contract remains unaffected. That is precisely the position of things here. The authorities upon this subject are clear: see *Kitchner v. Venus*, 12 Moore's P. C. 361; *Shand v. Sanderson*, 4 Hurlst. & N. 381. [Willes, J. To which you may add a case in this court of *Kern v. Deslandes*, 10 C. B. (N. S.) 205 (a). Here, the bill of lading was held by persons [366] who had notice of the terms of the charterparty. Williams, J. The plaintiff will be content to take 4l. 10s. per ton in respect of the sugars first put on board, and 30s. per ton for the rest?] Yes.

Sir George Honynman (with whom was F. M. White), for the defendants. The plaintiff is only entitled, as against these defendants, to the freight mentioned in the bill of lading given by the master to Lohse, Cortada, & Co., viz. 30s. per ton. The original charterparty remains uncancelled. Upon the fact of M'Cormick, Ball, & Co.'s failure becoming known, Lohse, Cortada, & Co. claimed to exercise the right which the Spanish law gives to an unpaid vendor to stop in transitu the goods which had already been shipped. The captain, doing the best for the interests of his owner, in order to avoid the unloading of the cargo, consented to enter into a fresh bargain with Lohse,

(a) By a charterparty which was negotiated by A. as agent of B., the charterer (B.) engaged to pay a lump-freight of 735l. for a voyage to the coast of Africa and back to London, payable in cash on correct delivery of the return cargo: and the charterparty contained the following clauses,—“The master to sign bills of lading at any rate of freight, without prejudice to this charter.” B., the charterer, shipped certain oil on his own account for London, for which the master signed a bill of lading making the oil deliverable to A. or assigns, “he or they paying freight for the said goods as usual.” This bill of lading B. indorsed to A. in part payment of advances made by him on the purchase of the outward cargo. It was held that, A. having notice of the terms of the charterparty, the owner was entitled to a lien on the oil for the entire charter freight.

Cortada, & Co. [Willes, J. The case does not state that the Spanish law gave the shippers the right to demand the re-delivery of the 498 hogsheads and 49 barrels: and it is in the highest degree improbable that it should do so. Williams, J. The contract was made in England, and was to be performed in England.] Not the contract with Lohse, Cortada, & Co. for the shipment of the sugar at Ponce. A sale of goods by a Spanish merchant in a Spanish port must be subject to the Spanish law. [Williams, J. There [367] is nothing upon the face of the special case to shew that the sugars shipped were sold by Lohse, Cortada, & Co. to McCormick, Ball, & Co. On the contrary, they appear to have been shipped by them as agents for the charterers.] The right to demand re-delivery of goods was recently discussed in this court in *Blasco v. Fletcher*, 3 C. B. (N. S.) 147. [Willes, J., referred to *Curling v. Long*, 1 Bos. & P. 634.] The right of an unpaid vendor to stop goods in transitu is superior to the lien of the carrier: *Oppenheim v. Russell*, 3 Bos. & P. 42; *Smith v. Goss*, 1 Campb. 282; Blackburn on the Contract of Sale, 262. [Willes, J. In *Oppenheim v. Russell*, the claim of lien was for the carrier's general balance: and in *Smith v. Goss*, the question did not arise between the vendor and the carrier.] In *Thompson v. Small*, 1 C. B. 328, a ship was chartered for a voyage from London to Sydney, the charterer to have the entire use of the ship, and to pay the owner 1600l. in London in two months. The ship cleared at the Custom House. The charterer bought of the plaintiff goods to be paid for before the ship left London; and the plaintiff delivered the goods on board, and took the mate's receipt for them. Before the ship was ready to sail, the charterer was unable to pay for the goods (though not bankrupt nor taking the benefit of the Insolvent Debtors Act), and the plaintiff thereupon gave notice to the captain to re-deliver them, and, on his refusal, made an arrangement with the charterer, and again applied to the captain in the charterer's name for the re-delivery, offering to pay all reasonable charges. The captain having refused to re-deliver, it was held that the ship-owner had no lien upon the goods, but that the charterer had a right, as between himself and the ship-owner, to take the goods out of the ship, at all events until the stipulated sum had become due, and that the captain was therefore liable [368] in trover. [Willes, J. That was a very peculiar case. There the freight was a lump sum payable two months after the sailing of the vessel. It could not create a lien, at all events until the freight became due. Now it is doubted whether it would even when due. This court on one occasion treated such a stipulated sum as freight (a). But the true key to the decision in *Thompson v. Small* is given in *Kirchner v. Venus*, 12 Moore's P. C. 361. Where parties, instead of trusting to the general rule of law with respect to freight, make a special contract for a payment which is not freight, it must depend upon the terms of that contract whether a lien does or does not exist. When the contract made gives no lien, a court of law will not supply one by implication.] The shippers of the sugar might have refused to put it on board if they had known of the stoppage of McCormick, Ball, & Co. They insisting upon having it unshipped when they did receive intelligence of the event, the master goes to the British vice-consul; and, being advised that he may be compelled to comply with that demand, acting as a free agent, he elected to adopt the course which he deemed best for the interest of his owner, and entered into a new contract with the shippers under which he engaged to bring the sugars home at a freight of 30s. per ton. What passed at Ponce was exactly the same as if the goods had been landed, and re-shipped under the new charter and bill of lading. At all events, the plaintiff had no right to detain these sugars for more than the original bill of lading freight, viz. 40s. per ton. They were shipped upon the faith of a clause in the charterparty empowering the master to sign bills of lading at any rate of freight [Williams, J. Lohse, Cortada, & Co. were aware of the existence of the charterparty by which the owner was entitled to [369] freight at 4l. 10s. per ton.] True: but they were also aware of the power reserved to the master to sign bills of lading at a lower rate. In *Foster v. Colby*, 3 Hurlst. & N. 705, S. & W. chartered a ship from Liverpool to Calcutta and home for the sum of 7000l., "the freight to be paid 1250l. on the vessel clearing from Liverpool, and 1000l. on delivery of the outward cargo at Calcutta, the remainder in cash two months from the vessel's report inwards, and after right delivery of the cargo, &c.; the master to sign bills of lading at any rate of freight required, without prejudice to this charterparty: the owners of the ship to have an absolute lien on the

(a) *Gledstanes v. Allen*, 12 C. B. 202 (l).

cargo for all freight, dead freight, and demurrage." There were provisions for payment of the freight in cash on delivery of the cargo, if the cargo was delivered abroad. S. & C., who were the charterers' agents at Calcutta, having made advances to disburse the vessel, shipped a quantity of linseed, for which the captain signed bills of lading deliverable to their order or assigns on payment of freight at 5s. per ton, the current rate being 5l. 10s. Against this shipment, S. & C. drew a bill of exchange, and indorsed and delivered it, together with the bill of lading, for value. It was held that, assuming the charterparty to have created a lien for the charterparty freight against the charterers, a bona fide indorsee of the bill of lading, without notice of the charterparty, was entitled to the linseed on payment of the bill of lading freight. "If" said Pollock, C. B., "a shipowner so conducts his business as to permit the master to sign bills of lading at a lower freight than that payable by the charterparty, in consequence of which parties are induced to make advances on such bills of lading, the ship owner is bound. It is said that, from the small amount of freight mentioned in the bill of lading, the indorsee must have had notice that [370] the sum named was not the true freight for the goods, that suspicions should have been excited, and that it ought to have been assumed that the parties did not mean what they said. But, in a court of law, we must presume that persons who sign mercantile documents mean what they say." And Bramwell, B., says: "The bank,"—the consignees of the bill of lading, "claims to be owner of the goods, and by the bill of lading it appears that the owner is to have them on payment of 5s. per ton. It is a monstrous proposition that, when a person purchases goods upon the faith of a document shewing that he is entitled to the possession of them on payment of a particular sum, the party who signed that document may say 'I did not mean what I wrote, but I am entitled to something more.' But no one is bound to suppose the other means something contrary to what he has said." And in *Shand v. Sanderson*, 4 Hurlst. & N. 381, the like doctrine was laid down. [Williams, J. In those cases the question arose between the ship-owner and an assignee for value. Different considerations arise as between the ship-owner and the charterers.] As to the sugars subsequently shipped, there can be no question but that the defendants were entitled to have them on payment of the bill of lading freight. [Williams, J. As to that we are with you.] The defendants are also entitled to deduct the disbursements and expenses mentioned in the case.

Williams, in reply, conceded that the 108 hogsheads and 8 barrels were deliverable on payment of the 30s. freight: but he insisted that, by reason of the clause in the charterparty which provided that, "for security and payment of all freight, *dead freight*, demurrage, and other charges, the master and owners were to have an absolute lien and charge on the said cargo or goods [371] laden on board," the plaintiff was entitled to a lien in respect of a full imaginary cargo at 4l. 10s. per ton, deducting the 30s. per ton for the sugars shipped under the second contract. [Williams, J. There is no implied lien for dead freight: and the expression "dead freight" is wholly inapplicable to the claim here: *Phillips v. Rodie*, 15 East, 547; *Birley v. Gladstone*, 3 M. & Selw. 205.]

WILLIAMS, J. I am of opinion that the plaintiff is entitled to recover in this action. The first question submitted for our consideration is, whether the plaintiff is entitled to recover against the defendants any further sum than the 225l. paid into court. I am of opinion that he is: but it is unnecessary for us now to state the exact amount to which he is entitled: and it will be enough for us to state the principle, and the parties can agree as to the amount. With respect to the 498 hogsheads and 49 barrels of sugar put on board the "Hooyland" by Messrs. Lohse, Cortada, & Co., before they received intelligence of the failure of M'Cormick, Ball, & Co., the charterers, I am of opinion that the plaintiff is entitled to freight on the footing of the price stipulated for in the original charterparty, viz. 4l. 10s. per ton. The ground upon which I arrive at that conclusion is that, upon the facts before us, from which we are to draw such inferences as a jury might draw, the 498 hogsheads and 49 barrels were not only shipped under the original charterparty, but were shipped by Messrs. Lohse, Cortada, & Co. as agents of M'Cormick, Ball, & Co., the original charterers, and therefore the case stands as if they had been shipped by the charterers themselves. That being so, the law does not admit of any doubt, that the charterers, having so shipped the goods, had no right to require them to be unshipped. It was the captain's [372] duty to retain them for the benefit of his owner, by way of lien for the sum

which would become due in respect of freight to be earned under the charterparty. Then comes the question, what effect the bill of lading which the captain thought himself compelled to sign at a rate of freight lower than that mentioned in the charterparty, has upon the plaintiff's rights. It seems to me that it has no effect whatever. The captain had no authority from his owner, under the circumstances under which these goods were put on board, to substitute any new bargain for that which had already been entered into and which bound both parties. He had no right to vary the terms of that bargain. Therefore, so far as regards the 498 hogsheads and 49 barrels, the account must be taken between the parties on the basis of a charge of 4l. 10s. per ton, as mentioned in the charterparty.

With regard to the 108 hogsheads and 8 barrels subsequently put on board, I deduce from the facts stated in the special case this state of things, viz. that the charterers, Messrs. McCormick, Ball, & Co., and their agents, Lohse, Cortada, & Co., had declined to ship any more goods on the terms of the original charterparty; and therefore what occurred afterwards stands upon the same ground as if the captain had made a bargain with a third person on such terms as, acting for the benefit of his owner, he thought it prudent to make. These goods therefore were, I think, received upon the footing of quite a different contract, and one which the captain had authority to make so as to bind his owner. As to these, therefore, the bill of lading freight of 30s. per ton is that which ought to be attributed to them. This disposes of the whole case as originally argued, except as to the claim for expenses.

Besides the 100l. for disbursements stipulated by the charterparty to be deducted from the freight, there [373] were some extras and necessary expenses incurred by the captain for the benefit of his owners. These, I think, ought to be allowed out of the freight.

In his reply, Mr. Watkin Williams entered upon a new field of contest, viz. that, as, by the terms of the charterparty, it was agreed that, for security and payment of all freight, dead freight, demurrage, and other charges, the master and owners were to have an absolute lien and charge on the cargo, the plaintiff was entitled to a lien for what would have been the freight if a full cargo had been put on board,—treating that as dead freight which was wanting to constitute a full loading to the extent of the ship's capacity. The words relied on in support of this claim are the printed words inserted in all these documents: and, although they might have had an application if there had been any special provision in the charterparty as to dead freight to which they could be applied, yet, if there are no such special provisions, they are not to be regarded. There are many words in most mercantile instruments which have no meaning at all if the contract in hand does not fit them. It was contended by Mr. Williams that the damages which the plaintiff was entitled to recover for breach of the charterparty in not loading a full homeward cargo, would be dead freight within the meaning of the words used in this clause. But it seems to me that "dead freight" is wholly inapplicable to a claim such as this, which consists merely of the right to have damages in respect of a failure to ship a full cargo.

Upon the whole, I think the plaintiff is only entitled to damages calculated according to the principles I have above stated.

WILLES, J. I am of the same opinion. As to the 498 hogsheads and 49 barrels, it appears that they [374] were loaded by the agents of the charterers with the intention of so far fulfilling the obligations of the charterers to load the vessel: and the bills of lading were signed by the master accordingly. The charterparty provided that those goods should be charged with the payment of freight at the rate of 4l. 10s. per ton, but the bills of lading were signed for a freight of 40s. per ton only; and, if those bills of lading had got into the hands of bona fide holders for value, as between them and the ship-owner the freight of 40s. per ton only could have been enforced: but, as between the ship owner and the charterers, the bills of lading have no effect upon the charterparty. Had there not been a clause in the charterparty empowering the master to sign bills of lading at a lower rate of freight, and had the bills been in the hands of a bona fide holder for value, it might have been contended that the new contract was substituted for the old contract contained in the charterparty. In that case it might have been necessary to consider whether in signing the bills of lading there was fraud on the ship-owner, as in *Faith v. The East India Company*, 1 B. & Ald. 630. But it is unnecessary now to consider that, because the charterparty gave power to the captain to sign bills of lading at any rate of freight. That power is probably

reserved for the convenience of enabling the consignees to dispose of the cargo afloat, since, if the goods were laden with a heavy charter freight, the bills of lading would not be negotiable. The charterparty, however, provides that the exercise of that right is to be without prejudice to the charterparty; and its exercise certainly would prejudice the owner's rights under the charterparty, if it were to affect the rate of freight as between him and the charterers. It seems to me to be quite obvious that, unless that which took place between Lohse, Cor-[375]-tada & Co. and the master at Porto Rico had the effect of substituting the second charterparty for the first, the defendants must pay the £l. 10s. stipulated for by the original charterparty. The master was not justified in sacrificing the rights of his owner by substituting for the contract for a freight of £l. 10s. a ton a new contract for 30s. per ton. The bare statement of the proposition is sufficient to dispose of it. As to the alleged law of Spain with regard to the right of a shipper to take back goods once shipped being greater than in our own law, it is enough to say that there is nothing upon the face of the special case to shew that such is the law of that country. Indeed, it should seem that the provision of the Spanish code by which a shipper can claim the unshipment and return of his goods at the port of loading, is inapplicable to a shipment by or on behalf of a charterer, and only applies to the case of shipment on board a general ship (*buque de carga general*). In the latter case, it is provided by article 765 of the *Código de Comercio*, that a shipper may require unshipment upon payment of half freight and all expenses of unstowing and re-stowing, but subject to an option on the part of the other shippers to purchase his goods at the invoice price, instead of allowing him to unload them. So much as to the 498 hogsheads and 49 barrels which were put on board the ship by Messrs. Lohse, Cortada, & Co. as agents for and on account of Messrs. McCormick, Ball, & Co.

As to the 108 hogsheads and 8 barrels which were afterwards shipped, I apprehend it is perfectly clear that they were not shipped under the original charterparty, but under bills of lading making them deliverable in London on payment of freight at the rate of 30s. per ton, and that the owner is only entitled to demand that sum. The master finding himself in a foreign port with his ship only in part loaded, he-[376]-cause the agents of the charterers, in consequence of the insolvency of the charterers, refused to ship any more goods, enters into a fresh contract to take on board other goods to complete his cargo. Was he not at liberty to do so? And, assuming that the merchant from whom he obtains such goods is aware of the existence of the charterparty, does that bind him to the terms of it? I apprehend not. I think the master had authority to do whatever was best for his owner: and I think in this matter he acted strictly within his authority, and consequently that the owner could only demand in respect of those goods the stipulated freight of 30s. per ton.

Then it is said that, if that be so, the difference between the bill of lading freight and the £l. 10s. stipulated for by the charterparty may be recovered as dead freight. In support of that Mr. Williams relies upon the clause in the charterparty by which it was agreed that "for the security and payment of all freight, *dead freight*, and demurrage and other charges, the master and owners should have an absolute lien and charge on the said cargo and goods laden on board;" and he has insisted that the damage sustained by the owner by reason of the charterers not having shipped a full cargo at the rate of freight stipulated for by the charterparty, was "dead freight" within that clause. I agree, however, with my Brother Williams, that the words in this part of the charterparty are mere ordinary words which have no precise signification. Besides, I apprehend the true meaning of dead freight is something totally different. As well might the words be applied to the 350l. which was to be paid by bills in advance on the sailing of the vessel from Glasgow, as to damages in respect of goods not put on board. I am aware that the expression "dead freight" has been applied to damages in respect of room lost in conse-[377]-quence of the charterers not loading according to the charterparty. But that has arisen from the poverty of our language: and I am not aware of any case in which a lien has been claimed in respect of such damages. The true meaning of dead-freight is illustrated by the case of *Phillips v. Reed*, 15 East, 547. There, the freighters of a ship covenanted that, if she should not be fully laden, he would not only pay for the goods on board, but also for so much in addition as the ship would have carried, for which he had before stipulated to pay freight according to different rates for three descriptions of goods: and it was held that the ship-owner had no lien upon the goods actually on board

for the amount of the *dead-freight*, in other words, for the compensation in damages which he was entitled to for the freighter's breach of contract in not putting a full loading on board,—which damages were unliquidated,—and there being no lien in such a case either by the usage of trade or the express contract of the parties. There was also a case of *Birley v. Gladstone*, 3 M. & Selw. 205, where the term “dead-freight” was used to denote a sum to be paid in respect of space not filled according to the charterparty. There, the ship-owners covenanted to receive a full cargo, and the freighter to load the same, and to pay so much for every ton of flax, &c., which should be delivered at the King's beams at Liverpool, and so much per diem for demurrage, and the parties mutually bound themselves, especially the ship-owners the ship, her tackle and appurtenants, and the freighter the goods to be laden and put on board, in a penal sum, for the performance of every article contained in the charterparty: and it was held that the ship-owners had not a lien upon the goods actually brought home to Liverpool, for a sum of money claimed to be due in respect of goods which were put on board at the loading [378] port, but afterwards re-laded and restored to the agent of the freighter under process of the law at the loading port, nor for a sum claimed for *dead-freight*. I do not, therefore, say that the expression “dead-freight” may not be so applied: but it is clear that it has not that meaning in the clause conferring a right of lien in this charterparty.

BYLES, J. I am of the same opinion. This is a mere question of lien. We have nothing to do with any damages the plaintiff might have a right to claim in respect of the profit he has lost by not having a full homeward cargo shipped upon the terms stipulated by the charterparty. That remains untouched. Now, the captain clearly had no authority to vary the terms upon which that part of the cargo which was first shipped was to be carried: as to that, therefore, the plaintiff was entitled to demand and had a lien for the 4l. 10s. per ton. Then, with respect to the goods subsequently shipped. What was the captain to do when Messrs. Lohse, Cortada, & Co. refused to ship any more goods on account of McCormick, Ball & Co.? Was he to return with a half-loaded ship? I conceive he was justified in entering into a new contract in order to complete the loading. Acting for the best, in the interest of his owner, he accordingly makes a new contract to carry 108 hogsheads and 8 barrels of sugar for Loshe, Cortada, & Co., at a freight of 30s. per ton. To that freight the plaintiff is entitled. That sum would have to be deducted from any damages which the plaintiff would be entitled to claim for not having had a full and complete cargo. The sum which has been called dead-freight would be the difference between the freight stipulated for by the first charterparty, and the 30s. stipulated for by the new contract. I should rather call it substituted freight. The plaintiff's lien will therefore be limited in the way suggested.

[379] KEATING, J. I entirely agree with the rest of the court, and do not think it necessary to add anything.

WILLIAMS, J. I forbore to make any remarks upon the cases of *Shand v. Sanborn*, 4 Hurlst. & N. 381, *Kirchner v. Venus*, 12 Moore's P. C. 361, and *Kerr v. Deslandes*, 10 C. B. (N. S.) 205, because I considered that the clause in the charterparty by which the master was to be allowed to sign bills of lading at any rate of freight, had no effect, seeing that in our view the goods had been shipped by the charterers themselves.

Judgment for the plaintiff for 90sl. 3s. 4d. over and above the 225l. paid into court.

BERRESFORD AND OTHERS v. MONTGOMERIE AND OTHERS. May 27th, 1864.

[S. C. 34 L. J. C. P. 41; 10 L. T. 814; 10 Jur. N. S. 823; 12 W. R. 1060.]

The 67th section of the Merchant Shipping Act Amendment Act, 1862 (25 & 26 Vict. c. 63), enacts that, where the owner of goods imported fails to make entry thereof, or, having made entry, to land the same or take delivery thereof within a certain time, the ship-owner may make entry of and land or unship the goods at the times and in the manner and subject to certain conditions,—amongst others, “*if at any time before the goods are landed or unshipped, the owner has made entry for the landing and warehousing thereof at any particular wharf or warehouse other than that at which the ship is discharging, and has offered and been ready to take delivery thereof, and the ship-owner has failed to make such delivery, and has also failed at the time*

of such offer to give the owner of the goods correct information of the time at which such goods can be delivered, then the shipowner shall, before landing or unshipping such goods under the power hereby given to him, give to the owner of the goods, or of such wharf or warehouse as last aforesaid, twenty-four hours' notice in writing of his readiness to deliver the goods," &c. Held that, to entitle himself to notice under this condition, the owner of the goods must at the time of his offer be in a condition actually to take delivery thereof. — And held that, where the ship owner at the time of the offer to take delivery is not able to make it, he is not excused from the duty of giving twenty-four hours' notice of his readiness to deliver, because the owner of the goods or his agent does not ask for "correct information of the time at which such goods can be delivered."

This was an action by the plaintiffs, merchants, against the defendants, ship-owners, for a breach of the Merchant Shipping Act Amendment Act, 1862, 25 & 26 Vict. c. 63.

The first count of the declaration stated that, before [380] and at the time of the grievances thereafter mentioned, the plaintiffs were owners of goods, to wit, of hides, within the meaning of the Merchant Shipping Act Amendment Act, 1862, and were entitled as agents for the owners thereof to the possession of the same: that the defendants were ship owners within the said act, and were authorized to act as agents for the owners of a certain ship called the "City of Edinburgh," and were entitled to receive the freight, demurrage, and other charges in respect of the said ship: that the said goods were imported in the said ship from foreign parts into the united kingdom in the said ship, and that, before the said goods were landed or unshipped, they the plaintiffs made entry of the said goods within the meaning of the said act for the landing and warehousing thereof at their wharf called Pickle Herring Upper Wharf, which said wharf was not the wharf at which the said ship was discharging, and were entitled and ready, and offered, to take delivery of the said goods,—of all which premises the defendants had notice: that all things were done and had happened and existed, and all times had elapsed, to entitle them the plaintiffs to take such delivery and to land the said goods, yet the defendants did not allow them to do so: that the defendants and all persons whose duty it was so to do failed to make such delivery, and failed at the time of such offer to give the plaintiff correct information of the time at which the said goods could be delivered: that, without the consent of the plaintiffs, the defendants landed and unshipped the said goods at a wharf or place (to wit) at the London Docks, other than the plaintiffs' wharf, which had been named in the entry aforesaid, and without giving to them, being the owners of the said goods and wharf as aforesaid, twenty-four hours' notice of their readiness to deliver the said goods, and did not bear or pay the expenses of [381] landing and unshipping the same: and that, by reason of the premises, the plaintiffs were compelled and obliged, in order to obtain possession of the said goods, to pay divers large sums of money as the expenses which had been incurred by reason of such landing and unshipping as aforesaid, and also lost the use of and had to pay large sums for the demurrage of divers barges and lighters which they had employed to take delivery of the said goods, delivery of which the defendants failed to make, and did not allow the plaintiffs to take, as in that count mentioned.

There was also a count for the conversion of bales of hides, and a count upon an account stated.

The defendants pleaded,—first, not guilty,—secondly, a traverse of the allegation that the plaintiffs had made entry of the goods within the meaning of the act,—thirdly, a traverse that they were ready and willing and had offered to take delivery of the goods,—fourthly, a traverse of the allegation that the plaintiffs did not have twenty-four hours' notice, as alleged,—fifthly, to the second count, that the goods were not the plaintiffs' goods. Issue thereon.

The cause was tried before Byles, J., at the sittings in London after last Hilary Term. The facts were as follows:—the "City of Edinburgh" arrived in the London Docks on the 24th of March, 1863, having on board fifty bales of hides consigned to Laroche & Co., and was duly reported. On the 26th Laroche & Co. entered the hides inwards at the Custom House, and obtained an order for their delivery over the ship's side for landing at the plaintiffs' wharf, Pickle Herring Upper Wharf. They immediately sent this order to the plaintiffs, together with the bills of lading duly

indorsed. The plaintiffs handed the delivery order to Chapman, their lighterman, who sent one Cayley, his apprentice, to the vessel to inquire if the goods were [382] ready for delivery. Cayley arrived on board at about 4 o'clock in the afternoon of that day, when he saw the second mate, to whom he handed the order. The hatches were closed, and no unloading was then going on. The mate told the lad that the hides were not ready for delivery. There was no lighter alongside the ship at this time; but there was one lying in the dock about one hundred yards off, which might have been brought alongside if the goods had been ready. Cayley thereupon left the order with the mate, and went away. At 9 o'clock on the morning of the 27th, the Dock Company made an entry for landing the hides. On the 28th, they were reached, and, after a portion of them had been landed on the quay, the second mate recollected that he had received the order from the plaintiffs, and shewed it to the first mate. The Custom House officer who was superintending the landing thereupon said that notice should have been sent to the plaintiffs; but the first mate directed the unloading to proceed, and the hides were warehoused by the Dock Company, who refused to give them up to the plaintiffs without payment of 10l. 2s. 6d. for landing and warehousing. The money was paid under protest, and this action brought.

The ordinary working hours at the docks, it appeared, were from 8 a.m. to 4 p.m.; the Custom House hours from 6 a.m. to 6 p.m.; but it was proved that the working hours in the docks occasionally were the same as the Custom House hours.

On the part of the plaintiffs it was submitted that, under the 67th section of the Merchant Shipping Act Amendment Act, 1862 (25 & 26 Vict. c. 63), they were under the circumstances entitled to twenty-four hours' notice that the goods were ready for delivery, and that the landing of the goods in the docks without giving them such notice was a conversion.

[383] For the defendants it was contended that the mere delivery of an order to the mate after working hours, and when there were neither lighters nor men at hand to receive the goods, was not such a demand as to entitle the plaintiffs to notice under the statute, and that the plaintiffs' application for the hides ought to have been renewed on the following morning.

Under the direction of the learned judge, a verdict was entered for the plaintiffs for the sum claimed, 10l. 2s. 6d., leave being reserved to the defendants to move to enter a verdict for them, if the court (drawing such inferences from the facts as a jury might draw) should be of opinion that the defendants were not in default,—the judgment of the court to be conclusive, unless the court should otherwise order.

Giffard, in Easter Term last, obtained a rule nisi accordingly.

F. M. White (with whom was Lush, Q. C.), now shewed cause. The question in this case turns upon the construction to be put upon the 67th section of the 25 & 26 Vict. c. 63, which enacts that, "where the owner of any goods imported in any ship from foreign parts into the united kingdom fails to make entry thereof, or, having made entry thereof, to land the same or take delivery thereof and proceed therewith with all convenient speed by the times severally hereinafter mentioned, the ship-owner may make entry thereof, and land or unship the said goods at the times, in the manner, and subject to the conditions following, that is to say,—1. If a time for the delivery of the goods is expressed in the charter-party, bill of lading, or agreement, then at any time after the time so expressed,—2. If no time for the delivery of the goods is expressed in the charter-party, bill of lading, or agreement, then at any time after the [384] expiration of 72 hours, exclusive of a Sunday or holiday, after the report of the ship,—3. If any wharf or warehouse is named in the charter-party, bill of lading, or agreement, as the wharf or warehouse where the goods are to be placed, and if they can be conveniently there received, the ship-owner, in landing them by virtue of this enactment, shall cause them to be placed on such wharf or in such warehouse,—4. In other cases, the ship-owner, in landing goods by virtue of this enactment, shall place them in and on some wharf or warehouse on or in which goods of a like nature are usually placed; such wharf or warehouse being, if the goods are dutiable, a wharf or warehouse duly approved by the commissioners of customs for the landing of dutiable goods,—5. If at any time before the goods are landed or unshipped, the owner of the goods is ready and offers to land or take delivery of the same, he shall be allowed so to do, and his entry shall in such case be preferred to any entry which may have been made by the ship-owner,—6. If any goods are, for the purpose of convenience in assorting the same, landed at the wharf where the ship is discharged,

and the owner of the goods at the time of such landing has made entry and is ready and offers to take delivery thereof, and to convey the same to some other wharf or warehouse, such goods shall be assorted at landing, and shall, if demanded, be delivered to the owner thereof within twenty four hours after assortment; and the expense of and consequent on such landing and assortment shall be borne by the ship owner,"— 7. (Which is the material one to be considered here) "If at any time before the goods are landed or unshipped, the owner thereof has made entry for the landing and warehousing thereof at any particular wharf or warehouse other than that at which the ship is discharging, *and has offered and been ready to take delivery thereof*, and [385] the ship owner has failed to make such delivery, and has also failed at the time of such offer to give the owner of the goods correct information of the time at which such goods can be delivered, then the ship owner shall before landing or unshipping such goods under the power hereby given to him, give the owner of the goods, or of such wharf or warehouse as last aforesaid, *twenty four hours' notice in writing of his readiness to deliver the goods*, and shall, if he lands or unships the same without such notice, do so at his own risk and expense." Entry having been made by the owners of these goods for landing and warehousing them at a particular wharf, and delivery having been once demanded, it was the duty of the ship-owners to give them notice of their readiness to deliver them; and they had no right to put them on a place where the owners did not want them, and to saddle them with expenses to procure their release. A ship owner has no right, independently of the statute, at once on the ship's arrival in a dock or at a wharf to land the goods: *Spots v. Hay*, 4 T. R. 260; *Gatliffe v. Bourne*, 5 Scott, 667, 4 N. C. 314; *Bourne v. Gatliffe*, in the Exchequer Chamber, 5 Scott, N. R. 1, 3 M. & G. 613; in the House of Lords, 11 Clark & Fin. 45, 8 Scott, N. R. 694; though the ship owner was not bound to wait an indefinite time: *Howard v. Shepherd*, 9 C. B. 297. The clause now under consideration was introduced into the Merchant Shipping Act Amendment Act of 1862 for the express protection of wharfingers. The plaintiffs, having put themselves in a position to receive the goods, and having once intimated their readiness to take delivery, it clearly was the duty of the defendants to give them notice. [Willes, J. The intimation of readiness to receive the goods was given after working hours on the 26th of March.] The second mate took the order without objection on that score. Be-[386] sides, these not being dutiable goods, they might have been landed up to 6 p.m. If Cayley had been told the request could not be complied with because it was brought too late, he would have gone again on the following morning. All that was said, however, was that the hides were ready for delivery.

Giffard and Murphy, in support of the rule. The question is whether that which was done by the Dock Company was done rightly under the Merchant Shipping Act Amendment Act and their own acts; or, in other words, whether what was done by the plaintiffs was a compliance with the 7th article of the 67th section of the first-mentioned act. It is submitted that what the plaintiffs did was a mere colourable compliance with that provision. These were packages weighing 5 cwt. each. A mere inquiry whether they were ready for delivery, unless the party making it was ready at the time to take delivery, amounts to nothing. It did not appear that Cayley had a lighter alongside. [Erle, C. J. What was the use of having a lighter there on the 26th, when the ship owners were not ready to deliver the hides?] The words of the statute are "has offered and been ready to take delivery." Can it be said that these words are complied with by mere proof of sending down an order at a time when it was impossible for the one party to deliver and for the other to receive the goods? This is not like the case of *Startup v. Macdonald*, 2 Scott, N. R. 485, in error, 7 Scott, N. R. 269, 6 M. & G. 593: there, the tender was made, though not within the ordinary business hours, yet while there remained sufficient of the natural day for completing the delivery of the oil, and there was some one at the warehouse who might have received it. [Willes, J. The plaintiffs' servant, on handing the order to the second mate, asked him if the goods were [387] ready; and the answer he received was that they were not. What was the man to do?] He should have come again on the following morning. The mate was not bound, unless asked, to tell him when the goods would be ready. [Byles, J. I should think he was.] That might have been so, perhaps, if a man had gone there prepared to take delivery. [Byles, J. It was never suggested that his going there was a mere pretence. If it had been, I should not have withdrawn the matter from the jury. [Willes, J. If we are to

assume that Cayley really went for the purpose of getting the goods, and that the lighter was ready though not actually alongside, and that the goods could not be got, there is an end of the case.] Some effect must be given to the words "has offered and been ready to take delivery: they clearly are not satisfied by a mere inquiry for information. The offer must be made at a time when there is a present ability to receive the goods. The construction contended for on the other side gives no effect to the expression "failed to give information." The ship-owners cannot be said to have been in default in this respect, unless they have been asked for information, and have refused to give it.

ERLE, C. J. On considering the evidence given in this case, and which we are to deal with as a jury would, the balance in my mind is in favour of the plaintiffs. The ship-owners would have had a right to land the goods as they did, unless the owners of the goods brought themselves within the 7th article of the 67th section of the 25 & 26 Vict. c. 63, which provides that, "if at any time before the goods are landed or unshipped the owner thereof has made entry for the landing and warehousing thereof at any particular wharf or warehouse other than that at which the ship is discharging, and has offered and been ready to take [388] delivery thereof, and the ship-owner has failed to make such delivery, and has also failed at the time of such offer to give the owner of the goods correct information of the time at which such goods can be delivered, then the ship-owner shall, before landing or unshipping such goods under the power hereby given to him, give to the owner of the goods or of such wharf or warehouse as last aforesaid twenty four hours' notice in writing of his readiness to deliver the goods, and shall, if he lands or unships the same without such notice, do so at his own risk and expense." The facts are these:—Certain bales of hides consigned to Messrs. Laroche & Co. arrived in the London Docks on board the "City of Edinburgh" on the 25th of March. The consignees entered them inwards at the Custom House, and obtained a delivery order for landing them at Pickle Herring Wharf, a wharf belonging to the plaintiffs, and they delivered the order to the plaintiffs, who sent it by an apprentice, a youth about 18, on board the vessel. The lad went on board, and handed the order to the second mate, who told him the goods were not then ready for delivery. The plaintiffs had no lighter alongside the "City of Edinburgh" at this time: but there was one 100 yards off. Do these facts shew that the merchants offered and were ready to take delivery of the hides? Did they really wish to get their goods? I think it is manifest that they intended to get the hides conveyed to Pickle Herring Wharf. They sent the delivery order to the vessel through the ordinary channel. I cannot see the least pretence for calling that colourable. If what was done at 4 o'clock in the afternoon had been done at mid-day, and by two lightermen of full age instead of by a lad of 18, and the lighter had been alongside instead of 100 yards off, no question could have been raised. If the order had been presented within the ordinary working hours, I do not [389] see why a lighterman of 18 should not have been as competent to receive the goods as one a few years older: nor do I see that the fact of the lighter being a few yards more or less distant from the ship's side makes any difference. Much stress was laid on the time at which Cayley was sent to the ship, viz. the ordinary hour for striking work in the docks, 4 p.m. But, if the hides had been readily accessible, and the labourers had left off work, the mate would probably have desired Cayley to come in the morning. Instead of that, however, the answer was, "The goods are not ready for delivery." There is nothing in the evidence to induce me to come to the conclusion that there was not an offer and a readiness to take delivery on the part of the merchants. That being so, and the ship-owners having failed to make delivery, or to give correct information of the time at which the goods could be delivered, they were bound to give twenty-four hours' notice of their readiness to deliver them. Under these circumstances the ship-owners were clearly not justified in landing the goods as they did. I think the plaintiffs had properly complied with the conditions required of them by article 7.

WILLIAMS, J. I must confess I have felt some difficulty, not as to the law applicable to the case, but as to the conclusion we ought to come to upon the facts. The legislature seem to have thought proper to control the general power given to the ship-owner by the 67th section of the 25 & 26 Vict. c. 63, by certain conditions, the 7th of which provides that if the owner of the goods has made entry for landing and warehousing the goods at any wharf other than that at which the ship is discharging, and has offered and been ready to take delivery thereof, and the ship-owner has failed

to make such delivery and to give the owner of the [390] goods information of the time at which they can be delivered, he shall before landing them give the owner twenty-four hours' notice of his readiness to deliver them. The question is whether the events have happened here upon the happening of which the owner of these hides was entitled to the twenty-four hours' notice. To raise this predicament, there must not only have been a failure on the part of the ship-owners to deliver, but the merchants must have offered and been in a condition to take delivery of the goods. I feel some difficulty in coming to the conclusion that the owners were ready to take delivery. My Lord and my two learned Brothers think there was evidence that they were. I do not quite agree with them: but, as it is a mere question of fact, that is not very material. As to the remaining question of fact, whether there was a failure on the part of the ship-owners to give the owners of the goods correct information of the time at which the goods could be delivered,—it was contended on the part of the defendants, that it was necessary not only that the ship-owners should have neglected to give such information, but that they should have refused to give it after being asked for it. I cannot assent to that construction. The 67th section was inserted in case of the ship-owner. The 7th condition, however, requires him to give the information, and, on his failure to give it, obliges him to give twenty-four hours' notice of his readiness to deliver. Upon the whole, I am disposed to agree with the rest of the court, that the plaintiffs are entitled to recover.

BYLES, J. I am of the same opinion. I quite agree in all the observations of my Lord as to the question of law,—upon which, indeed, the court is unanimous. As to the facts, Mr. Giffard had the offer to go to the [391] jury, but he declined to do so. And in this I think he acted with judgment: for here he has succeeded in raising a doubt, which he probably would have failed to do at *nisi prius*.

My Brother Willes, who was obliged to go to Chambers, desired me to say that he concurs in this judgment, for the following reasons,—that it is now ascertained, or not disputed, that Cayley was an agent to offer to receive the hides; that he did offer, and to a person who had authority to receive the offer: that Cayley was ready, i.e. as ready as a reasonable man would or need be, to take the goods; that the ship-owners were not ready to deliver, and failed to give the owners of the goods correct, for they failed to give them any, information of the time at which the goods could be delivered; and that they also failed to give the owners of the goods twenty-four hours' notice of their readiness to deliver.

Rule discharged.

THE DEAN AND CHAPTER OF THE CATHEDRAL CHURCH OF CHRIST IN OXFORD
v. THE DUKE OF BUCKINGHAM AND CHANDOS. June 7th, 1864.

[S. C. 33 L. J. C. P. 322; 10 L. T. 575; 10 Jur. N. S. 1749; 12 W. R. 986.

Referred to, *Reece v. Strousberg*, 1885, 54 L. T. 134.]

The Dean and Chapter of Christchurch, Oxford, the owners of the manor of Maids-morton, in Bucks, had from the year 1710 been in the habit of granting leases of the manor, and of renewing them from time to time. By one of these leases, which was made to Richard Grenville, then Duke of Buckingham, in 1828, the manor, with all lands, tenements, rents, reversions, and services thereunto belonging or appertaining, together with the keeping and profits of the courts and leets, with all wards, marriages, reliefs, &c. (except and reserved to the Dean and Chapter all the rents of the freeholders of the manor and all timber trees),—were demised to the Duke, his executors and administrators, from the 10th of October, 1826, for twenty-one years, subject to the payment of the money and corn-rents therein mentioned: with a proviso against alienation of the demised premises without the previously obtained consent of the Dean and Chapter.—By indenture of the 1st of August, 1833, the said Richard Grenville, Duke of Buckingham, assigned to trustees, upon certain trusts, all the manors, messuages, lands, tenements, tithes, and other hereditaments of or to which he was absolutely possessed or entitled at law or in equity for any term or terms of years beneficially, and not as mortgagee or trustee. On the 18th of December, 1833, —the first seven years of the before-mentioned lease of the manor having been expired, —a new lease of the manor in the same terms

was granted by the Dean and Chapter to the Duke (Richard Grenville) for twenty-one years from Michaelmas, 1833.—In January, 1839, the Duke (Richard Grenville) died, having by his will devised all his real and personal estate to his son, appointing him his sole executor.—On the 26th of January, 1842, the Dean and Chapter granted a fresh lease of the manor to Richard Plantagenet, the then Duke, for twenty-one years from Lady-Day, 1841, in the same terms as the former leases.—In neither of the leases of 1833 and 1842 was any mention made of the deed of the 1st of August, 1833; nor was any licence to alienate applied for; nor was the deed ever notified to the Dean and Chapter until March, 1863.—At a special court baron of the late Duke (Richard Grenville) described as “farmer of the Dean and Chapter of Christchurch, and lord of the said manor,” on the 29th of April, 1836, one Hearn was admitted to a copyhold tenement of the manor for three lives, on payment of 275l.—At a court held on the 2nd of April, 1840, it was presented that Hearn had, out of court, in consideration of 800l., surrendered the copyhold to which he had been admitted in 1836, to the use of the then Duke (Richard Plantagenet), his heirs and assigns, and the Duke was thereupon admitted tenant, to hold the same tenement to the use of himself, his heirs and assigns, during the three lives and the life of the survivor: and, at a court held on the 9th of May, 1845, one of the lives having dropped, the then Duke, as lord of the manor, granted the same tenement to himself, his heirs and assigns, for the life of his son, the now Duke.—At a court held on the 3rd of July, 1840, the persons for whose lives a certain copyhold tenement had been granted in 1800 and 1811 being all dead, the Duke granted the same tenement to himself for the life of himself and the lives of his son (the now Duke) and of his sister (Lady Anna Eliza Grenville), and the life of the survivor of them.—At a court held on the 11th of November, 1811, the then lord granted a copyhold tenement to Richard Grenville (then Earl Temple), Richard Plantagenet (then Viscount Cobham), and Lady Mary Arundell, for their lives and the life of the survivor.—At a special court held by the then Duke, Richard Plantagenet, on the 8th of July, 1840, the death of the late Duke was presented, and thereupon the same tenement was granted to Richard Plantagenet, his heirs and assigns, during the life of the defendant, then Marquis of Chandos. There was a similar grant at a court held on the 9th of May, 1845, on the death of Lady Mary Arundell.—Richard Plantagenet, Duke of Buckingham, died on the 29th of July, 1861, and all such interest as he had in the property in question vested in his only son, the defendant:—Held, that the above grants were ineffectual and void in law, as having been made by the lord to himself; and that there was nothing in the facts stated in the case to warrant the court in presuming, as to the grants made subsequently to the date of the indenture of August 1, 1833, that they were made by the Duke as agent for the trustees named in that deed.

The following case is, by order of Byles, J., dated the 23rd of February, 1864, stated for the opinion of this court, without pleadings:—

[392] The manor of Maidsmorton, in the county of Bucks, is the property of the Dean and Chapter of Christchurch, Oxford; and they or their lessees have the right of making grants for three lives of certain copyhold tenements. The copyholders themselves having no right of renewal.

In or about the year 1710, the manor was demised by the plaintiffs for twenty-one years; and the lease was from time to time subsequently renewed by them for further periods of seven years.

[393] In the year 1828, one of these renewed leases was made to Richard Grenville Nugent Chandos Temple, Duke of Buckingham and Chandos. By the terms of that lease, all that manor or lordship of Maidsmorton, in the county of Bucks, with all lands, tenements, rents, reversions, and services thereunto belonging, or in anywise appertaining, together with the keeping and profits of the courts and leets, with all wards, marriages, reliefs, escheats, and all other commodities and emoluments whatsoever to the manor or lordship belonging or appertaining, except and reserved to the Dean and Chapter during the demise all the rents of the freeholders of the manor, and all timber-trees then standing or which during the demise should stand upon the premises,—were devised to the said Richard Grenville Duke of Buckingham and Chandos, his executors and administrators, from the 10th of October, 1826, for twenty-one years, subject to the payment of the money and corn-rents therein mentioned;

and the same lease contains a proviso against any alienation of the demised premises without the previously obtained licence of the Dean and Chapter.

By indenture dated the 1st of August, 1833, all the manors, messuages, lands, tenements, tithes, and other hereditaments of or to which the said Richard Grenville Nugent Chandos Temple, Duke of Buckingham and Chandos, was absolutely possessed or entitled at law or in equity for any term or terms of years beneficially, and not as mortgagee or trustee, were assigned to Sir Thomas Francis Freemantle and James Buller East, therein described, upon the trusts therein mentioned.

On the 18th of December, 1833 (the first seven years of the before-mentioned lease of the manor having then expired), a lease of the manor for twenty-one years as from Michaelmas, 1833, was granted by the [394] plaintiffs to the same lessee. This lease is (substantially) in the same form and terms as the last-mentioned lease.

In January, 1839, Richard Grenville Nugent Chandos Temple, Duke of Buckingham and Chandos, died, having made a will giving all his real and personal estate to his son Richard Plantagenet Temple Nugent Brydges Chandos Grenville, commonly called Marquis of Chandos, and appointing him his sole executor; and, on the 26th of January, 1842, a lease of the manor for twenty-one years as from Lady-day, 1841 (at which time seven and a half years of the former renewed lease would have expired), was granted by the plaintiffs to the said Richard Plantagenet Temple Nugent Brydges Chandos Grenville, then Duke of Buckingham and Chandos. This last lease is also (substantially) in the same form and terms as the lease of 1828.

In neither of the leases of 1833 and 1842 is any mention made of the deed of the 1st of August, 1833. No licence was applied for for the alienation of the property comprised in that deed; nor was the deed ever notified to the plaintiffs until the month of March, 1863.

The court rolls of the manor shew (as the fact was) that, at a special court-baron held on the 29th of April, 1836, of the Duke of Buckingham and Chandos (farmer of the plaintiff), lord of the said manor, it was presented by the homage that Thomas Hearn had lately purchased the life-interest of one Gilbert Flesher, the only then surviving life, in a copyhold tenement, and, having paid a sum of 275*l.* to the lord of the manor for the insertion of two new lives, the lord, by his steward, John King, granted the said tenement to the said Thomas Hearn, his heirs and assigns, for the lives of the said Gilbert Flesher and of [395] Richard Carter and Edward Parrott, and the lives and life of the survivors and survivor of them, at the will of the lord, according to the custom of the said manor: and the said Thomas Hearn was thereupon admitted tenant for the lives and life aforesaid.

The court rolls of the manor further shew (as the fact was) that, at a special court of the then Duke of Buckingham and Chandos, described as above mentioned, held on the 2nd of April, 1849, it was presented by the homage that, on the 1st of the same month, the said Thomas Hearn had, out of court, in consideration of 800*l.* paid to him by the said Richard Plantagenet, Duke of Buckingham and Chandos, surrendered into the hands of the lord of the manor, by the acceptance of his steward, John King, the copyhold tenement to which the said Thomas Hearn had been admitted on the 29th of April, 1836, to the use of the said Richard Plantagenet, Duke of Buckingham and Chandos, his heirs and assigns, for the lives of the said Gilbert Flesher, Richard Carter, and Edward Parrott, and the lives and life of the survivors and survivor of them, at the will of the lord, according to the custom of the said manor: and the said Richard Plantagenet, Duke of Buckingham and Chandos, was thereupon, by his attorney, Henry Smith, admitted tenant, to hold the said tenement unto and to the use of him the said Richard Plantagenet, Duke of Buckingham and Chandos, his heirs and assigns, during the lives of the said Gilbert Flesher, Richard Carter, and Edward Parrott, and the lives and life of the survivors and survivor of them.

The court rolls of the manor further shew (as the fact was) that, at the court of the said Richard Plantagenet, Duke of Buckingham and Chandos, described as aforesaid, held on the 9th of May, 1845, the said Gilbert Flesher being then dead, the lord of the manor, [396] by his steward, Henry Smith, granted the said tenement unto the said Richard Plantagenet, Duke of Buckingham and Chandos, his heirs and assigns, for the life of the defendant, Richard Plantagenet Campbell then Marquis of Chandos, now the Duke of Buckingham and Chandos.

The court rolls of the manor further shew (as the fact was) that, at the special court of the said Richard Plantagenet, Duke of Buckingham and Chandos, described

as aforesaid, held on the 3rd of July, 1840, it was presented by the homage that all the persons for whose lives and the lives and life of the survivors and survivor, a copyhold tenement had been granted in the years 1800 and 1811 were dead; and thereupon the lord of the manor, by his steward, John King, granted the same tenement to the said Richard Plantagenet, Duke of Buckingham and Chandos, his heirs and assigns, for the lives of himself and of his son the defendant (then Marquis of Chandos), and of his (the defendant's) sister, Lady Anna Eliza Mary Gore Langton, now the wife of William Henry Powell Gore Langton, Esq., and therein described as Lady Anna Eliza Grenville, and the lives and life of the survivors and survivor of them; and the same Duke was, by his attorney, Henry Smith, thereupon admitted tenant, to hold the same tenement to him and his heirs and assigns, for the lives of himself and the defendant and the said Lady Anna Eliza Mary Gore Langton, and the lives and life of the survivors and survivor of them.

The court-rolls of the manor further shew (as the fact was) that at the court of the then lord of the said manor, held on the 11th of November, 1811, the then lord, by his steward, granted a copyhold tenement unto the said Richard Grenville, Duke of Buckingham and Chandos (then Earl Temple), the said Richard Plantagenet, Duke of Buckingham and Chandos (then [397] Viscount Cobham), and Lady Mary Arundell, for the term of their lives, and the life of the survivors and survivor of them, successively, according to the custom of the manor.

The court-rolls of the manor further shew (as the fact was) that, at a special court of the said Richard Plantagenet, then Duke of Buckingham and Chandos, described as aforesaid, held on the 3rd of July, 1840, it was presented by the homage that the said Richard Grenville, Duke of Buckingham and Chandos, had lately died, and thereupon the lord of the manor, by his steward, John King, granted the same tenement unto the said Richard Plantagenet, Duke of Buckingham and Chandos, his heirs and assigns, during the life of the defendant (then Marquis of Chandos); and the said Richard Plantagenet, Duke of Buckingham and Chandos, was, by his said attorney, Henry Smith, admitted tenant of the said tenement, to hold to him and his heirs and assigns during the life of the said defendant, then Marquis of Chandos.

The court-rolls of the manor further shew (as the fact was) that, at the court of the said Richard Plantagenet, Duke of Buckingham and Chandos, described as aforesaid, held on the 9th of May, 1845 (the said Lady Mary Arundell being then dead), the lord of the manor, by his steward, Henry Smith, granted the said tenement unto the said Richard Plantagenet, Duke of Buckingham and Chandos, to hold the same unto the same duke, his heirs and assigns, for the life of the said Lady Anna Eliza Mary Gore Langton, according to the custom of the manor whensoever the same premises should come into the hands of the lords of the said manor.

Richard Plantagenet, Duke of Buckingham and Chandos, died on the 29th of July, 1861; and all such interest as he may be held to have had in the [398] property in question has vested in his only son, the defendant.

The plaintiffs contend that each and every of the above-mentioned grants made respectively at the said courts holden on the 2nd of April, 1840, the 3rd July, 1840, and the 9th May, 1845, are ineffectual and void in law; and that the several parties claiming to hold the said copyhold tenements under and by reasons of such grants are not entitled to hold the same.

The defendant contends that each and every of such grants is effectual and valid in law; and that the premises therein comprised are become vested in him for the lives subsisting therein under such grants; and that he is entitled to hold the same accordingly.

The question now submitted to the opinion of this court is, whether all or any and which of such grants are effectual and valid or not.

Hayes, Serjt. (with whom was Cripps), for the plaintiffs. The grants in question are void. It is necessary to the validity of a grant that there should be a grantor capable of granting, and a grantee capable of taking. At the time of making these grants, the grantor was lord farmer of the manor. *Nemo potest esse tenens et dominus*. There is no case exactly in point: but authorities are not wanting to establish the principle which must govern this case. In *Firbank v. Symes v. Pennant*, 2 Wils. 254, the question was, whether the demise by copy of court-roll by a lord of a manor to his wife was good in law: but the court said,—“As this was a provision by a husband for his

wife, we should be glad (if possible) to get over that maxim in law '*that a husband and wife are one person*,' and therefore cannot grant lands to one another: so, where there is no particular custom in a manor, the [399] common law must take place: this is an original voluntary grant by the husband to the wife, who cannot by law take immediately from him, any more than a monk, who is dead in law, and considered as no person: so here is no person to take, for the wife and husband are only one person. We are dealing with a fundamental maxim of the common law, and might as well repeal the first section of Littleton as determine this grant from the husband immediately to the wife to be good, and where there is not so much as the shadow of a person intervening." [Willes, J. Does this operate more than a suspension?] The term is gone. The lord having no valid grant of it, it goes to the reversioner. In Cruise's Digest, title x., ch. vi., which treats of "Extinguishment and Suspension of Copyholds," it is said (pp. 324-326), "Copyhold estates may be destroyed in several ways: for, whenever an estate of this kind ceases to be held by copy of court-roll according to the custom of the manor, it is said to be extinguished and gone. Thus, if a copy holder surrenders his estate to the lord, to the use of the lord, the copyhold is thereby extinguished. It is, however, necessary in a case of this kind that the lord to whom the surrender is made have a lawful estate in the manor: for a surrender by a copyholder to a person who is possessed of the manor by wrong will not operate as an extinguishment of the copyhold. A bishop having been disseised of a manor during Cromwell's usurpation, a copyholder surrendered to the disseisor, *ut inde faciat voluntatem suam*. After the restoration, the bishop entered. Resolved that the copyhold was not extinguished, because the surrender was void: *Pitt v. Moore*, 2 Show. 156. Lord Chief Baron Gilbert says (Ten. 254), if a surrender be made to the lord, expressing no use, it shall be to the use of the lord: for, it cannot be imagined that the surrender was made to no [400] end or purpose: and a surrender may be made to the lord, and no use need be expressed. It is said in Comyns's Digest, *Copyhold* (F. 8), that, in such a case, the lord shall have it to the use of the surrenderor. But it is laid down by Lord Holt (*Fisher v. Wigg*, 1 P. Wms. 17, 1 Ld. Raym. 627), that, if a copyholder surrenders to the lord without declaring a use, the copyhold extinguishes: as on a surrender by tenant for life to him in reversion. Where a copyhold is thus surrendered to the lord, the land continues to be part of the demesnes of the manor, freed from that customary right of occupation which the copyholder had in it, and will pass by any conveyance of the manor. Thus, it was resolved in a modern case (*Doe d. Gibbons v. Pott*, 2 Dougl. 709), that if a lord of a manor mortgage the manor in fee to A., and afterwards purchase copyholds held of the manor, and take surrenders of them to himself in fee, they shall enure to the benefit of the mortgagee. And a settlement by the lord of all his estate mortgaged to A. shall pass the equity of redemption of such surrendered copyholds. In a subsequent case (*St. Paul v. Dudley and Ward*, 15 Ves. 167), it was held by Lord Eldon that, where the lord of a manor was tenant for life, with remainders over, and purchased a copyhold held of the manor, taking the surrender to him and his heirs, it was extinguished, and as parcel of the manor became subject to the limitations of it. If a copyholder releases all his estate and interest to the lord of the manor, it will operate as an extinguishment of his copyhold: for a release cannot in its own nature pass away a possession, yet it may amount to a signification of the tenant's intention to hold the lands no longer: and the rule is that everything amounting to a determination of the copyholder's will to hold no longer, ex-[401]tinguishes the copyhold (a). So, if the lord conveys away the freehold of a copyhold to a stranger, and the copyholder releases to the stranger, this will also extinguish the copyhold: but, if a copyholder be ousted, and so the lord disseised, and the copyholder releases all his right to the disseisor, it will have no effect, because the disseisor has no customary estate on which the release of the customary right may enure: *Wakeford's case*, 1 Leon. 102; *Wilson v. Allen*, 1 Jac. & W. 611; *Mortimore's case*, Hetley, 150; *Gilb. Ten.* 300. Any conveyance of the land by the lord to the copyholder, for an estate of freehold, or even for a term of years, will extinguish the copyhold: for, the estate of the copyholder, being only at will, becomes merged by the accession of

(a) *Gilb. Ten.* 300; *Blommer Hassett v. Humberstone*, Hutton, 65, Sir W. Jones, 42 (*Blewerhasset v. Homberstone*), Winch, R. 66 (*Hasset v. Hanson*).

any greater estate: Co. Cop. s. 62. If the lord demises land held by copy to a stranger for years, and the stranger assigns over his term to the copyholder, the copyhold will be thereby extinguished; for both these interests cannot exist in the same person simul et semel; and consequently one of them must be determined, which of necessity must be the customary estate; for, the estate derived from the common law cannot merge in that; and, when common law and custom come together, and one or the other must necessarily stand, the common law shall be preferred: *Lane's case*, 2 Co. Rep. 16 b. It was resolved upon the same principle (*Hide v. Newport*, Moore, 185; *French's case*, 4 Co. Rep. 31 b.), that, where a copyholder in fee took a lease for years of the manor, the copyhold was extinct for ever, and not during the continuance of the lease only." In *Bingham v. Woodgate*, 1 Russ. & M. 32, it was held by Sir John Leach, M. R., that, where a customary tenement [402] is freehold, and the lord, being only tenant for life of the manor, purchases the fee of the customary tenement the seigniority is suspended during the life of the lord, but revives at his death, and the customary tenement descends to his heir. In *Doe d. Gibbons v. Pott*, 2 Dougl. 709, 720, Lord Mansfield says: "After the mortgage, the mortgagee in fee had a right to the manor and everything held of it as parcel thereof. In notion of law, the mortgagor was only tenant at will, or, at most, from year to year. He had the lowest estate possible. In equity he was lord of the manor, subject to the charge upon it; but he could do nothing to weaken the security. In both views it is clear what he could do in consequence of the surrenders. He had the opportunity, if he had been absolutely tenant in fee, either to continue the copyholds as parcel of the manor,—by granting them out again by copy of court-roll, because the custom is not broken by their merely having continued in the lord's hand, but they may notwithstanding be alleged to have been demised and demisable by copy of court roll, which is all that is necessary,—or to sever them from the manor by any common-law conveyance, as a lease, &c. But, the manor being mortgaged in fee, he could not sever them, because that would have diminished the security: for, the mortgagee had a right to the services, quit-rents, escheats, forfeitures, and other casualties." [Willes, J. That was a peculiar case. The mortgagee has all the interest which the mortgagor had. The copyhold was not absolutely extinguished; otherwise there could be no re-grant. Williams, J. What is the principle which enables the lord to make a voluntary grant?] It depends on custom. In 1 Scriven on Copyholds, p. 91, it is said: "The law does not regard either the quality of the person of the lord, or the quantity of his estate; for, although he be not [403] *sui juris*, or be seised of a limited interest only, yet may he make a voluntary grant in fee or for such estate as is authorized by the custom of the manor, which grant would be good, notwithstanding the interest granted should continue longer than that of the lord; for instance, the infancy, idiotcy, or lunacy of the lord of the manor,—or his being an outlaw, an excommunicate, a feoffee on condition, guardian in socage, tenant in tail, for life, or for years or even at will; tenant by the courtesy, by statute, or by elegit; or his being a bishop or other ecclesiastic seised in right of his bishopric or church,—will not disable him from making a voluntary grant: and, in the latter case, the grant would be good even against the King, on the vacancy of the see. So, a grant by a doweress, or by the husband seised in right of his wife, is equally good to bind the inheritance or other estate authorized by the custom; but, in the latter instance, the wife's joining is essential: and this because it is not the husband alone, but both husband and wife that are seised in right of the wife." For all these propositions the learned author cites abundant authorities. In Coke's Copyholder, edit. 1764, p. 69, it is said: "The reason of the law is this:—A copyholder upon voluntary grants made by copy doth not derive his estate out of the lord's estate only, for then the copyholder's estate should cease when the lord's interest determineth: nam, cessante primitivo, cessat derivativas: but the life of the copyholder's estate is the custom of the manor: and therefore, whatsoever befalleth the lord's interest in his manor, be it determined by the course of time, by death, by forfeiture, or other means, yet, if the lord were legitimus dominus pro tempore, how small soever his estate was, that is enough; for the same custom that fixeth a copyholder instantly in his land upon his admittance, will likewise preserve [404] and protect his interest to the end, in such manner that, though the lord's interest faileth, yet his shall never fall to the ground, being upheld by such a prop. such a pillar." In Watkins on Copyholds, 4th edit., by Coventry, vol. 1, p. 423 [354], it is said that, "if A. be a copyholder in

fee, and accept a common-law lease for years of the premises, or a lease for years of the entire manor, his copyhold interest will be extinguished. Or, if A. be lessee of the manor, and B. a copyholder in fee, and B. bargain and sell his copyhold to A. and his heirs, the copyhold interest shall be extinguished for ever." "So (note *y*), if he surrenders to a lessee for years of the manor, to the use of the same lessee, the copyhold will be extinguished:" Godh. 101, case 117. And in note (1) p. 424, it is said: "A question has occurred, whether, upon the descent of a copyhold in fee to a person having already the fee of the manor by purchase subject to a lease of it for years, the lessee be entitled to call upon the tenant (his landlord) on whom the copyhold in fee has so descended, to come in and be admitted and pay to the lessee, as lord of the manor, the customary fines. Mr. Hargrave considered that an absolute extinguishment in this case would work great injustice to the lessee, yet, from the invincible nature of the rule that one person cannot be both lord and tenant at the same time, he doubted whether, in strictness of law, such an effect would not be produced. But he thought it probable that a court of equity would relieve against the extinguishment, if that were really the effect at law, and particularly from the circumstance that the conveyance of the manor to the lord and tenant was expressly subject to the existing lease." In 1 Cruise's Digest, p. 269, it is laid down that, "Whenever copyholds are transferred from one person to another, or descend to an heir, a new grant is also made by the [405] lord: so that, in fact, every copyhold is held by grant from the lord. But, in those cases, the grantee must be admitted in the lord's court, and the admittance, in which the new grant is contained, entered on the rolls; upon which the title of the grantee entirely depends. All those who have any estate in a manor, though it be only for years or even at will, may regrant a copyhold which escheats or comes to them in any other way: reserving the antient rents, customs, and services. And such grant shall bind the lord who has the inheritance of the manor; for each of them is dominus pro tempore, and within the custom. The reason is, that a copyholder does not derive his estate out of that of the lord only, for then the copyhold interest would cease with the estate of the lord; but from the custom."

As to the effect of the deed of 1833,—it will be said that the general words are sufficiently extensive to convey all that the Duke had. Upon the face of it, this deed does not shew what the trusts were. The subsequent conduct of the Duke is as if no such deed existed. Two renewals of the term are afterwards obtained, no notice being taken of the deed of the 1st of August, 1833. The Duke would be estopped from saying that these leases were bad: *Davidson v. Gent*, 1 Hurlst. & N. 744. [Willes, J. Is there any one of these grants which, if made to a third person, would have been good as against the Dean and Chapter?] It is submitted not. Lord Coke, commenting upon the words "seised of a manor," in s. 73 of Littleton, says,—Co. Litt. 58 b.,—"Although the word be 'seised,' which properly betokeneth a freehold, yet tenant for years, tenant by statute-merchant, staple, elegit, and tenant at will, guardian in chivalrie, &c., who are not properly seised but possessed, are domini pro tempore, not only to make admittance, but to grant voluntary copies of [406] antient copyhold lands which come into their hands. And therefore there is a diversity between disseisors, abaters, intruders, and others that have indefeasible titles; for their voluntary grants of antient copyhold lands should not bind the disseisees or others that right have. And voluntary grants by copy made by such particular tenants as is aforesaid shall bind him that hath the freehold and inheritance, because all these be lawful lords for the time being: but so is not a tenant at sufferance, because he is in by wrong, as hath been said: and so was it adjudged P. 29 Eliz., inter *Rous et Arters*, 4 Co. Rep. 24. But admittances made by disseisors, abaters, intruders, tenants at sufferance, or others that have defeasible titles, stand good against them that right have, because it was a lawful act, and they were compellable to do them." The distinction was acted upon in *Doe d. Burgess v. Thompson*, 5 Ad. & E. 532, 1 N. & P. 215. There, copyhold property in a manor belonging to the see of Ely was surrendered to B., who was admitted on this surrender at a court purporting to be a court of Joseph, Bishop of Ely, lord of the manor. At the time of the admission, no grant of the temporalities had been made to Joseph since the death of the preceding bishop, nor had Joseph been confirmed. It was held that the admission was nevertheless good, the lord's title being immaterial, since the admission was not a voluntary act, but in pursuance of a surrender. So, in *Harris v. Jays*, Cro. Eliz. 699, it was held that a voluntary grant by one who was steward de facto only, was bad; though it would

have been otherwise if it had been a thing of necessity. For these reasons it is submitted that these voluntary grants are void, and the plaintiffs are therefore entitled to recover.

Hearn's case,—the grant of April 2, 1840,—differs slightly from the others; but not in any important particular. The same principle is involved in all.

[407] C. Hall (with whom was Murray), contra. The objection is one of a purely technical character. If the grants had been to a trustee for the Duke, there would have been no difficulty. The general principle relied on for the plaintiffs is not disputed: but the authorities cited have little or nothing to do with the present question. The real question is, what is the operation of the deed of the 1st of August, 1833, upon the then existing lease held by the Duke of Buckingham. It is submitted that the property comprised in it passed by that deed to the trustees, and that the acceptance of the lease subsequently created no estoppel binding on the Duke or his successors. It is contrary to principle to set up an estoppel where the parties are not in the relative position of lessor and lessee. In Co. Litt. 47 b., it is said that, "If a man take a lease of his own land by deed indented reserving a rent, the lessee is concluded. But, if a man takes a lease of the herbage of his own land by deed indented, this is no conclusion to say that the lessor had nothing in the land, because it was not made of the land itself: but, if a man take a lease for years of his own land by deed indented, the estoppel doth not continue after the terme ended: for, by the making of the lease, the estoppel doth grow, and consequently by the end of the lease the estoppel determines, and that part of the indenture which belonged to the lessee doth after the term ended belong to the lessor, which should not be if the estoppel continued." *James v. London*, Cro. Eliz. 36, is an authority to the same effect; and so is *Cuthbertson v. Irving*, 4 Hurlst. & N. 742. Whether Hearn's grant was good or not, is a matter of indifference; for, if the reversion were vested in Hearn, he sold to the defendant. There is nothing in law to invalidate the surrender and admittance. As to the other two, the true character of the Duke was that of agent for [408] the trustees. The relation between them was that of mortgagor and mortgagee, or trustee and cestui que trust. He stands precisely in the position that the plaintiff in *Melling v. Leek*, 16 C. B. 652, stood in. Cresswell, J., in delivering the judgment of the court there says that, "although it may be well argued, on general principle, as well as on the authority of *Garrard v. Tuck*, 8 C. B. 231, that a cestui que trust who is in possession with the consent, or even the mere acquiescence, of the trustee, must be regarded as his tenant at will, yet this doctrine (as is observed in the excellent note of Messrs. Morley and Coote, in their edition of Watkins on Conveyancing, p. 19) applies only to the case where the cestui que trust is the actual occupant. If he is only allowed to receive the rents or otherwise deal with the estate in the hands of the occupying tenants, he stands in the relation merely of an agent or bailiff of the trustees, who choose to allow him to act for them in the management of the estate." Whether the renewed leases were valid or not, the Duke would take them bound in equity with a trust for the trustees of the deed of 1833. But it is not necessary to rely on that; for, we find the Duke acting as lord, holding courts, and making grants, and doing other acts as agent for the trustees. No authority is to be found bearing very accurately upon the matter: certainly there is none against the defendant's contention. [Williams, J. Do you say that we are to take it that the Duke, in continuing to exercise the functions of lord, did so as agent of the trustees?] Yes. [Williams, J. That is a question of fact. He was clothed at the time with the character of lessee, and is found holding courts in his own name. Is not that inconsistent with the fact which you wish us to assume?] No new lease was made to the defendant when he executed the two grants of 1840. [Williams, [409] J. As between the Dean and Chapter and the Duke, he was lord of the manor.] It is submitted that the Duke is not estopped from shewing the true state of things: *Portman v. Hallis*, Cro. Eliz. 386. The subject is discussed in Williams on Executors, 5th edit. 1245, and in Sheppard's Touchstone, 454. [Williams, J. The court-roll describes the Duke as "farmer of the Dean and Chapter of Christchurch, Oxford, lord of the said manor."] It is not necessary to name the lord of the manor at all. It is said that these grants are void, being made by a tenant at will to himself. But the answer is obvious: as the defendant could not act in both capacities, the very act of assuming to grant must be a determination of the tenancy at will: Co. Litt. 57 a.; *Burch v. Wright*, 1 T. R. 378, 382. Each tenant, therefore, would have held as copyholder, and not as tenant at

will. That applies to the two grants of 1840. As to the grant of 1845, it was not a grant by the lord to himself.

HAYES, Serjt., was heard in reply (a).

ERLE, C. J. I am of opinion that our judgment in this case should be for the plaintiffs, the Dean and Chapter of Christchurch, Oxford, who are lords of the manor of Madsdorton. The case turns upon the validity of certain grants and admittances to copyhold tenements of the manor, made by the Dukes of Buckingham who preceded the now Duke, the defendant. I am of opinion that nothing passed by those grants, [410] because at the respective times when they were made the Duke was lessee of the manor, and so the grant was in effect a grant by the lord to himself: and I take it to be clear that such a grant would not pass any estate. In Viner's Abridgment, *Copyhold* (N. 1), pl. 8, is an authority straight to the point,—"A man cannot be a copyholder unto a manor whereof he himself is lord, although he be but dominus pro termino annorum, or in jure uxoris:" Calth. Reading 53. This is perfectly clear, and indeed it was not disputed in the able argument of Mr. Hall. I do not say that the copyhold by the grant becomes merged, nor do I say that it was extinguished or put an end to; because it is clear that it may still be capable of being re-granted, though suspended for a time. If therefore the case had stood there, it is agreed on all hands that the plaintiffs would be entitled to judgment. But the main argument on the part of the defendant has been as to the effect of the deed of August 1st, 1833,—whether it had the effect of preventing the Duke from being lord of the manor at the time.

By that deed the Duke (Richard Grenville) granted all the manors, messuages, lands, tenements, tithes, and other hereditaments of or to which he was possessed or entitled at law or in equity for any term or terms of years beneficially, and not as mortgagee or trustee, to Sir Thomas Francis Freemantle and James Buller East, upon certain trusts. If they had granted the copyhold tenements to the Duke, the grant might have been valid. But that deed is put forward for the purpose of shewing that the Duke at the time he made these grants had nothing in the manor. There is, however, a difficulty about that because, if the Duke had nothing in the manor, no estate could pass by his grant. The main strength of Mr. Hall's argument has been, that the trustees under the deed of the 1st of [411] August, 1833, must be taken to have allowed the Duke to act as their agent, and that the grants must be taken to be grants by the trustees by their agent. That would, however, be a question of fact. But it is not found as a fact in the case: and every fact which is stated in the case in relation to this matter negatives that there was any intention either on the part of the Duke or the trustees that there should be a grant taking any operation from the trustees or by their authority. Certain it is that, after the deed of August, 1833, granting the Duke's interest in this manor, amongst other things, to the trustees, every act done with reference to the estate is inconsistent with the notion that the trustees intended to authorize the cestui que trust to act for them, or that the cestui que trust considered himself their agent; for, in December, 1833, the then Duke (Richard Grenville) takes from the Dean and Chapter a new lease of the manor; and at the expiration of about seven years of that term another renewal is made to his successor Richard Plantagenet, the late Duke. In all these, the Duke is treated as the lord farmer of the manor: and courts have been held in the name of the Duke as lord farmer, at which surrenders and admittances have taken place, without a sign of the trustees having ever assumed to exercise any right over the manor or ever interfered in any way with what was being done. It seems to me, therefore, that the defence founded upon the deed of the 1st of August, 1833, fails, and that that deed may be considered as altogether out of the case. It comes then to the undisputed proposition that a grant by the lord of a manor of a copyhold tenement to himself is void and operates nothing. For these reasons, therefore, I come to the conclusion that the plaintiffs are entitled to judgment.

[412] WILLIAMS, J. I am of the same opinion. The question that is submitted for our consideration in this case is, whether all or any and which of the grants

(a) At the close of the argument, Willes, J., called the attention of the parties to the omission to number the paragraphs of the special case in accordance with the rule of Hilary Term, 1862, which disentitles the attorneys to the costs of drawing and copying, without the special order of the court. See 11 C. B. (N. S.) 477

mentioned therein are effectual and valid or not. Had it not been for the argument founded upon the assignment of the 1st of August, 1833, which was urged by Mr. Hall with considerable learning and ingenuity, it could not for a moment be contended,—indeed, it was so conceded,—that these grants could be sustained, because it is plain that they would be in violation of the principle upon which the dictum in Viner's *Abridgment*, *Copyhold* (N. 1), pl. 8, to which my Lord has referred, viz. that a man cannot be a copyholder of a manor whereof he himself is lord, is founded. But then it is said that, admitting that principle, this is not the case of a man being a copyholder to himself, because that assignment put the trustees in the place of the Duke with reference to the lease of the manor, and, the trustees having allowed the Duke, notwithstanding that assignment, to continue in the enjoyment of the property assigned, all his acts in relation thereto must be referred to an authority conferred upon him by them to act as their agent. Now, it may be and no doubt is the law that, if a mortgagor is allowed by the mortgagee to remain in possession, and nothing else appears in the case, you may assume acquiescence on the part of the mortgagee, and that the acts of the mortgagor are acts done by him as his agent. But that rule has no application where, besides the fact of the mortgagor continuing in possession, there are other facts in the case which are wholly inconsistent with the presumption of such agency. It appears to me that there are abundant facts here to shew that the successive Dukes did the several acts in question, not in the character of agents to the trustees, but in that of the lessees of the manor. When the leases became [413] renewable at the expiration of each period of seven years, the renewed lease was made, not to the trustees, but to the then Duke. And, from the fact of their taking these renewals, and holding courts baron avowedly in the character with which such renewed leases invested them, and from the other circumstances adverted to by my Lord, it is plain that we should be violating the truth if we were to draw the inference that the grants were made by the Dukes of Buckingham in the character of agents for the trustees under the deed of the 1st of August, 1833. For these reasons, I think the ingenious argument presented by Mr. Hall fails, and that the rule of law must prevail.

WILLES, J. I am of the same opinion. It appears to me that the defendant can derive no advantage from the deed of the 1st of August, 1833. Upon the face of the grants, the grantor intended and professed to grant to himself. Such a grant is void for obvious reasons, and on established authority. Can, then, a person who has attempted to grant in that informal mode make the grant valid by shewing that in fact the manor was vested in trustees for him? It is insisted that he may, though the trustees did not in any way actively interfere. It is said that, although, in respect of property in the actual possession of the cestui que trust, not interfered with by the trustees, the former is to be considered as tenant at will to the latter, yet, in respect of property of which the cestui que trust is not in actual possession, but of which he receives the rents and profits, the relation of the parties is not that of landlord and tenant at will, but that of principal and agent. I am quite prepared to admit that ordinarily that would be so. This court recently, in a case of *Snell v. Finch*, 13 C. B. (N. S.) 65, applied the doctrine of *Trent v. Hunt*, 9 Exch. 14,—where it was [414] held that, if a lessor, having mortgaged his reversion, is permitted by the mortgagee to continue in the receipt of the rent incident to that reversion, he during such permission is presumptione juris authorized, if it should be necessary, to realize the rent by distress, and to distrain for it in the name of the mortgagee, as his bailiff,—to the case of trustees and cestui que trust under circumstances similar to those in the case cited by Mr. Hall of *Melling v. Leak*, 16 C. B. 652. I do not therefore doubt that ordinarily that would be so, and that such a state of things might be inferred from the trustees not interfering, without proving any actual authority from them. But I do exceedingly doubt the applicability of that law to the case of trustee and cestui que trust of a manor. A manor does not consist of mere rents and profits. It is a feather in the cap of the lord. The person entitled as lord has many things to do that are of more consequence than the mere receiving of rents and fines. He has officers to appoint, and court barons to hold,—things which may well be considered capable of actual possession and enjoyment. I should therefore be disposed to hold the case different from that of a mere trust to receive rents and profits. I should have thought that the proper conclusion to arrive at, if the matter were properly examined into, would be, that the cestui que trust, being allowed by the trustees to exercise the functions of the lord of the manor, would be more properly called tenant at will to

them, rather than agent, and must be considered to have done all he did as lord de facto. But I do not know that it is at all necessary to pronounce any absolute opinion upon that, because, for the reasons stated by my Brother Williams, this being a question of fact, and the case being altogether bare of any suggestion of authority in the Duke of Buckingham to act as agent for the trustees named in the deed [415] of the 1st of August, 1833, but, on the contrary, that instrument containing much to suggest a strong suspicion that neither the Duke nor the trustees ever entertained a notion that his manor was affected by it, I entirely agree that it would be a strained and false conclusion for us to hold that the Duke, professing to act for himself as lessee and father of the Dean and Chapter of Christchurch, was in reality acting as the agent of the trustees, so as to make good a grant which upon the face of it is void for running against the rule of law which has been so well laid down. Upon the best consideration, therefore, which I have been able to bring to this case, I am of opinion that the deed of 1833 must be considered as being out of the question: and that makes an end of all the grants except that made to Hearn in April, 1840. That was an existing interest purchased by the Duke for the sum of 800*l*. There certainly is apparent justice in saying that, if possible, the mere slip of the Duke in having that conveyed to himself, instead of conveying it to trustees for his use, should not deprive him of the benefit of his purchase: and I should hope that the reversioners will not attempt to take advantage of that slip, so as to reap an advantage to which in equity and fairness they are not entitled. As to the others, they may be looked at as casual profits: but, as to this, I should have been glad if we could have held, as in the case of freeholds (upon a tenure created before the statute of *Quia Emptores*) that the fact of the purchase of the interest of the tenant by one who has only a partial interest in the manor should operate by way of suspension only, as in *Littleton*, s. 560; so that the Duke would be entitled, apart from the grant, and waiving the grant, inasmuch as it could not be effectual. But I find it impossible to apply that doctrine (which is so reasonable and expedient as to freeholds) to the case of a copyhold which [416] has got into the hands of the lord. That seems to be a case in which you are not put to choose between suspension and extinguishment. There is no extinguishment: because, although the lord may enjoy the estate, yet the tenancy retains its demisable character, and may be re-granted by the lord, to hold according to the custom. The result appears to me to be that, when the copyhold gets into that condition, the lord has a right to re-grant it. That right the Duke here did not effectually exercise during the existence of the lease: and, now that the lease has run out, neither he nor his heirs can exercise the right. I have gone thus at large into the reasons which have induced me to come to this conclusion, because I certainly have struggled hard against arriving at it. But I feel that the law compels me to do so. On these grounds, I agree with my Lord and my Brother Williams that our judgment must be for the plaintiffs.

BYLES, J. I am of the same opinion. I feel the force of what has been said by my Brother Willes with regard to *Hearn's case*; but I take it for granted that that will be settled before another tribunal. Here, we have only to deal with a dry point of law. I am not prepared to say that the lease of the manor is still a subsisting lease: it is not so, if there was an entry as upon a condition broken, which would put an end to it. Now, the lease contains a proviso that the Duke shall not alienate, sell, or assign over his estate for the term of years, or any part thereof, without the special licence and consent of the Dean and Chapter. It does not go on to say what shall be the consequence if he does so: and I am not at all prepared to say what would be the consequence,—whether the lease would be absolutely void, or voidable only upon entry. In one part of his argument, Mr. Hall fell somewhat inadvertent[417]ly into an admission that the lease would be void for the condition broken. He, however, retraced his steps: and possibly it may not be so: but, at all events, it would be voidable, if there be an entry: and, as a man may disavow for one thing and avow for another, so, if he has a right to enter, whatever might be his intention in so doing, he may afterwards justify himself in an action of ejectment for so doing. Now, what was done here? After the condition broken, a new lease was sealed, under which the Duke entered. The original lease was thereby put an end to. It may be observed that this is the only way in which effect can be given to the transaction; because the two subsequent leases have always been treated by both parties as good, and I can conceive no other means by which that can be, than by the original lease being con-

sidered to have been put an end to. As at present advised, therefore, it seems to me that the lease assigned to Sir Thomas Freemantle and James Buller East, the trustees under the deed of the 1st of August, 1833, was put an end to; that the subsequent leases were good; and that the admittance by the Duke of himself is void, it being impossible that he could at the same time be both lord and tenant. The entry upon the court-roll is that the lord, by his steward, grants to his own use. That being so, the transactions are void, Hearn's as well as the others: and, the lease to the Duke having expired by effluxion of time, the Dean and Chapter were entitled to enter.

All this proceeds upon the supposition that the lease conveyed to the trustees was put an end to. But, supposing that lease to be still subsisting, what is to follow? I have taken an opportunity, whilst the argument was proceeding, of looking through the court rolls of the manor from the year 1800, in the time of the predecessor in estate of the Duke of Buckingham. [418] In all these entries the Duke treats himself as lord farmer of the manor. Nothing that was done by him professes to be done by him as agent for the trustees. The utmost that can be made of it is, that he had some scintilla of interest. Possibly he might not have been a wrong-doer, though I should incline to think he was an abater or an intruder. The authorities cited by Mr. Hall would seem to shew that he was a wrong-doer. If so, a regular admittance might be good. But this admittance was not regular; and an informal or irregular admittance by a mere wrong-doer never can be good. This is a *grant* by a wrong-doer to himself. There is no evidence that it was made by him as agent, but, on the contrary, strong evidence that it was not. The plaintiffs, therefore, are clearly entitled to judgment.

Judgment for the plaintiffs.

MARSH v. CONQUEST. June 8th, 1864.

[S. C. 33 L. J. C. P. 319; 10 L. T. 717; 10 Jur. N. S. 989; 12 W. R. 1006.]

1. It is competent to the assignee of "the sole right of representing" a dramatic piece to sue for penalties under the 3 & 4 W. 4, c. 15, s. 2, notwithstanding the assignment is not by deed or registered under the Copyright Act, 5 & 6 Vict. c. 45.—
 2. The defendant, the proprietor of a theatre, let it for one night for the benefit of one of his performers, who was to pay him 30l for the use of it for that night, together with the services of the corps dramatique, band, lights, and accessories. The performer who so had the use of the theatre represented therein a dramatic piece the sole right of representing which had been assigned to the plaintiff:—Held, that the defendant "caused the piece to be represented," and consequently was guilty of an infringement of the plaintiff's right, and liable to the penalty imposed by the Dramatic Copyright Act, 3 & 4 W. 4, c. 15, s. 2.—
 - 3 The assignment of the copyright of a book consisting of or containing a dramatic piece does not, in the absence of an expressed intention that it should do so, pass the right of representing or performing it. That may be the subject of a subsequent assignment to a third person.
- A plaintiff is entitled to costs under the 15 & 16 Vict. c. 54, s. 4, though he obtains a verdict for 40s. only, if his *permanent* place of residence is more than twenty miles from the place where the plaintiff dwells or carries on his business, although at the time of the commencement of the action he was for a *temporary purpose* residing within that distance.

This was an action for a breach of the Dramatic Copyright Act, 3 & 4 W. 4, c. 15.

The first count of the declaration stated that the [419] plaintiff was the proprietor of and had the sole liberty of representing or causing to be represented at any place or places of dramatic entertainment in any part of the united kingdom, &c. a dramatic piece called "Spring-heel'd Jack, the Flying Highwayman, or The Mysteries of the Old Red Grange," as the assignee of the author thereof, which dramatic piece had been and was composed after the passing of the 3 & 4 W. 4, c. 15 (the Dramatic Copyright Act), by one Douglas Stewart: yet that the defendant, during the continuance of such sole liberty, and within twelve calendar months before the commencement of the suit, contrary to the intent of the statute in such case made, and the right of the said plaintiff as such assignee as aforesaid, wrongfully represented and caused to

be represented, without the consent in writing of the plaintiff first had and obtained, at certain places of dramatic entertainment in England, the said production and divers parts thereof, whereby the defendant became liable for each and every of such representations to the payment to the said plaintiff of an amount not less than 40s., or to the full amount of the benefit or advantage arising from such representation, or to the injury or loss sustained by the plaintiff therefrom, whichever was the greatest damage. Averment, that the full amount of the benefit and advantage arising from each of such representations was the greater damage, and the sum payable by the defendant to the plaintiff by reason of the premises.

The second count was similar to the first: but averred that 40s. for each of the said representations was the greater damage, and the sum payable by the defendant by reason of the premises.

The defendant pleaded, first, not guilty, —secondly, that the plaintiff was not the proprietor of, nor had he the sole liberty of representing or causing to be represented, the said dramatic piece, as alleged. Issue thereon.

The cause was tried before Bramwell, B., at the Surrey Spring Assizes, 1863. It appeared that one Stewart, in January, 1863, wrote the "dramatic piece" mentioned in the declaration for the plaintiff, who suggested the plot and incidents, and that Stewart assigned to the plaintiff the sole right of representation, by a writing of which the following is a copy:

"January 10th, 1863.

"I hereby assign to Mr. Boleno Marsh the sole and entire right of performing in town or country the drama of Spring-heel'd Jack, for the sum of 2l.

"Received the above.

"DOUGLAS STEWART."

There was no assignment by deed, nor was there any registration pursuant to the 22nd section of the Copyright Act, 5 & 6 Vict. c. 45.

The defendant was the proprietor of the Grecian Theatre, in the City Road; and it was proved that Spring-heel'd Jack was performed at that place on one evening after the date of the above assignment. It appeared, however, that, upon the occasion of such representation, the defendant had let the use of his theatre for the night, together with the properties, scenery, actors, and lights, to his son George Conquest, the stage-manager, for his benefit, the latter paying 30l. for the use of the house, &c., and selecting his own pieces; and that the son obtained from Stewart a licence for a representation for that night.

Under these circumstances, it was contended, on the part of the defendant that, inasmuch as he had no control over the performances for that evening, he could not be held guilty of representing or causing to be represented the plaintiff's drama. And it was further contended that the plaintiff was not entitled to [421] recover, because there was no valid assignment of the right of representation, and no registration under the act.

The learned Baron thereupon nonsuited the plaintiff, reserving him leave to move to enter a verdict for 40s. if the court should be of opinion that, notwithstanding these objections, he was entitled to recover.

Montagu Chambers, Q. C., in Michaelmas Term last, obtained a rule nisi accordingly.

Lush, Q. C., in Hilary Term last, shewed cause. The defendant has been guilty of no violation of the statutes. It was expressly held by this court in *Russell v. Brant*, 8 C. B. 338, that no one can be considered as an offender against the provisions of the Dramatic Copyright Act, so as to be liable to an action at the suit of the author or proprietor, unless he, by himself or his agent, actually takes part in the representation which is a violation of the copyright: and therefore, that one who merely lets a room to the offender is not liable, even though he supplies the benches and lights, or sells a ticket of admission, himself deriving no other profit than that arising from the letting of the room. Wilde, C. J., in delivering the judgment of the court, said that, "if it were to be held that all those who supply some of the means of representation to him who actually represents, are to be regarded as thereby constituting him their agent, and thus causing the representation within the meaning of the act, such a doctrine would embrace a class of persons not at all intended by the legislature." And that is followed by *Leach v. Knowles*, 3 Fost & Smith, 556. There, Knowles, the accused proprietor of a theatre, under the 7 & 8 Vict. c. 68, entered into an arrange-

ment with one Dillon whereby Dillon had the use of [422] the theatre for dramatic entertainments. Dillon provided the company, had the selection of the pieces to be represented, together with the entire management of their representation, and exclusive control over the persons employed in the theatre. Knowles, on his part, paid for printing and advertising, furnished the lighting, door-keepers, scene-shifters, and supernumeraries, and hired the band, music being a necessary part of the performance. The money taken at the door was taken by servants of Knowles, who retained one half of the *gross receipts* as his remuneration for the use of the theatre, and handed the other half to Dillon. Among the pieces represented were two which Lyon had the sole liberty of representing or causing to be represented, &c., as assignee of the author, under the Dramatic Literary Property Acts, 3 & 4 W. 4, c. 15, and 5 & 6 Vict. c. 45,—and it was held that no action under these statutes was maintainable by Lyon against Knowles, as the above facts did not shew that those pieces had been represented, &c. by him, or that there was a partnership between Dillon and him so as to render him liable for the representation, &c. of them by Dillon. “If,” said Cockburn, C. J., “Dillon and his company could be in any sense regarded as the company of the defendant, he might be considered as representing or causing to be represented the piece in question. But the facts are quite otherwise. As I understand the evidence, the defendant made over to Dillon the use of this theatre, to perform therein with his company such pieces as he should be minded to represent there. All that the defendant did was, to stipulate that his servants should receive the proceeds, in order that the remuneration which he contracted for should be secured to him. But the theatre, with its accessories, lights, band, &c., were under the direction and control of Dillon, and the defendant had [423] divested himself both of the right to interfere in the choice of the pieces to be represented, and of any veto to be exercised by him as to providing, acting, or representing any particular piece. The defendant is nothing more than the proprietor of the theatre, who has transferred for the time the exercise of all his rights in it as such to Dillon.” The next question is one of some nicety, upon the construction of the statutes. The facts are these:—The plaintiffs procured Stewart, a dramatic author, to write for him the piece in question, and Stewart, in consideration of 2l., by parol assigned to the plaintiff “the sole and entire right of performing” it in town or country. In the absence of a due assignment by deed, and registration under the act, the plaintiff can have no title. Now, the author of a dramatic piece may assign the copyright, retaining the right of representing or causing it to be represented: but he cannot assign the right to represent, and retain the copyright: or, if he has assigned the copyright, he cannot afterwards make a separate assignment of the right of representing. The 1st section of the 3 & 4 W. 4, c. 15 enacts that “the author of any tragedy, comedy, play, opera, farce, or any other dramatic piece or entertainment, composed *and not printed and published by the author thereof or his assignee*, or which hereafter shall be composed *and not printed or published by the author thereof or his assignee*, or the assignee of such author, shall have as his own property the sole liberty of representing or causing to be represented at any place or places of dramatic entertainment whatsoever in any part of the united kingdom, &c., any such production as aforesaid *not printed and published by the author thereof or his assignee*, and shall be deemed and taken to be the proprietor thereof; and that the author of any such production printed and published within ten years before [424] the passing of this act by the author thereof or his assignee, or which shall hereafter be so printed and published, or the assignee of such author, shall, from the time of passing this act, or from the time of such publication respectively, until the end of twenty-eight years from the day of such first publication of the same, and also, if the author or authors, or the survivor of the authors, shall be living at the end of that period, during the residue of his natural life, have as his own property the sole liberty of representing or causing to be represented the same at any such place of dramatic entertainment as aforesaid, and shall be deemed and taken to be the proprietor thereof. In *Shepherd v. Conquest*, 17 C. B. 427, the plaintiffs, the proprietors of a theatre, employed an author to compose for them a dramatic piece, paying him a weekly salary and travelling expenses: there was no contract in writing, nor any assignment or registry of the copyright, but a mere verbal understanding that the plaintiffs were to have the sole right of representing the piece in London: and it was held that the plaintiffs were not assignees of the copyright, nor had they such a right or interest therein as to entitle them to maintain an action for penalties

under the 3 & 4 W. 4, c. 15, s. 2. In *Cumberland v. Planché*, 1 Ad. & E. 580, 3 N. & M. 537, it was held that a person to whom the copyright of a dramatic piece has been assigned previously to (and within ten years of) the passing of the 3 & 4 W. 4, c. 15, is an assignee within that clause of the act which gives to the author's assignee, in the case of a dramatic work published within ten years, the sole liberty of representing it, the assignee taking, as Lord Denman observed, "the whole right of the author." The provisions and privileges of that act are extended by the 5 & 6 Vict. c. 45, the Copyright Amendment Act, s. 20, which,—after reciting the [425] Dramatic Copyright Act, and that "it is expedient to extend the term of the sole liberty of representing dramatic pieces given by that act to the full time by this act provided for the continuance of copyright, &c.," enacts that "the provisions of the said act and of this act shall apply to musical compositions, and that the sole liberty of representing or performing, or causing or permitting to be represented or performed, any dramatic piece or musical composition, shall endure and be the property of the author thereof and his assigns for the term in this act provided for the duration of copyright in books; and the provisions hereinbefore enacted in respect of the property of such copyright, and of registering the same, shall apply to the liberty of representing or performing any dramatic piece or musical composition, as if the same were herein expressly re-enacted and applied thereto, save and except that the first public representation or performance of any dramatic piece or musical composition shall be deemed equivalent, in the construction of this act, to the first publication of any book." By s. 21, it is provided that the person who shall at any time have the sole liberty of representing such dramatic piece, &c., shall have all the remedies given and provided in the former act. And by s. 22, which was introduced in consequence of the decision in *Cumberland v. Planché*, it is enacted that "no assignment of the copyright of any book consisting of or containing a dramatic piece or musical composition shall be holden to convey to the assignee the right of representing or performing such dramatic piece or musical composition, unless an entry in the said registry-book [as provided by s. 11] shall be made of such assignment, wherein shall be expressed the intention of the parties that such right should pass by such assignment." That undoubtedly implies that the author may convey title to [426] the copyright of the book, and retain the sole right of representation: but, unless he reserves it, the sole right of representation is a property which is annexed to and follows the copyright of the book. There is no clause in the statute which creates a separate property in the right of representation, after the author has parted with the copyright of the book. The author may sell the copyright of the book; he may sell it with the sole right of representing; and he may sell the copyright of the book, reserving to himself the sole right of representation: but he cannot assign the right of representation, after he has parted with the copyright in the book. [Erle, C. J.] It is clear that, if the author sells the copyright of the book only, he retains the right of representation. Having, then, the right of representing, cannot he transfer that property? Copyright is a peculiar property, the creature of the statute; and, when the statute means that it shall be assignable, it says so, and points out the mode. [Erle, C. J.] It is true that the sole right of representation did not exist at common law: *Murray v. Elliston*, 5 B. & Ald. 657, 1 D. & R. 299 (a). But, the statute having made that a property, is it not subject to all the incidents of property, one of which is that it shall be assignable? Unless there be anything in the statute to prohibit it, I am prepared to hold that the power to assign the right of representation does exist. [427] Assuming it to be capable of assignment, it must at all events be registered. [Erle, C. J.] The 24th section of the 5 & 6 Vict. c. 45, contains a proviso "that nothing herein contained shall prejudice the remedies which the proprietor of the sole liberty of representing any dramatic piece shall have by virtue of the 3 & 4 W. 4, c. 15, or of that act, although no entry shall be made in the book of registry." It may be that the author may maintain an

(a) There, the manager of Drury Lane Theatre having publicly represented for profit Byron's tragedy of *Marino Faliero*, altered and abridged for the stage, without the consent of the assignee of the copyright, the latter applied for an injunction to restrain the defendant from continuing the representation: and, upon a case sent by the Chancellor for the opinion of the court of King's Bench, the court certified that no action could be maintained for so doing.

See *Rush v. Conquest*, 9 C. B. (N. S.) 755, and 11 C. B. (N. S.) 479.

action without registration: but the question is whether an assignment unregistered can confer any title. If this be an assignable property, the assignment must either be by deed or by entry on the register, otherwise it is not valid: s. 13 (*u*). [Erle, C. J. That is only an enabling clause.] By s. 20 all the provisions of the statute in respect of registering are applied to the sole liberty of representing or performing any dramatic piece.

Montagu Chambers, Q. C., in Trinity Term, was heard in support of the rule. This action is founded upon the 2nd section of the 3 & 4 W. 4, c. 15, which imposes a penalty for performing dramatic pieces contrary to the [428] act. It has been insisted on the part of the defendant that, by reason of the enactment contained in the 22nd section of the 5 & 6 Vict. c. 45, to entitle the plaintiff to recover, he must have registered the assignment. That point, however, is disposed of by the case of *Lacy v. Ilips*, 33 Law J., Q. B. 157, where it was held that, where by the same deed the administrator of the author assigned to the plaintiff, after the passing of the 5 & 6 Vict. c. 45, the copyright and acting-right in a dramatic piece first published after the passing of the 3 & 4 W. 4, c. 15, the plaintiff can maintain an action for penalties under the latter act against the defendant for performing the piece without his licence, within twenty-eight years of its publication, although the deed has not been registered: as the plaintiff's right is under the 3 & 4 W. 4, c. 15, and there is nothing in the 5 & 6 Vict. c. 45, which renders registration necessary in the case of an assignment of such a right of representation. Cockburn, C. J., there says: "It seems to me that the 22nd section of the 5 & 6 Vict. c. 45, has no application to the present case, because we have here an assignment not only of the 'copyright,' but of the 'right to represent.' The 22nd section in its terms only applies to a case of an assignment of a copyright, and it is very plain that that legislative enactment was intended to correct what had formerly been an omission on the part of the legislature in a previous legislation on the subject, and upon which, by the exposition of this court in *Cumberland v. Planché*, 1 Ad. & E. 580, 3 N. & M. 537, it was held that the assignment of the 'copyright' carried with it incidentally the exclusive right of representation. The 22nd section was evidently intended to meet that decision, by enacting that no assignment of a copyright should carry with it the right to represent, unless there was an entry on the registry-book that it [429] was the intention of the parties that the assignment should have that effect. That does not apply to a case in which there is in terms an assignment of the right of representation itself. Now, in this case, there was an assignment of the right of acting, as well as of the copyright: and it is not because the necessity of registration imposed by the 24th section applies to cases of assignment of copyright that, in an assignment of a right to represent, the same necessity is in any way to be inferred." That is a decision expressly in point. The 24th section of the 5 & 6 Vict. c. 45, provides that nothing therein contained shall prejudice the remedies which the proprietor of the sole liberty of representing any dramatic piece shall have by virtue of the 3 & 4 W. 4, c. 15, or of this act, although no entry should have been made in the book of registry aforesaid. Then it is said that, because the defendant had let the theatre for the night to his son for his benefit, and had no part in the selection of the pieces for performance, therefore he did not represent or cause to be represented the plaintiff's play: and in support of this proposition reliance is placed upon two cases, viz. *Russell v. Briant*, 8 C. B. 836, and *Lyon v. Knowles*, 3 Best & Smith, 556. All that was decided in *Russell v. Briant*, was that the mere letting a room, with the accommodation of lights and benches, did not constitute an offence within the act. And in *Lyon v. Knowles*, the defendant was sought to be charged by reason of his

(a) "It shall be lawful for the proprietor of copyright in any book heretofore published, or in any book hereafter to be published, to make entry in the registry-book of the Stationers' Company of the title of such book, the time of first publication thereof, the name and place of abode of the publisher thereof, and the name and place of abode of the proprietor of the copyright of the said book, or of any portion of such copyright," &c.; and "it shall be lawful for every such registered proprietor to assign his interest or any portion of his interest therein, by making an entry in the said book of registry of such assignment and of the name and place of abode of the assignee thereof," &c.: "and such assignment so entered shall be effectual in law to all intents and purposes whatsoever, without being subject to any stamp or duty, and shall be of the same force, &c. as if made by deed."

having let the use of his theatre, together with lights, band, door-keepers, scene-shifters, and scene-maintainers, the corps dramatique being provided and the plays selected by the keeper, who had the entire management of the representation and exclusive control over the persons employed. Here, however, the actors and actresses and all who were engaged or assisting in the performance were the paid servants of [430] the defendant; and the defendant received a profit upon the performance. The fact of the assignment not being in itself a clearly no objection to the plaintiff's right to recover: and the objection that the right of representation could not pass by an assignment after the author had parted with the copyright, has already received an answer. [Williams, J. It is by no means clear upon the evidence that Marsh was not the original proprietor of both the copyright and what has sometimes been called the stage-right (a)¹.]

LITTLE, C. J. Mr. Chambers has said enough to satisfy me that the rule ought to be made absolute to enter a verdict for the plaintiff for one penalty of 40s., for one representation of the dramatic piece in question without the consent of the proprietor. It seems that the plaintiff employed Stewart to write the piece, furnishing him with the plot and incidents, and that Stewart in consideration of 2l. signed a paper whereby he professed to assign to the plaintiff the sole and entire right of performing the piece. I think that instrument of assignment was sufficient to pass the right, if any were in Stewart, to the plaintiff. I think there is nothing in the point urged by Mr. Lush, that the right of representing a dramatic piece can only be assigned by deed. The statute 3 & 4 W. 4, c. 15, contemplates the case of both the author and the assignee being entitled to authorize the representation: and s. 24 of the 5 & 6 Vict. c. 45 contains a proviso "that nothing therein contained shall prejudice the remedies which the proprietor of the sole liberty of representing any dramatic piece shall have by virtue of the 3 & 4 W. 4, c. 15, or of this act, although no entry shall be made in the book of registry aforesaid." I think that proves that the plaintiff might claim as assignee, without [431] shewing a title by deed. Then, as to the objection raised to the plaintiff's right to sue because the assignment was not registered, after the case of *Lane v. Esdales*, 23 Law J., Q. B. 157, I am satisfied that it is not tenable. After that judgment, we must hold that the assignment need not be registered. The principal matter to be discussed and weighed appears to me to be whether the defendant had caused the dramatic piece in question to be represented. It appears that the defendant is the proprietor of the Grecian Theatre, and the employer of the dramatic corps attached thereto: that his son, the stage manager, hired for his benefit-night the theatre together with the company of actors and servants and lights, for the sum of 30l.; and that the son, in the defendant's theatre, and with the aid of his actors and actresses, musicians, servants, lights, and other paraphernalia, represented the dramatic piece in question, in violation of the plaintiff's sole and exclusive right of representing or causing it to be represented. I think the defendant is responsible for that representation. He was the proprietor of the theatre, and had entire control over the establishment and all belonging to it: and what was done by his son was done by his permission. The case of *Lane v. Kneales* seems to me to recognize that distinction. There, the defendant merely let his theatre, with the scenery, scene-shifters, band, lights, &c., to Dillon, who brought his own company to represent pieces of his own selection, the plaintiff having no control whatever over any person employed in the representation. Here, however, the piece is performed by the defendant's own corps dramatique, his son being one of them; and the performance takes place for the defendant's profit to the extent of 30l. I think, therefore, it is impossible to say that the defendant did not cause the piece to be represented.

[432] WILLIAMS, J. I am of the same opinion. I have nothing to add to what has been said by my Lord, except as to the last point. It seems to me that in point of law the representation of this dramatic piece was caused by the defendant. His son acted in the capacity of stage manager for him; and he, in consideration of 30l., obtained leave from his father to use the theatre for one night as he pleased, with all the dramatic corps, musicians, lights, &c., without any restriction. It seems to me to follow that the defendant authorized all that was done, and consequently is responsible for that violation of the rights of the plaintiff.

Rule absolute accordingly (a)².

(a)¹ See *Hutton v. Kean*, 7 C. B. (N. S.) 268.

(a)² The Lord Chief Justice and Williams, J., being the only members of the court

June 8th.—The plaintiff having applied to Keating, J., at Chambers, for an order for costs under the statute 13 & 14 Vict. c. 61, upon an affidavit which stated that, at the time of the commencement of the action, he resided at No 70, Spring Street, Edgbaston, Birmingham, in the county of Warwick, within the jurisdiction of the Warwickshire county-court holden at Birmingham, and still resided there; that the defendant at the time of the commencement of the action resided and carried on business at the Eagle Tavern, City Road, in the county of Middlesex, within the jurisdiction of the Clerkenwell county-court of Middlesex holden at Islington: and that his aforesaid place of business was distant from the place of residence and business of the defendant more than twenty miles, to wit one hun-[433]-dred miles and upwards,—his application was opposed upon affidavits alleging that the plaintiff recovered only 40s. damages, and that at the time of the commencement of the action the plaintiff resided with his family at North Woolwich, in the county of Essex; whereupon the learned judge refused to make an order.

Montagu Chambers, Q. C., now moved for a rule under the 15 & 16 Vict. c. 54, s. 4, which enacts that, “in any action in which the plaintiff shall not be entitled to recover his costs by reason of the provisions of the 11th section of the 13 & 14 Vict. c. 61, whether there be a verdict in such action or not, if the plaintiff shall make it appear to the satisfaction of the court in which such action was brought, or to the satisfaction of a judge at Chambers, upon summons, that such action was brought for a cause in which concurrent jurisdiction is given to the superior courts by the 128th section of the 9 & 10 Vict. c. 95.—or for which no plaint could have been entered in any such county-courts, or that such action was removed from a county-court by certiorari, or that there was sufficient reason for bringing such action in the court in which such action was brought,—then and in any of such cases the court in which such action is brought, or the said judge at Chambers, shall thereupon by rule or order direct that the plaintiff shall recover his costs, and thereupon the plaintiff shall have the same judgment to recover his costs that he would have had if the before-mentioned act of the 13 & 14 Vict. c. 61, had not been passed.”

The application was supported by affidavits stating that, though actually residing at North Woolwich at the time of the commencement of the action, the plaintiff's residence there was of a temporary character only, for [434] the purpose of enabling him to fulfil an engagement in his profession of comedian and ballet-master at the North Woolwich Gardens, his *permanent residence* being at that time and still being at Birmingham. In *Macdougall v. Paterson*, 11 C. B. 755, it was held that, where a man having a *permanent residence* at one place, has a lodging for a *temporary purpose* only at another place, he does not “dwell” at the latter place, within the meaning of the 128th section of the 9 & 10 Vict. c. 95, so as to oust the jurisdiction of the superior courts. So, in *Gorslett v. Harris*, 29 Law Times, 75, upon an application to deprive the plaintiff of costs, it appearing that the defendant was a builder who had been employed to fit up certain houses in the county-court district where a material part of the cause of action arose, and that for the purpose of enabling him to perform that contract he had set up workshops and counting-houses there,—it was held, nevertheless, that, as the works there were only set up for the purpose of the particular job, and his permanent residence was elsewhere, he did not carry on his business there within the meaning of the 9 & 10 Vict. c. 95. [Byles, J. In a more recent case in this court,—*Butler v. Ablewhite*, 6 C. B. (N. S.) 740,—the same doctrine prevailed, and was carried perhaps a little further. There, the plaintiff had *two permanent places of residence*,—one in London, where the defendant dwelt, and where the cause of action accrued,—the other more than twenty miles from London. At the time of bringing the action, the plaintiff was living with his family at his country residence: and it was held to be a case of concurrent jurisdiction, and that the plaintiff was entitled to costs under the 15 & 16 Vict. c. 54, s. 4 (a).]

who had heard the argument of Mr. Lush, the other judges abstained from taking any part in the decision.

(a) And see *Bennett v. Benham*, 15 C. B. (N. S.) 616, where it was held that, where one of two plaintiffs resides within and the other without the distance of twenty miles from the defendant, and the sum recovered is under 20l. in contract and 5l. in tort, the case is one of concurrent jurisdiction within the 128th section of the 9 & 10 Vict. c. 95.

[435] LITTLE, C. J. Let the attorney go back to my Brother Keating with the new affidavits, and call his attention to the 15 & 16 Vict. c. 54, s. 4.

This was done, and the learned judge made the order as prayed.

BOVILL v. HADLEY AND OTHERS. June 13th, 1864.

[S. C. 10 L. T. 650.]

The 43rd section of the Patent Law Amendment Act, 15 & 16 Vict. c. 83, enacts that it shall be lawful for the judge before whom an action for infringing letters-patent shall be tried, to certify on the record that the validity of the patent came in question; and that "the record, with such certificate, *being given in evidence in any suit or action for infringing the said letters patent,*" shall entitle the plaintiff, on obtaining final judgment, to "his full costs, charges, and expenses, taxed as between attorney and client," unless the judge shall certify that he ought not to have such full costs. — An action having been brought by a patentee (substantially) for the recovery of royalties under a due licence, a compromise was entered into before the plaintiff's case was closed, and an order of nisi prius was drawn up, under which the defendant was to pay an agreed sum, and a verdict was to be entered for the plaintiff in the action, for 40s. damages, and costs, with all "usual certificates" — After the cause was thus disposed of, the presiding judge, upon an *ex parte* application, indorsed on the record a certificate that the record in a certain action wherein Bovill was plaintiff and Keyworth was defendant, and the certificate thereon indorsed, was given in evidence at the trial of this action: Held, that this certificate was improperly granted, — the record and certificate in the former action not having been given in evidence, — and it not being under the circumstances a "usual certificate" within the contemplation of the parties.

This was an action brought for the infringement by the defendants at their flour-mills in Upper Thames Street of certain letters-patent granted to the plaintiff on the 6th of June, 1863, and being a prolongation of letters-patent originally granted to the plaintiff on the 5th of June, 1849, for "improvements in the manufacture of wheat into meal and flour," and which last-mentioned letters-patent expired on the 5th of June 1863.

[436] The circumstances which gave rise to this action were as follows: — The defendants had formerly carried on business as millers at Gloucester, where they used the plaintiff's patent of 1849 under a licence from him. In 1858 the defendants became occupiers of the City Mills, Upper Thames Street, under an assignment of the lease from one Ponsford, the lessee. These mills had been built under the superintendence of the plaintiff, and fitted with machinery upon the principle of his patent: and the defendants continued to use the patent down to January last. Prior to June, 1863, disputes had arisen between the plaintiff and others interested with him in the patent, as to the right to receive the royalties due for the use thereof, and in consequence no royalties were paid for some time: but, ultimately, those disputes were arranged and a sum of money paid by the defendants in satisfaction of all claims down to the 5th of June, 1863, upon which day the patent expired. The new patent having been granted to the plaintiff's solely, negotiations were opened between him and the defendants for the purpose of fixing the royalty and other terms upon which the defendants were for the future to use the patent: but these negotiations failed in consequence of the plaintiff's requiring the defendants to take an absolute licence for the full period (five years) of the extension of the patent. Ultimately this action was brought by the plaintiff to recover damages for the alleged infringement of the plaintiff's patent from June, 1863, down to the commencement of the action. The defendants paid money into court, but the plaintiff declined to accept it. There never was any question raised between the parties as to the validity of the patent; nor was it disputed that the defendants had used the patent, — the only question being as to the amount of royalty payable.

There was another action standing for trial between the same parties at the same Assizes (Surrey Spring Assizes, 1864), and in that action the validity of the patent was in question.

After the trial of this cause had proceeded some way, a compromise of both actions was made upon terms embodied in an order of nisi prius, and a verdict was by agreement entered in each action, for 40s. and costs, *with all usual certificates*.

The validity of the plaintiff's letters-patent of 1849 were in question in a cause of *Bovill v. Kenworth*, where the plaintiff had a verdict, and the judge who tried that cause (Lord Campbell) certified on the record, under the Patent Law Amendment Act, 1852 (15 & 16 Vict. c. 83, s. 43), that the validity of the letters-patent in the declaration mentioned came in question.

After the verdict had been entered in pursuance of the terms of the compromise, Erle, C. J., upon having Lord Campbell's certificate indorsed upon the record in *Bovill v. Kenworth* produced to him, indorsed and signed on the record in this action a certificate in the form given in Scott's Costs, 2nd edit. p. 823, No. 6, that the record in *Bovill v. Kenworth* and the said certificate had been given in evidence upon the trial of this action.

This certificate being produced before the Master, he was proceeding to tax the plaintiff's costs "as between attorney and client;" whereupon

Watkin Williams, for the defendants, on a former day in this term, obtained a rule nisi in the following form. - "Upon reading the record of nisi prius between the said parties, and the certificate of the Lord Chief Justice indorsed thereon, to the effect that the record in *Bovill v. Kenworth* had been given in evidence in this cause, it is ordered that the plaintiff shew cause, &c., why the said certificate should not be set aside, and a certificate be indorsed [438] on the said record, if necessary, to deprive the plaintiff of full costs in this cause as between attorney and client, on the grounds that the said record in *Bovill v. Kenworth* was not in fact given in evidence in this cause, and that such first-mentioned certificate is not a 'usual certificate' within the meaning of the terms agreed upon between the parties at the trial of this cause."

Bovill, Q. C., Garth, and Matthew, now shewed cause. The certificate in question was a "usual certificate" within the terms of the compromise, and was authorized by the 43rd section of the statute 15 & 16 Vict. c. 83, which enacts that, "in taxing the costs in any action in any of Her Majesty's superior courts, &c., commenced after the passing of this act, for infringing letters-patent, regard shall be had to the particulars delivered in such action, and the plaintiff and defendant respectively shall not be allowed any costs in respect of any particular unless certified by the judge before whom the trial was had to have been proved by such plaintiff or defendant respectively, without regard to the general costs of the cause; and it shall be lawful for the judge before whom any such action shall be tried to certify on the record that the validity of the letters-patent in the declaration mentioned came in question (a); and the record, with such certificate, *being given in evidence* in any suit or action for infringing the said letters-patent, or in any proceeding by seire facias to repeal the letters-patent, shall entitle the plaintiff in any such suit or action, or the defendant in such proceeding by seire facias, on obtaining a decree, decretal order, or final judgment, to his full costs, charges, and expenses, taxed as between attorney and client" (b). It was held so long ago as [439] the case of *Norhall v. Wilkins*, 17 Law Times, 20, that, to entitle a plaintiff who has recovered a verdict in an action for the infringement of a patent, to treble costs under the 5 & 6 W. 4, c. 83, s. 3, the proper course (in order to avoid prejudice to the defendant) is, to produce such record after the verdict has been pronounced. [Willes, J. It is merely to affect the amount of costs. It is an absolute right; but it would seem that there must be an order of the court or a judge.] The reason for the provision is obvious: many expenses, such as experiments by scientific men, and the like, are necessary in patent causes, which are not usually allowed as costs between party and party. [Williams, J. The statute intends that there shall be some control over the plaintiff: the judge is to exercise that.] It may be that the plaintiff's right to full costs cannot come into operation unless the cause is tried: but that is a question which does not arise here. In *Forman v. Dawes*, 11 M. & W. 730, by a court of requests act (48 G. 3, c. 52, Wolverhampton), it was enacted that no action should be brought for any matter done in pursuance of the act

(a) In the event of the plaintiff obtaining a verdict?

(b) This is an alteration from the former enactment of 5 & 6 W. 4, c. 85, s. 3, which gave the plaintiff under similar circumstances "treble costs," - not treble costs in the ordinary sense, viz. taxed costs, adding a half and a quarter thereto (*Sturand v. Ludlam*, 4 B. & C. 889, 7 D. & R. 484), but costs "to be taxed at three times the taxed costs."

Double and treble costs abolished by 5 & 6 Vict. c. 97.

until a month's notice of action should be given, &c., and if in such action it should appear to be so done, the jury should find for the defendant, and, upon such verdict, or, if the plaintiff should become nonsuited, "or if upon a verdict or demurrer judgment should be given against the plaintiff, the defendant should recover treble costs." The defendant obtained a verdict without having given any evidence,—the plaintiff having failed to establish any case: and it was held that the defendant was entitled [440] to treble costs, without entering a suggestion on the roll, or having given the act of parliament in evidence at the trial. Rolfe, B., in delivering judgment, says: "With regard to the first point, that the defendant had given no evidence, and therefore that he was not entitled to the costs, I apprehend that is not required. The defendant is not obliged to give evidence, to entitle himself to costs. That impression may have arisen from an expression found in this act of parliament and in many others, an unhappy expression, that a party 'may give this act and the special matter in evidence;' but that means, I apprehend, that the party may plead the general issue, and, without a reference to the general rules of pleading, give the special matter of defence in evidence; but it does not mean that he is to give evidence if nothing calls for an answer from him. And it is conclusive that such is its meaning, that the defendant is equally to have treble costs if the plaintiff be *nonsuited*." It is clear, therefore that it is not necessary to go through the ceremony of proving at the trial that which is to affect something arising after the trial, viz. the taxation of costs.

Lush, Q. C., and Watkin Williams, in support of the rule. As between the parties to this action, there never had been any question as to the validity of the patents or either of them. The plaintiff's apparatus had been put up by the patentee for Ponsford; and, when the defendants took an assignment of Ponsford's lease and all the machinery on the premises, they were obliged to continue the use of the patent, for they could not remove it without incurring great expense. They had before used it at their mills at Gloucester, under a licence: and they paid all royalties due, as Ponsford had done, down to the expiration of the patent in 1863. As licensees, they were stopped [441] from disputing the validity of the patent,—the extended as well as the original patent. [Williams, J. So held in the House of Lords, in *Crossley v. Deane*, 8 Law T. (N. S.) 260.] The provision in the Patent Act has no reference to a case of this description. The 3rd section of the 5 & 6 W. 4, c. 83, gave the plaintiff treble costs, where the certificate was given in evidence "in any other suit or action whatever touching such patent,"—words which would have embraced an action for royalties. The recent act restrains it to the case of the certificate being given in evidence in any suit or action *for infringing the said letters-patent*, &c.] That obviously means, where the patentee has to defend the validity of his patent a second time. [Byles, J. You contend that this cannot be a "usual certificate," because the statute requires none.] Just so. What was meant was a certificate to entitle the plaintiff to costs of particulars and to the costs of a special jury. Neither was this matter for a suggestion: *Endau v. Seaton*, 1 Taunt. 210(a). Assuming, however, that the statute does apply to a case like this,—to entitle the plaintiff to full costs, it is necessary that the record and certificate should be "given in evidence in the action." The judge is to exercise a discretion whether under all the circumstances the plaintiff should have costs or not. Unless the certificate is brought to the notice of the judge at the trial, the defendant cannot be heard. In *Newhall v. Wilkins*, 17 Law T. 20, the record and certificate were brought to the notice of Lord Campbell immediately after the verdict was pronounced. Here, the certificate was given upon an *ex parte* application. It must be produced at some period during the trial. It may be [442] like the record of a conviction of a prisoner. It is submitted, therefore, that this case is not within the statute at all,—that this certificate is not a "usual certificate" within the contemplation of the parties,—and that the plaintiff has not performed the condition upon which alone full costs are given. Besides, the compromise was entered into before the defendants' case was begun. That must have been founded upon the then existing materials: whereas, a step taken afterwards opens up a totally different state of things.

ERLE, C. J. The cause having been stopped by a compromise, with a stipulation that all usual certificates should be given, that must mean all usual certificates *rebus sic stantibus*. No certificate under the 15 & 16 Vict. c. 83, s. 43, could be necessary

(a) See *Newham v. Bever*, 8 C. B. 560, and *Mabery v. Titterton*, 7 M. & W. 540.

unless the record and certificate in the former action had been given in evidence. When the compromise was made, nothing more could be done: consequently, the certificate under the Patent Law Amendment Act could not have been within the contemplation of the parties. The rule for setting aside my certificate must therefore be made absolute, and, if necessary, a certificate indorsed upon the record that the plaintiff ought not to have "full costs."

WILLIAMS, J. I am of the same opinion. The court has simply to determine whether the plaintiff should have full costs or not. I think it was not in the contemplation of the parties at the time the compromise was entered into that he should have them.

WILLES, J. The compromise put an end to the case. The plaintiff could not have full costs under the 43rd [443] section of the 15 & 16 Vict. c. 83, without putting the record and certificate in the former action in evidence.

BYLES, J., concurred.

Rule absolute.

MAUGHAM v. SHARPE AND ANOTHER. June 1st, 1864.

[S. C. 34 L. J. C. P. 19; 10 L. T. 870; 10 Jur. N. S. 989; 12 W. R. 1057. Referred to, *Reeves v. Watts*, 1866, L. R. 1 Q. B. 416; *Ramsden v. Lupton*, 1873, L. R. 9 Q. B. 31; *Sinmons v. Woodward*, [1893] A. C. 105; *Johnson v. Diprose*, [1893] 1 Q. B. 517; *Gilligan v. National Bank*, [1901] 2 I. R. 540. Followed, *Wray v. Wray*, [1905] 2 Ch. 349.]

1. A., in consideration of an advance of 650l. made to him by B. and C., who carried on business under the name of "The City Investment and Advance Company," by deed in the form of a mortgage assigned to them all the goods, chattels, and effects upon his farm and premises, to secure the re-payment of the advance, with power to the mortgagees, on default, to sell at their discretion and to pay over the surplus to A. B. and C. took possession under this deed (which was not registered under the Bills of Sale Act), and sold the goods by auction.—D. after B. and C. had taken possession entered under a subsequent bill of sale (duly registered), and paid out a claim of the landlord for rent:—Held, that B. and C. having perfected their title by taking possession under their mortgage, had a right to sell; and that they were not responsible to D. for any default in the mode of conducting the sale.—2. Held also, that D. could not recover against B. and C. the sum paid by him to the landlord, as money paid to their use.—3. Held also, that the conveyance of the goods to "The City Investment and Advance Company," enured as a conveyance to B. and C., so soon as it was ascertained that they were the persons who carried on business under that name.

This was an action substantially for misconducting a sale of goods.

The first count was for the conversion of certain goods and chattels, and the second for money received by the defendants to the plaintiff's use.

The third count stated that, by indenture bearing date the 2nd of February, 1864, made between one William Dolby of the one part, and the plaintiff of the other part, and duly registered under the Bills of Sale Act (17 & 18 Vict. c. 36), the said William Dolby did grant, bargain, sell, and assign to the plaintiff all the goods, farming-stock, growing crops, agricultural implements, live and dead stock, and every other article which then were in or about a certain farm called the Horse Grove, at Rotherfield, and more fully set forth in the schedule to the said indenture, for the purpose [444] of securing to the plaintiff the re-payment of the sum of 650l. then advanced by him to the said William Dolby, which said sum was at the time of the committing of the grievances thereafter mentioned, and still remained, due and unpaid,—of all which the defendants had notice: that the defendants claimed to have a charge or lien upon the said goods, chattels, and effects, as a security for an alleged debt due to them from the said William Dolby, and to have a power to sell the said goods, chattels, and effects to satisfy their said debt: and that thereupon, and whilst the said indenture continued in full force and effect, and the said sum of 650l. so advanced as aforesaid remained due and unpaid, the defendants proceeded to sell and dispose of the said goods, chattels, and effects granted and assigned to the plaintiff as aforesaid, on

pretence of satisfying the said alleged debt due to them from the said William Dolby as aforesaid; and that thereupon it became and was the duty of the defendants to use all reasonable care and diligence in and about selling and disposing of the said goods, chattels, and effects, and in and about preventing a sale thereof at an under-value: Breach, that the defendants did not use reasonable or any care or diligence in and about selling and disposing of the said goods and effects, or in and about preventing a sale thereof at an under value, but so carelessly and negligently conducted themselves in the premises that the said goods, chattels, and effects were sold at an under-value, and for prices grossly insufficient and inadequate, and not more than sufficient to satisfy the defendants' said debt, although the defendants ought to and might have obtained for the same a much larger sum, and sufficient not only to satisfy the said alleged debt, but also to leave a large balance towards the satisfaction of the sum of 650*l.* so due and owing to the plaintiff as afore-[445]-said; whereby and by reason of the premises the plaintiff was altogether deprived of the benefit of his said security and of the said indenture.

To this count the defendants pleaded, —fourthly, a traverse of the assignment of the goods by William Dolby to the plaintiff; —fifthly, that, before and at the time of the making of the said indenture, and thence until and at the time of the alleged sale and disposal of the said goods, farming-stock, growing crops, agricultural implements, live and dead stock, and other articles, the same respectively were the goods of and belonging to the defendants, and at the time of the said indenture the same were not, nor were any of them, the goods of, nor did they or any of them belong to, the said William Dolby, nor had the said William Dolby at that time the power to grant, bargain, sell, or assign the same, or any of them, and that the defendants sold and disposed of the same as in the third count mentioned, in their own right. Issue thereon.

The cause was tried before Erle, C. J., at the last Spring Assizes for the county of Surrey. The facts which appeared in evidence were as follows:—On the 10th of December, 1863, Dolby, who occupied a farm at Rotherfield, in the county of Sussex, obtained an advance of 400*l.* from the defendants, who carried on business in London under the name of the City Investment and Advance Company, upon the security of an assignment of all his farming-stock and effects, which was in the following form:—

“This indenture made the 10th day of December, 1863, between William Dolby, of Horse Grove, Rotherfield, in the county of Sussex, farmer, hereinafter called the mortgagor, of the one part, and the City Investment and Advance Company, of No. 25 Cannon Street, in the city of London, hereinafter called the mortgagees, of the other part: Whereas, the said mort [446] gator, being desirous of borrowing the sum of 400*l.*, hath applied to the said mortgagees to lend him the same, which they have agreed to do upon having such security as hath already or may hereafter be given by guarantee or otherwise: And whereas the said mortgagees, in pursuance of this agreement, have this day lent to the said mortgagor the said sum of 400*l.*, which is hereafter called ‘the said loan,’ the receipt whereof the said mortgagor doth hereby admit and acknowledge: Now this indenture witnesseth that, in consideration of the said loan, he the said mortgagor hath bargained, sold, assigned, and transferred, and by these presents doth bargain, sell, assign, and transfer unto the said mortgagees, their executors, administrators, and assigns, all and singular the household furniture, books, plate, linen, live-stock, implements, crops, goods, chattels, effects, and things of him the said mortgagor, now being in or upon the house, premises, and lands situate at Horse Grove, Rotherfield, aforesaid, now occupied by him the said mortgagor, and also all other goods, chattels, and effects of the said mortgagor in and about the aforesaid house and premises, or which may hereafter come into or upon any part of the aforesaid house and premises, either in substitution or otherwise, during the time any money may be due from the said mortgagor, his executors, administrators, or assigns, under or by virtue of these presents, to have and to hold the said goods, fixtures, and effects hereby assigned or intended so to be, unto the said mortgagees, their executors, administrators, and assigns, as their own proper goods, chattels, fixtures, and effects: Provided that, in case the said mortgagor, his executors, administrators, or assigns, shall pay the sum of 50*l.*, on the 10th of January, 1864, 100*l.* on the 10th of February, 1864, 100*l.* on the 10th of March, 1864, 100*l.* on the 10th of April, 1864, and 50*l.* on the 10th [447] of May, 1864 next, or on such further or extended day or days to be agreed on by the said mortgagees at the request of the said mortgagor, or earlier than

either such days if by the said mortgagees, their executors, administrators, or assigns, demanded,—then these presents and every part thereof shall cease, determine, and be void, except as to the rights and remedies of the said mortgagees for any breaches already then committed. But it is hereby agreed and declared that the day first named for payment is not to be extended or altered unless the said mortgagees shall think fit, and notwithstanding the request of such mortgagor. And the said mortgagor doth hereby for himself, his heirs, executors, and administrators, covenant with the said mortgagees, their executors, administrators, and assigns, that he, the said mortgagor, his heirs, executors, or administrators, will on the aforesaid days of payment, or on such further or other day or days as aforesaid, or before either of such days, if required so to do by the said mortgagees, their executors, administrators, or assigns, pay to them the said mortgagees, their executors, administrators, or assigns, the said loan without any deduction or abatement from or out of the same. And it is hereby declared and agreed between the said parties hereto, subject to, but nevertheless without prejudice to the several clauses, provisoes, and agreements herein contained, that it shall and may be lawful for the said mortgagees, their executors, administrators, or assigns, or other the person or persons for the time being entitled to possession of the said goods, fixtures, and effects, to give to the said mortgagor, as often as they shall think fit, such further or other time or times beyond the aforesaid day or days appointed for the re-payment of the said loan: and also that it shall and may be lawful, notwithstanding the proviso for redemption, for the said mortgagees or [448] other the person or persons for the time being entitled to the possession of the said goods, fixtures, and effects, immediately to take, have, and retain possession of the said goods, fixtures, and effects, until all money, costs, charges, and expenses hereby secured shall have been fully paid and satisfied: but it is also hereby declared and agreed to be lawful for the said mortgagees at any time during the continuance of this security, if they shall think fit, to relinquish possession of such goods, fixtures, and effects, and again to re-take and retain possession thereof, as often and whenever they shall think fit, without this security being invalidated or rendered void or voidable. And it is hereby further agreed and declared, in case default shall be made in payment by the said mortgagor, his executors, administrators, or assigns, of the said loan or any part thereof contrary, to the covenant for payment thereof hereinbefore contained, then and in such case it shall be lawful for the said mortgagees, their executors, administrators, or assigns, either immediately or whenever they shall think fit, to sell and dispose of the said goods, fixtures, live-stock, implements, crops, and effects, and every part thereof, on or at the said hereinbefore-mentioned house or premises where the said goods, fixtures, and effects now are, or to remove the said goods, fixtures, and effects, and sell the same whenever and wheresoever they shall think proper, either by private contract or public auction, together or in parcels, for such price or prices as can be reasonably had or gotten for the same, or to have the said goods, fixtures, and effects valued by a competent person, and to purchase them at such valuation, or to let them for hire (and to receive and take the moneys to arise from such letting to hire), and thereout in the first place to retain to and reimburse and pay themselves the said loan or so much thereof as shall then [449] remain due, together with all costs of sale, valuation fee, and other charges and expenses which may have been incurred, and all expenses, damages, law charges, and payments that may have been incurred or made by them in and about the defending, supporting, and upholding their claim and mortgage on the said goods, fixtures, and effects, and incident or in relation thereto, and giving effect to these presents according to the true intent and meaning thereof, and in and about making any such sale or sales, and also in and about the receipt and recovery of the said loan, and in the next place, or in the first place if he* shall so think fit, to pay all rent, rates, taxes, and incumbrances that may be due in respect of the messuage, tenement, and premises where the said goods, fixtures, and effects shall be, and which shall or may effect or attach to the said goods, fixtures, and effects: and from and after the full payment of the said loan, and all commissions, valuations, costs, charges, damages, expenses, payments, rents, taxes, and incumbrances as are herein mentioned, to render to and account for the surplus (if any) of the money arising from such sale or sales aforesaid unto the said mortgagor, his executors, administrators, or assigns. And the receipt

* Sic.

or receipts of the said mortgagees shall be a sufficient discharge to all and every purchaser or purchasers, who shall not be required to see to the application thereof by the said mortgagees, their executors, administrators, or assigns. And it is hereby further declared and agreed that the said mortgagees may, if they think fit, pay any rent or taxes which shall or may at any time be due or payable in respect of any house or premises where the said goods, fixtures, and effects, or any of them, shall be put or placed while any money shall be due on this security, and to add the same to this security as a charge upon the said goods, fixtures, and [450] effects; and, in the event of the sale of the said goods, chattels, fixtures, and effects not taking place, that the said mortgagees, their executors, administrators, or assigns, shall not be obliged or compelled or compellable to accept the said loan, or so much thereof as shall then remain due, and interest as aforesaid, without being paid all commission, valuation fees, costs, charges, damages, expenses, and payments of any kind which they may have been put to or incurred or sustained or be liable to have made with reference or in relation to these presents. And, in the event of payment of the said last-mentioned commission, valuation [fees], costs, charges, damages, expenses, and payments not being made to the said mortgagees, their executors, administrators, or assigns, or in the event of the said mortgagor permitting himself to be sued in any of Her Majesty's courts of law or equity for any debt or debts justly due and owing, or if any writ of fieri facias, distresses for rent or taxes, or any other proceedings of any nature, be levied or taken against the said goods, fixtures, and effects hereby assigned or expressed or intended so to be, or in the event of the said mortgagor not producing to the said mortgagees, their executors, administrators, or assigns, when demanded by them or either of them, the receipt or receipts for the rent or taxes payable by him the said mortgagor in respect of the said house or houses or premises where the said goods, fixtures, and effects shall be or be placed, for the quarter immediately preceding the day when the receipt or receipts shall be so demanded, or in the event of the said mortgagor or any other person doing or committing, or neglecting or refusing to get done, any act, matter, or thing whereby the said mortgagees, their executors, administrators, or assigns, or the security given by these presents to them the said mortgagees, their executors, administrators, or as-[451]-signs, is, shall, or may in any manner be prejudiced or damaged, then and in either such events it shall and may be lawful for the said mortgagees, their executors, administrators, or assigns, or their agent or agents, forthwith to enter the said house and premises, and to sell and dispose of the said goods, fixtures, and effects, notwithstanding the time for payment by the said mortgagor as aforesaid of the said loan shall not have arrived, and to deal with the said goods, fixtures, and effects, and apply the proceeds arising from the sale thereof as they might have done if the time for payment of the said loan according to the said covenant in that behalf hereinbefore contained had elapsed and expired, and the said mortgagor had made default in payment thereof. And the said mortgagor [doth] hereby, for himself, his heirs, executors, and administrators, covenant, promise, and agree to and with the said mortgagees, their executors, administrators, and assigns that, in the event of the said mortgagees putting or placing any person in and upon the said house and premises Horse Grove, Rotherfield aforesaid, for the purpose of taking and keeping possession of the said goods, fixtures, and effects, that the said mortgagor will daily and every day pay all expenses of and incident to such possession: and that, in the event of default in payment by the said mortgagor of the said expenses, the said mortgagees shall be at liberty to pay the same and to demand immediate re-payment thereof, and, in default of such re-payment, shall be at liberty to deal with the said goods, fixtures, and effects, in like manner as if default had been made in the payment of the said loan, contrary to the covenant for the payment thereof hereinbefore contained."

The deed also contained covenants by the mortgagor not to remove the goods, for title, and other covenants not material to the question now before the court.

[452] The lease of the farm and also a promissory note for 400l. were deposited as collateral security: but the mortgage was not registered under the statute 17 & 18 Vict. c. 36.

Default having been made by Dolby in payment of the first instalment, the defendants (the mortgagees) on the 3rd of February, 1864, took possession of all the goods upon the premises. Whilst they continued in possession, the landlord distrained for 350l. rent due at Michaelmas, 1863, and (Dolby having left the farm) proceeded to advertize a sale of the effects for the 12th of February, 1864.

On the 2nd of February, 1864, Dolby had procured a loan of 650l. from the plaintiff, for which he gave him a bill of sale on the property already assigned to the defendants by the deed of December 10th, 1863. This last-mentioned bill of sale was duly registered under the statute on the 8th of February; and on the same day one Roberts on his behalf claimed to take possession, but was prevented by the defendants. The plaintiff then attempted to get an assignment of the goods from the landlord, whose claim (amounting with the auctioneer's charges to 382l.) he paid on the 11th. On the same day the sheriff entered with an execution for 160l.

In this state of things, the defendants, being apprehensive of a bankruptcy, availing themselves of the advertisements issued by the landlord, procured another auctioneer to proceed with the sale, and the goods were accordingly sold on the 12th and 13th of February. The sale, after paying 167l. 15s. 6d. into court to abide the event of an interpleader issue with the sheriff, and 47l. 8s. 4d. for the expenses, realized 406l. 16s. 2d.

On the part of the plaintiff, witnesses were called who valued the property on the premises at the time [453] of the sale, one at 1000l., another at 1200l.; and it was also proved that two persons attending the sale had been bribed by the landlord not to bid against him, but it was not shewn that the defendants were cognizant of that fact.

It was then submitted on the part of the plaintiff—first, that the bill of sale of the 10th of December, 1863, professing to be a conveyance to the City Investment and Advance Company, passed no property in the goods to Sharpe and Baker, the defendants, and consequently the fifth plea was not sustained,—secondly, that the defendants' bill of sale being void as against the sheriff and all having a better title than the sheriff, the plaintiff's registered bill of sale was entitled to priority,—thirdly, that he was entitled to recover damages against the defendants for not having conducted the sale in a reasonably proper manner,—and, fourthly, that he was entitled under the count for money paid to recover against the defendants the 382l. paid by him to get rid of the landlord's distress.

His lordship overruled the last suggestion, but reserved the plaintiff leave to move on the other points if in the result it should be necessary: and he left it to the jury to say whether or not the sale had been properly conducted.

The jury returned a verdict for the plaintiff for 582l., being 382l. for the amount paid to the landlord, and 200l. for having been wrongfully deprived of the fruits of his bill of sale.

Lush, Q. C., in pursuance of leave reserved to him, in Easter Term last obtained a rule calling upon the plaintiff to shew cause why the verdict entered for him should not be set aside, and a verdict entered for the defendants on all the pleas except the seventh, or a nonsuit, on the ground that those pleas were estab-[454]-lished by the evidence: or for a new trial, on the ground that the verdict was against the weight of evidence, and the damages excessive.

Joyce, for the plaintiff, also moved on the points reserved to him at the trial; and the court ordered the following addition to be made to the defendants' rule,—"And it is further ordered that, in the event of this rule being made absolute, the plaintiff is to be at liberty to argue the points that were reserved to him on the trial,—a copy of which he is to deliver to the defendants or their attorney."

Hawkins, Q. C., Joyce, and Morgan Lloyd, now shewed cause. The sale clearly was not conducted in a reasonable manner, so as to obtain the best prices for the goods. [Erle, C. J. Assuming that the plaintiff has a ground of action against the defendants, I am not prepared to say that I was dissatisfied with the verdict. Your great difficulty is this,—Is there any duty imposed by law upon the holders of the first bill of sale towards the holder of the second, so as to give the latter a cause of action against the former for selling the goods at a sacrifice?] It must be conceded that the defendants had a right to sell under their bill of sale. They were, however, aware of the plaintiff's claim under the second bill of sale; and they were also aware of the distress having been put in by the landlord, and of the plaintiff's having paid out the landlord. The payment of that rent was one of the obligations which the defendants took upon themselves when they took possession of the goods under their deed. There is a manifest distinction between a mortgage of land and a mortgage of chattels: the latter amounts to no more than a pledge. "The mortgagee hath an absolute interest in the land, but the other [455] hath but a special property in the goods, to detain them for his

security : " 5 H. 7, pl. 1 ; 9 E. 4, pl. 25 ; 36 E. 3, Bar, 188 : " *Ratcliff v. Davies*, Cro. Jac. 244. In *Franklin v. Neale*, 13 M. & W. 481, it was held that the pawnor of a chattel still retains his property in it (though qualified by the right existing in the pawnee), which he has a right to sell, and by the sale to transfer that property to the buyer ; and that, if the pawnee, on the buyer's tendering him the amount due, refuses to deliver it up, the buyer may maintain trover for it. If the defendants' bill of sale gave them a right to the goods only as a security for their advance, the law would impose upon them a duty to take due care of them, and, if they exercised their power of sale, to get the best price they reasonably could obtain for them. If this had been a mortgage of land, there would have been a right to sue left in the grantor. By this instrument a conditional reversion is left in him. [Williams, J. It is an absolute conveyance, with a proviso by way of defeasance. The deed is drawn with the utmost ingenuity, to give the mortgagees every conceivable advantage.] There is much confusion in the cases as regards the distinction between mortgages of realty and pawns of chattels. In *Flory v. Denny*, 7 Exch. 581, it was held that a mortgage of a personal chattel may be made without deed. That shews that "mortgage" is only another word for "pledge." There may be a pledge without actual possession : *Reeves v. Capper*, 5 N. C. 136, 6 Scott, 877. The cases of *The Lancashire Waggon Company v. Fitzhugh*, 6 Hurlst. & N. 502, and *Mears v. The London and South Western Railway Company*, 11 C. B. (N. S.) 850, also shew that the grantor retained such an interest in these goods as to enable him to maintain an action for a conversion thereof or injury thereto. The same principle is recognized in *Johnson v. Stear*, 15 C. B. (N. S.) 330, and *Pigot v. Cubley*, 15 C. B. (N. S.) 701.

[456] Then, the bill of sale was not made to the defendants, Sharpe and Baker, but to the City Investment and Advance Company, and therefore conveyed no property in the goods to the defendants. [Erle, C. J. They were the only persons interested in the so-called Company. It was merely the style of the firm.] The parties must be truly described : Com. Dig. *Foist* (E. 3) ; Bac. Abr. *Grants* (C.) ; Co. Litt. 3 a. ; Sheppard's Touchstone, 236 ; *Williams v. Bryant*, 5 M. & W. 447. [Willes, J. This must be taken to be the description of a corporation. To assume falsely to be a corporation is an offence against the prerogative of the Crown. Erle, C. J. Dolby grants his goods to a corporation. Can a private individual come forward and say that means me ?] Even if these persons had a right to use the name of a corporation, there was no evidence that they were known as such. If the defendants could take by such a description, it must be one by which they could sue. Is there any pretence for saying that these defendants could have sued as the City Investment and Advance Company ?

The whole of the goods had been seized by the sheriff under the *fi. fa.* The defendants' bill of sale, not having been registered under the 17 & 18 Vict. c. 36, was void as against the sheriff's claim. They availed themselves of the plaintiff's bill of sale (which was duly registered) in order to get rid of that execution ; and now they turn round and say that as between them and the plaintiff their bill of sale is good. [Williams, J. As between two persons claiming under bills of sale, registration nil operatur.] No doubt that is so. But, as between the defendant and the sheriff and all having better title than the sheriff, the defendants' bill of sale was void : *Edwards v. English*, 7 Ellis & B. 564. [Erle, C. J. The grievance to the plaintiff is, that the defendants paid the sheriff out of the goods which as against him the [457] sheriff had no right to seize. Garth intimated that the sheriff had abandoned his claim under the interpleader summons, and that the defendants had at Chambers assented to that money being paid over to the plaintiff.]

Then, the payment of the rent was a payment made under a mistake. [Erle, C. J. Not a mistake in point of fact, but of law.] The money was paid by the plaintiff's agent, in ignorance of there being a genuine bill of sale on the property. [Erle, C. J. The agent paid the money under the notion that if he paid the condemnation-money the property in the goods would pass to the plaintiff. He certainly knew of the defendants' bill of sale.]

Garth (with whom was Lush, Q. C.), in support of the rule. It is said that these defendants cannot take under this deed by the description of the City Investment and Advance Company. [Erle, C. J. Individuals may trade under a firm, but cannot assume to be a corporation.] What is assuming a corporate name ? [Willes, J. That is answered by the case of *Cooch v. Goodman*, 2 Q. B. 580. The court will take judicial

notice of what is a corporation.] There is nothing on the face of the deed to shew that the City Investment and Advance Company is a corporation, any more than the Agra and Masterman Bank is. It has been insisted that this deed, which is in the ordinary form of a mortgage of chattels, is nothing more than a pledge or pawn. The distinction between a mortgage and a pawn is well pointed out in the notes to *Coggs v. Bernard* (a)¹, in 1 Smith's Leading Cases, 5th edit. 194, where the learned editors, treating of Vadium or pawn, and referring to a series of authorities defining the relative rights and duties of the pawnor and the [458] pawnee, observe,—"From all this it will be seen that a pawn differs, on the one hand from a *lien*, which conveys no right to sell whatever, but only a right to retain until the debt in respect of which the lien was created has been satisfied (a)²; and, on the other hand, from a *mortgage*, which conveys the entire property of the thing mortgaged to the mortgagee conditionally, so that, when the condition is broken, the property remains absolutely in the mortgagee; whereas, a *pawn* never conveys the general property to the pawnee, but only a special property in the thing pawned: and the effect of a default in payment of the debt by the pawnor is, not to vest the entire property of the thing pledged in the pawnee, but to give him a power to dispose of it, accounting for the surplus, which power, if he neglect to use, the general property of the thing pawned continues in the pawnor, who has a right at any time to redeem it" (b). At p. 196, it is said: "A mere pledge of chattels personal is therefore not, properly speaking, a mortgage, and, though in writing, need not bare a mortgage stamp: *Harris v. Birch*, 9 M. & W. 591. There *may*, however, be a *mortgage*, properly speaking, of chattels, which will be subject to the same incidents as any other mortgage. A mortgage of a personal chattel may be made without deed: *Florey v. Denny*, 7 Exch 581." In *Ripoll v. Bowles*, 1 Ves. 348, 1 Atk. 165 (commented upon in 2 White & Tudor's Leading Cases, 2nd edit. 615, Burnet, J., says: "It was contended that pawns, by the Roman and English law, required delivery, but that hypothecation [459] or mortgage did not. As to the Roman law, there was an authority cited, Just Inst. lib. 4, tit. 6, s. 7, which passage, if it stood alone, might go a good way to prove what it was cited for. But there is another Roman authority proving pignus to be as valid without delivery; and the true distinction between them is only that pignus is of movables capable of delivery, the other of immovables only: Domat. lib. 1; Wood, lib. 3, ch. 2, 219; Digest, 50, tit. 16, Law 238; 13 lib. Pandects, tit. 7, Law 1; 20 lib. Pandects, tit. 4, Law 12, s. 10; where a pawn to two and delivered but to one, and where the pledge is concurrent in point of time, the preference to the person to whom a delivery is stated there, that he will have a better remedy by way of action than the other. Delivery, then, is not necessary by the Roman law; and other nations receiving this Roman law corrected the inconvenience of this law as to that point, that, if a pawn is not delivered, it shall not affect a purchaser for valuable consideration, as it certainly did in that law. But supposing that distinction true, it could have no influence in the present case, unless the Roman hypothecation and English mortgage were the same, which they are not. No property was transferred in the hypothecation: *an English mortgage is an immediate conveyance, with power to redeem*: and equity at any time admits redemption, notwithstanding forfeiture: but that does not alter the conveyance, therefore there is no comparison between them: and in the Roman law there is a place where it is held that, suppose there is an hypothecation, with condition that, if the money is not paid at the day, the pawnee shall enjoy the goods, that is a conditional sale: Just. Code, lib. 4, tit. 54, Law 2, and the same liber of the Code, relating to conditional sales of movables, Law 7. All that can be inferred from the Roman law with respect to [460] pawns and hypothecation will be foreign, and from the English law as to pawns as foreign. I admit delivery necessary to a pawn: the Year Book cited, 5 H. 7, fo. 1, is an express authority in point, and therewith agrees 2 Roll. Rep. 439, *Ross v. Bramsted*, that is no pawn where no possession is transferred at the time.

(a)¹ 2 Ld. Raym. 909, Com. 133, 1 Salk. 26, 3 Salk. 11, Holt, 13.

(a)² See *The Thames Ironworks Company v. The Patent Derrick Company*, 1 Johns. & H. 93.

(b) Com. Dig. Mortgage (B); *Walter v. Smith*, 5 B. & Ald. 439, 1 D. & R. 1; *Kemp v. Westbrook*, 1 Ves. 278; *Demandray v. Metcalfe*, Pre. Ch. 420, 2 Vern. 691; *Vanderzee v. Wallis*, 3 Bro. 21; *Ratchiffe v. Davies*, Yelv. 178, Cro. Jac. 244, Noy, 137, 1 Bulstr. 29.

2 Leon. 30 (*Clark's case*), and Yelv. 164 (*Brand v. Lisley*), are cases not of pawns, but bailment to third persons to sell goods for the use of a particular creditor, who will have an interest in the performance of that contract, and may sue the bailee, which has nothing in common with the case of a pawn. All the books treating of pawns treat them as in the possession of pawnee, where a pawn is compared to distress, and suppose that the custody of the pawn must be in the pawnee: *Mores v. Conham*, Owen, 123; *Coggs v. Bernard*, 2 Ld. Raym. 917; *Anonymous*, 2 Salk. 522: but there is one case more, where the proper distinction between mortgage and pawns is taken,—*Ratcliffe v. Davis*, Noy, 137, Cro. Jac. 244, Yelv. 179, 1 Bulstr. 29, where the court held there was a special property in pawnee, intitling to the custody till the condition is performed: but that, on payment, the whole property vested in pawnee; distinguishing it from a mortgage, *which is a conveyance of the thing.*" In 1 Smith's Leading Cases, 196, it is further said, that "a pawn being a sort of bailment, transfer of the possession of the chattel pledged is of the essence of it; and, if the pawnee part with the possession, he loses the benefit of his security." Here the defendants had perfected their security by taking possession of the goods before the plaintiff's claim was put forward. The latter had no interest or property in the goods at the time of the sale: and clearly had no right to complain (whatever might be the right of Dolby) of the mode in which the defendants exercised the [461] power of sale conferred upon them by their deed. [Erle, C. J. It is put upon the ground that there was an interest in the chattels left in the mortgagor, which was capable of being assigned, and was assigned to the plaintiff.] The pawnor or mortgagor could not give to a third party a better right than he himself had. The deed gave the defendants very large discretionary powers as to the sale of the property: and the only person who could take advantage of any breach of duty in that respect, would be the person who could take advantage of a breach of the contract. [Williams, J. Not necessarily so. In *Burnett v. Lynch*, 5 B. & C. 589, 8 D. & R. 368, lessee by *devd-poll* assigned his interest in the demised premises to A., subject to the payment of the rent and the performance of the covenants contained in the lease. A. took possession, and occupied the premises under this assignment, and before the expiration of the term assigned to a third person. The lessor sued the lessee for breaches of covenant committed during the time that A. continued assignee of the premises, and recovered damages against him: and it was held that the lessee might maintain an action upon the case founded in tort against A. for having neglected to perform the covenants during the time he continued assignee, whereby the lessee sustained damage.] The distinction between a mortgage and a pawn is also recognized in *Franklin v. Neale*, 13 M. & W. 481.

ERLE, C. J. In this action the plaintiff had recovered a verdict whereby he would have been indemnified for a great loss which he has sustained by having satisfied the claim of the landlord under a distress for rent which had been levied upon goods which had been conveyed to him by a bill of sale. The great difficulty I have felt is to find any law by which the [462] plaintiff can be entitled to retain his verdict. I am unable to find any. He has brought his action against the defendants for improperly and wastefully selling goods to which he claims a right. The defendants have pleaded that, at the time of making the instrument under which the plaintiff claims, and at the time of the sale, the goods in question had been assigned to them by the owner, and that they sold and disposed of them in their own right. In support of this plea, the defendants produced a deed which contains a skillfully elaborate conveyance of the goods to them, subject to a defeasance on payment of the mortgage-money by certain instalments. Now, if the property in these goods passed to the defendants by that instrument, their plea is made out. I have searched to the best of my ability to see whether we could regard the substance of the transaction, and say that it was a pawn of the goods, and that the mortgagor was a pawnor, and the parties taking pawnees, and so the former would have an interest which was capable of being conveyed to the plaintiff. But the frame of the instrument carefully excludes that: and I feel obliged to hold that the defendants are entitled to succeed. Another point urged before us was this,—The bill of sale under which the defendants claim purports to convey the property to the City Investment and Advance Company, and not to the defendants by name: and it was contended for the plaintiff that the goods could not pass to Sharpe and Baker. No doubt, Dolby considered that there was a company of which the one was manager and the other secretary. It is clear that individuals may carry on business under any name and style which they may choose

to adopt: and I see no reason why the defendants may not do so under the name of the City Investment and Advance Company. If parties pretend to be a corporation, and [463] presume to usurp the rights and powers of a corporate body as against the Crown, they may render themselves liable to be proceeded against for so doing. But, as between these parties, the City Investment and Advance Company are Sharpe and Baker, and consequently the conveyance in question is a conveyance to those individuals. I cannot therefore say that the deed was inoperative on this ground. It is unnecessary to say anything as to the point arising upon the seizure by the sheriff. The plaintiff will get the money which was paid in under the summons.

WILLIAMS, J. I am of the same opinion. I have tried my best to find some mode of extricating the plaintiff from the difficulties which beset him in this case, which is one of great hardship: but I have tried in vain. The first question is as to the validity of the deed whereby Dolby assigned the goods in question to the City Investment and Advance Company. It has been objected on the part of the plaintiff that that conveyance is inoperative, because it is necessary in a grant that the grantees should be named, otherwise the grant can in law have no operation. I apprehend, however, it is fully settled that a grant may be good, though the grantee be not named by his christian or surname. In Sheppard's Touchstone, p. 236, the learned author, after discussing the consequences of a mistake in the christian name or surname of the grantee, goes on to say,—“And yet, if the grant do not intend to describe the grantee by his known name, but by some other matter, there it may be good by a certain description of the person, without either surname or name of baptism:” for, he adds, “Id certum est quod certum reddi potest.” In this case, I apprehend, the meaning of the grant is plain: the deed purports and intends to convey the goods to those per-[464]-sons who use the style and firm of the City Investment and Advance Company. They may or may not be a corporation: but, when it is ascertained that those who carry on business under that name are the defendants, the deed operates to convey the property to them. The next question is, what is the nature of the grant, assuming that to be its operation. If it be competent to create a mortgage of personal property, this deed has certainly done it. It conveys the goods enumerated from the grantor to the grantees in the most full and explicit terms, so as to make the latter the owners thereof, subject only to the condition of the conveyance being defeated on performance of certain things by the grantor. That is a mortgage in the strict and proper sense of the term. It is said that there cannot be a mortgage of a chattel, and therefore that this instrument must operate as a pledge. But, why so? There is nothing illegal in making a grant in this form. The books recognize the distinction between a mortgage and a pledge of personal chattels: and there is an express authority in the case of *Florey v. Denmy*, 7 Exch. 581, that there may be a mortgage of chattels, as distinguished from a pledge, without delivery: so that there would seem to be nothing contrary to law in what is ordinarily called a mortgage of personal chattels. The property is absolutely and indefeasibly vested in the grantee, if the condition be not performed: and a court of law can look at no other owner than the mortgagee or grantee. When, therefore, Dolby professed to assign these goods to the plaintiff, he had nothing to assign: the property was out of him. That being so, the plaintiff can have no right to complain of the manner in which the absolute owners have thought fit to deal with the property. It is true that there is a covenant in the deed under which the mortgagees could be made responsible to the mort-[465]-gagor for any misconduct in the exercise of the power of sale. If this had been an action by the plaintiff in the name of the mortgagor, it is possible he might have been entitled to recover compensation for any shortcoming in this respect. Or it may be that, if recourse were had to a court of equity, the court would hold the mortgagees to be trustees in favour of the mortgagor or those to whom he has transferred his rights, and would give them a remedy for any abuse by them of their trust. We, however, can only look at such rights as the suitors have by law. We can, therefore, only regard the defendants as absolute owners of the goods in question; and consequently no action will lie against them at the suit of this plaintiff for dealing with them as they did.

WILLES, J., concurred.

BYLES, J., was sitting at nisi prius.

Rule absolute.

[466] IN THE EXCHEQUER CHAMBER.

TRINITY VACATION, 1864.

DRESSER v. NORWOOD AND ANOTHER. June 18th, 1864.

[S. C. 34 L. J. C. P. 48; 11 L. T. 111; 10 Jur. N. S. 851; 12 W. R. 1030. Dictum adopted, *McCaul v. Strauss*, 1883, Cab. & El. 111. Distinguished, *Taylor v. Yorkshire Insurance Company*, [1913] 2 I. R. 1.]

A. placed timber in the hands of H., a factor, for sale on a *del credere* commission. B. bought it through the agency of C., a broker, *who (as H. was aware) had prior knowledge of the fact that the timber was the property of A., and that H. was selling as factor only.* C.'s knowledge of the relative position of A. and H., however, was not communicated to B., who made the purchase *bonâ fide*, although he was aware that H. was in the habit of selling timber *as factor*:—Held,—reversing the decision of the court of Common Pleas,—in an action by A. against B. for the price of the timber, that B. was affected by the knowledge of his broker C., and therefore could not set off against the price of the timber so bought for him a debt due to him from H.—*Quære*, whether H.'s ignorance of the state of knowledge of C. would make any difference?

This was an appeal against a decision of the court of Common Pleas in an action brought by the plaintiff, a timber-merchant in London, against the defendants, Russia merchants at Hull, for the recovery of 321l. 16s. 9d. for deals sold to the defendants in May, 1858.

1. The first count of the declaration was for goods sold and delivered, work and labour and materials, money paid, interest, and money due on accounts stated.

The second count stated that, in consideration that the plaintiff at the defendants' request would sell and deliver to Marmaduke Chaplin certain deals and deal-ends at the price or sum of 9l. 10s. per standard hundred of deals, and 7l. 10s. per standard hundred of deal-ends, to be paid by the said M. Chaplin by cash within a month, less $2\frac{1}{2}$ per cent. discount, the defendants promised the plaintiff that they would guarantee the fulfilment of the said contract of sale of the said deals and deal-ends by the said M. Chaplin: Averment that, although the plaintiff, relying on the said promise, sold and delivered to the said M. Chaplin the said goods, at the price and on the terms aforesaid, and [467] the said price of the said goods was long since due and payable to the plaintiff; yet the said M. Chaplin had not paid the price of the said goods, or any part thereof,—of which the defendants had notice; and that, although the plaintiff had performed all things to entitle him to a performance of the said guarantee, yet the defendants had not fulfilled the contract as aforesaid, or paid the price of the said goods, or any part thereof, and the same remained wholly unpaid: Claim, 400l.

2. The defendants pleaded,—first, to the first count, never indebted,—secondly, to the first count, that the said goods were bought by the defendants from, and were sold and delivered to them by, one J. W. Holderness, *as the agent and factor of and for the plaintiff, with the plaintiff's privity and consent, in his the said J. W. Holderness's own name, as the true and sole owner thereof, and as and for his own goods*; and that the plaintiff did not appear nor was he known to the defendants as owner or interested in the said goods at or before the sale or delivery of the said goods, nor until after the price thereof had become due, nor until after the accruing to the defendants of the debt thereafter mentioned; and that credit for the said goods and the time thereof was given to the defendants by the said J. W. Holderness, and not by the plaintiff: That the other causes of action therein pleaded to, accrued to the said J. W. Holderness, and not to the plaintiff, otherwise than through and by means of the said J. W. Holderness as his agent and factor, in respect of and in connection with and as incidental to the said sale of the said goods, and not otherwise, and before the plaintiff had appeared or was known to the defendants as the owner of or interested in the said goods; and that, before the time of the sale and delivery of the said goods, the defendants [468] had given credit to the said J. W. Holderness for a large sum of money due and owing, from time to time, by drawing upon the said J. W. Holderness a certain bill of exchange dated the 20th of February, 1858, whereby the defendants

required the said J. W. Holderness to pay to them the sum of 600*l.* four months after the date thereof, and which said bill the said J. W. Holderness accepted, but did not pay, although the said bill became due before this suit, and before and at the commencement of this suit was and still is in the hands of the defendants wholly due and unpaid: And that the amount of the said bill exceeds the sum claimed in the said first count; and that, out of that amount, the defendants were ready to set off the sum claimed in the said first count.

The defendants also pleaded to the second count,—thirdly, that they did not promise as alleged,—fourthly, that the plaintiff did not sell or deliver to the said M. Chaplin the goods therein mentioned, in manner and form as in that count alleged,—fifthly, that the price of the said goods never did become payable from the said M. Chaplin to the plaintiff, in manner and form as in that count alleged. Issue thereon.

3. The cause was tried before Erle, C. J., at the sittings at Guildhall after last Michaelmas Term, when the following evidence was given:—

Henry Dresser, called on behalf of the plaintiff, stated,—“I am the plaintiff, a merchant and ship-owner in London. In September, 1857, I sent several cargoes of timber to Hull; amongst them two cargoes by the ships ‘Beatrice’ and ‘Amelia Hillman.’ These cargoes consisted of Kiana red wood deals and ends, and were shipped from the Kiana mills. I employed J. W. Holderness, of Hull, to sell these cargoes for me. He was a commission-merchant and auctioneer. He sold by auction. In October, 1857, I sent my man-[469]-ging clerk, Buckland, to Hull, to Holderness. I instructed him to get an acknowledgment from Holderness about the goods. On his return, Buckland handed me the following letter from Holderness:—‘Oct. 2nd, 1857. We hold to your order, as per conditions in our favour of 24th July, the following cargoes, “Beatrice,” “Amelia Hillman.”’”

The letter of the 24th of July, from Holderness to the plaintiff, was produced and read, as follows:—

“We have your letter of the 22nd, and in reply will take charge of the cargo per ‘St. Lawrence,’ from Wyburg, on the following terms, 2½ per standard per week rent, 4*s.* 6*d.* per standard landing charges, and the usual commission and del cred., or ½ per cent. if not sold by us. “J. W. HOLDERNESSE & Co.”

“In February, 1858, I sent Buckland to Hull again. I did not hear of the sale till after Holderness’s bankruptcy. I sent Buckland to Hull again after the bankruptcy.”

Cross-examined: “The cargoes were put up to auction by Holderness. I did not attend the sale. I received a catalogue. I dare say I looked at it. Probably I destroyed it. I do not think I had more than one catalogue sent by Holderness. My impression at the time of receiving the catalogue, was, that Holderness was the auctioneer. I never understood him to be the merchant. Ward was Holderness’s clerk. Holderness may have been described in the catalogue as merchant; but I did not observe it. I drew bills of exchange on Holderness against the cargoes. Three bills were drawn by me on Holderness, for 955*l.*, 455*l.*, and 655*l.* respectively. Some of them are those now produced. They were drawn before Holderness’s bankruptcy, and were never paid. He became bankrupt in June, 1858.”

[470] Re-examined: “I did not know whether or not Holderness was an importer on his own account. I understood that he acted entirely as a broker and commission-agent. I think that, when I sent him the cargoes in question, he had five or six other cargoes of mine in his hands, to the value of from 16,000*l.* to 20,000*l.*: at all events, they were very large cargoes. Holderness was a del credere agent. I have never been paid for these goods.”

J. W. Holderness: “I was a commission-agent at Hull. I was in the habit of selling by auction goods consigned to me. One of my clerks was the auctioneer: he had a licence; I had none. Chaplin, who died a few months ago, was my clerk for some time: after him, Ward. I had timber consigned to me by various merchants, for sale: not all on commission; I imported also myself. I had several cargoes consigned to me by plaintiff in August and September, 1857. I remember the two consignments by the ‘Beatrice’ and ‘Amelia Hillman.’ I had sold cargoes for the plaintiff on commission before these two. I was known in Hull as a commission-agent.

I had sold on commission for the defendants, who are merchants at Hull. Chaplin had been my clerk: he had left me when those cargoes came. I remember Buckland coming down and getting the acknowledgment which has been read. After Chaplin left me, he set up in business on his own account as a broker. He applied to me to purchase part of these two cargoes. I believe he knew whose timber it was. He applied to purchase a portion of the 'Amelia Hillman's' cargo. He brought a specification with him: applied for what was therein specified. I ultimately came to terms with him. He made out a bought note. I remember his bringing me this contract,—

[471] “Bought of Messrs. J. W. Holderness & Co., Hull, for my principals,

“20 St. P. std. 3 × 11 in. Kiana red wood } deals.
 10 St. P. std. 3 × 9 in do. do. }
 At 9l. 10s. per St. Petersburg standard hundred.
 Also 539 pieces of Kiana deal-ends, at 7l. 10s. do.
 Payment by cash within a month, less 2½ per cent.

“M. CHAPLIN.”

“He asked me for a delivery order. I asked him for the name of his principals. He declined to give me their names; stating that they resided in the country. He said they did not wish their names to be given; that he had bought on the dock side for the same parties without giving their names. After some further conversation, he asked me if I would take a banker's guarantie or a merchant's guarantie, which I agreed to do, in payment. He called a short time afterwards, and asked me if I would take Norwoods' (the defendants') guarantie; which I consented to do, and he brought it. This is it,—

“Messrs. J. W. Holderness & Co.

“Hull, June 2nd, 1858.

“Dear Sirs,—In compliance with your request, we beg to state that we are willing to guarantee the fulfilment of the contract for deals, &c., as made with you by Mr. Chaplin on 31st May last, having given him authority to declare us as principals.

“C. M. NORWOOD & Co.”

“I had three or four interviews with Chaplin during the negotiation for this purchase. I do not know that it was mentioned whose the goods were. *At that time Chaplin was perfectly aware they were Dresser's goods.* I think that in conversation I said to Chaplin that I did not know whether Dresser would take that price or not. That was before Chaplin bought them. We were two or three days, and had several interviews [472] before we arrived at the price. I believe the first interview took place with a clerk of mine, Mr. Ward, and he named it to me. Then I saw Chaplin myself. He had been managing clerk eighteen months. He had sold for me as my clerk, having an auctioneer's license; and he knew the nature of my business perfectly. Upon receiving the guarantie, he got a delivery order for the goods, and they were delivered to him. At this time I was in difficulties, and was pressed by my bankers. Holden & Sons were the solicitors of my bankers, and of the defendants also. They were also my solicitors; and they made me bankrupt ten or twelve days after the sale, and were the solicitors of the assignees. I was the acceptor of a bill of exchange drawn on me by defendants at four months from the 20th of February, 1858, for 600l., which was then running. I had known defendants for several years. I had sold for them on commission during the year 1857. I had never known defendants make a similar purchase before. They had no yard to store timber in.”

Cross-examined: “The sale for defendants was of a cargo by the ‘Windsor’ from Riga. It was stored on premises which I occupied. The cargo was sold at various times, from December, 1856, to October, 1857. Only one other cargo was ever consigned to me for sale by defendants; and that was the cargo against the price of which the 600l. acceptance, the subject of the present set-off, was drawn. I imported largely on my own account, and had an establishment on my own account at St. John's, New Brunswick, and imported largely from thence. I had large sales of timber at Hull: and, when I had a sale, I had catalogues in the form produced published and circulated.” [Catalogues of sale of timber were here put in evidence by defendants' counsel, in which Holderness was described at foot as “merchant,” Ward as “auctioneer.”]

[473] "I kept my own timber and the timber consigned to me by plaintiff in the same yard, except the cargoes which had been landed prior to plaintiff's placing them in my hands. I mean except those which had been landed by some other brokers. The catalogues were always in the same form, stating me to be the merchant, and my clerk, Chaplin, or Ward, as the case might be, the auctioneer. I never distinguished in the catalogues what timber belonged to myself, and what to other persons who had consigned it to me. Chaplin left me in 1857. I had a sale in March, 1858. Ward was then the auctioneer. Some of plaintiff's timber was included in the printed catalogue for that sale. I sent a catalogue to plaintiff. The mark by which I distinguished plaintiff's timber in the catalogue is a manuscript mark in my own printed catalogue, that is to say, in the copy kept for my own private use. In the copy sent to plaintiff, I think there was generally a mark to shew him that the timber marked there was his. The ship's name was not mentioned in the catalogue, nor the import mark. I might probably put a mark against plaintiff's timber in the catalogue I sent him, to draw his attention to it. That was the custom. Chaplin left me in January, 1857. He became bankrupt soon after. He died a few months ago. I became bankrupt soon after the delivery to the defendants of this timber, and paid no dividend. I feel confident Mr. Dresser's name was mentioned to Chaplin. Not during the negotiation. I will not swear that plaintiff's name was mentioned between me and Chaplin during the conversation or during the negotiation as to this sale; but *I will swear that Chaplin was perfectly aware the goods were plaintiff's from previous conversations.* I knew Chaplin was a broker when the bought-note was given. I asked for the name of his principals, and he declined [474] to give it. He subsequently brought me defendants' letter, which I call the guarantie. I looked upon it as a guarantie. After getting that letter, I made out and delivered the invoice."

The invoice was put in by the defendants' counsel, headed as follows:—

"Mr. M. Chaplin, for his principals.

"Hull, 5th June, 1858.

"Bought of J. W. Holderness & Co."

[Here follows an account of the timber the subject of the sale, and the prices, amounting to 321l. 16s. 9d.]

Re-examined: "The catalogues are in the same form as I have always used when I sold for the defendants. I used to send them catalogues in the same form. This is the usual way in which I make out my invoices. I never sent my principals copies of the invoices or of the contracts. I used to send them the account-sales when the cargoes were sold. The plaintiff's goods were not sold by auction."

Plaintiff re-called: "Chaplin applied to me about these cargoes when they were in course of landing at Hull, in 1857. He came to London, and called at my office, and told me that he understood I had several cargoes in Hull, and he wished me to place them in his hands for sale. The ships' names were mentioned. The 'Amelia Hillman' was one of them. I told him I could not do so, because I had entered into an arrangement with Holderness, by which I should have to sell them through him, and should have to pay him $\frac{1}{2}$ per cent. even if I sold them through any one else; and therefore, if he (Chaplin) sold them, I could only allow him $\frac{1}{2}$ per cent."

Isaac Borthwick Ward: "I became clerk to Holderness about August, 1857. Chaplin had then left. I recollect Holderness having some of plaintiff's timber for sale; amongst others, the cargo of the 'Amelia [475] Hillman.' It is called Kiama red wood deals. The name is peculiar. It is where the wood comes from. I believe it was known in Hull at that time who imported the Kiama red wood deals. I think there was only one importer of those deals, viz. plaintiff. The sale of the lot to Chaplin began by a negotiation between me and Chaplin. I saw him several times before we agreed on the price. At length the bought-note of 31st May was drawn up and signed. At the time he was purchasing, I asked him who the goods were for. He declined to name. I still pressed him. I knew he had been a bankrupt not long before; and that Holderness would not trust him alone. I pressed him for his principal's name. He still declined to disclose it. I then said I must speak to Holderness. I was present at the interview between him and Holderness. Holderness asked him for the name of his principals. Chaplin asked if he could get a guarantie from some respectable party (bunkers or merchants), would that satisfy him. Holderness said yes, that would do, if it was from any party of whose respectability he was

satisfied. He afterwards brought defendants' note or guarantie of 2nd June, 1858. Nothing passed between me and Chaplin during the negotiation for the sale about plaintiff. *I should think he knew whose goods they were. I think so from his having been in Holderness's service.* The defendants are commission-merchants and steam ship-owners in Hull. I never knew them purchase wood goods such as these before or since."

Cross examined: "Defendants hold a high position in Hull, and do a large business there. Chaplin became bankrupt early in 1857. He left Holderness in January, 1857. Shortly afterwards, he became bankrupt, and then commenced business as a commission-agent.

[476] J. W. Buckland: "I am now a member of plaintiff's firm, and was plaintiff's managing-clerk in 1857 and 1858. I went down to Hull to see Holderness when the cargoes were there. I procured the acknowledgment from Holderness in October. I know Chaplin. I have met him several times; but I don't recollect seeing him in October, 1857. I went to Hull again in February, 1858, and saw Chaplin there. I had some conversation with him about the 'Amelia Hillman' and 'Beatrice.' He was speaking about cargoes generally, what plaintiff had for sale in Hull; and he made me an offer. I told him there were certain cargoes in Holderness's hands; and I recollect very well telling him some of the particular cargoes that Holderness had there. I believe I mentioned the 'Asia,' 'Amelia Hillman,' and 'Beatrice.' Chaplin made me an offer for a portion of one of the cargoes. We came to no terms. I submitted the offer to plaintiff, and he did not accept it. Chaplin knew that I represented plaintiff."

Cross-examined: "In February, 1858, there were four cargoes of plaintiff's in Holderness's possession: only four, I think."

This was the plaintiff's case.

Charles Morgan Norwood, one of the defendants, stated: "I am a merchant at Hull, in partnership with my brother, the other defendant. In May, 1858, I employed Chaplin to purchase some timber of Holderness. Chaplin was a wood-broker. He had been a bankrupt within a year before. In the spring of 1858, I had the 600l. bill becoming due. It was drawn in February, and became due on the 23rd of June. At the end of May I instructed Chaplin to buy some deals of Holderness, if he could get them. Chaplin called on me at my office on the evening of the 27th of May. He told me that he should be at Holderness's sale; that the goods were selling at extremely low [477] prices; and that several of the wood-merchants in Hull had made purchases; and he recommended me to purchase. He said, 'Things are going below the cost price; there are some lots unsold at the sale, and I can buy some for you.' I had known Holderness to be a large importer; and in two instances he had sold for me. That was the only reason I had for supposing that he was a factor. Chaplin never said anything to lead me to think that Holderness was selling for anyone but himself. He said nothing about it. He shewed me the catalogue, and pointed out to me where the lots were. The next day I told Chaplin that, if he could purchase for me very cheaply the goods pointed out in the catalogue, he might; and I received the contract-note from him on the 31st of May. The next time I saw Chaplin, I think, was on the 2nd of June; and he said that Holderness had asked for the name of his principals, or a guarantie, one or the other. That was the way in which he put it. In consequence of that, I wrote the letter to Holderness of the 2nd of June, which has been read. A day or two after, we received the invoice. The goods were at Hull, in Holderness's yard. My brother, the other defendant, was absent from England, and took no part in the transaction. On these occasions, the seller pays the commission. I paid no commission."

Cross examined: "I had employed Chaplin before several times. I had never bought of Holderness before. I bought the timber because I heard it was cheap. I did not buy to set off. I did not want the timber, except to sell again, and make a profit of it if I could. I have bought cargoes of timber. My ships often bring me small quantities. I have not been in the habit of buying small quantities. I have known Holderness for some time. I have consigned two cargoes to Holderness for sale. I have sold him many [478] cargoes previously. The cargoes of my own which I sent to him as factor were put into his catalogue with the other timber, and invoices made out in the same way. I always took advances for the goods. I did not interfere in any way. I did not know he was a general factor. The reason I placed the two cargoes in his

hands was this:—It was at the crisis of 1857 and 1858; and, it being a time of depression, I could not sell deals in the ordinary way, except at a great sacrifice. Holderness offered to put them in his catalogue. I should not have given them to him, had they not been wholly unsaleable in the usual way. He sold very largely, and very frequently. I had a notion that the timber was his own. He was concerned in a very large timber-trade in New-Brunswick. I had an impression that by far the greater part of the timber he sold was his own. My only reason for thinking that he sold for others was, because he sold for me. I know of no other case. I did not know of Holderness being in difficulties: the only thing that struck me was, Chaplin's statement that at the sale of the 27th of May the goods were sold at very low prices; in fact, at a sacrifice. This was to my mind an unsatisfactory circumstance. When I authorized Chaplin to buy, I intended to pay in cash. I did not know Holderness to be in the position he was. It did not occur to me to set-off until the bill became due. Holderness became bankrupt a few days before the bill became due."

Re-examined: "I had never employed Chaplin, except as a broker. I believed the timber to be Holderness's. There was a sale by auction on the 27th of May, out of which this arose."

4. Before the summing up of the case to the jury, a discussion arose as to the meaning of the second plea, and as to the effect of the evidence. The counsel for [479] the defendants contended that, if Holderness, being the plaintiff's factor for sale, and intrusted with the goods for that purpose, sold them to the defendants as the real owner, the defendants not knowing that the plaintiff was the real owner, the second plea was proved, notwithstanding that the plaintiff might not have intended or expressly authorized Holderness to represent himself to the purchasers as the real owner of the goods, or to sell them as such, and, notwithstanding that Chaplin knew that the goods were the plaintiff's, and not Holderness's.

The counsel for the plaintiff, on the other hand, contended that the plea was not proved, unless the jury should be of opinion that the sale by Holderness was made with the actual privity and consent of the plaintiff to his holding himself out as the true owner of the goods, and should also be of opinion that Chaplin as well as Norwood was ignorant at the time of sale of the fact that the plaintiff was the real owner of the goods.

5. The Lord Chief Justice left the following three questions to the jury, reserving, by consent, to either side to move the court on any question of law which might remain open after the jury had answered the questions left to them:—

First. Did Holderness sell the goods as his own, with the plaintiff's consent? To which the jury answered "No."

Second. Did Norwood know, when Chaplin purchased the goods, that the plaintiff was the owner? To which the jury answered, "No."

Third. Did Chaplin know, when he made the purchase, that the plaintiff was the owner of the goods? To which the jury answered, "Yes."

6. Upon these findings, the learned judge ordered the verdict to be entered for the plaintiff for 321l. [480] 16s. 9d., being the amount of the invoice: but gave leave to the defendants to move to enter the verdict for them on the second plea, if the court should be of opinion that, upon the evidence and findings above stated, it ought to be so entered.

A general verdict for the plaintiff for 321l. 16s. 9d. was thereupon entered: but the plaintiff had not claimed to recover on the second count, and in fact abandoned that count at the trial; and the entry of the verdict for the plaintiff on the issue joined on the pleas to that count was in reality so made only upon the understanding that it was to follow the verdict upon the first count.

7. In Hilary Term following, the defendants accordingly obtained a rule calling upon the plaintiff to shew cause why a verdict should not be entered for the defendants pursuant to the leave reserved, on the ground that, upon the facts proved, the defendant was entitled to the verdict; or why a new trial should not be had between the said parties, on the ground of misdirection, or that the verdict was against the evidence with reference to the timber having been intrusted to Holderness for sale on a *del credere* commission, and possession having been given to him and advances made by him, and the sale having been made in his name.

The rule came on for argument in Easter Term, 1863, when the court ordered that the verdict for the plaintiff should be set aside on all the pleas except the first, and that, instead thereof, a verdict should be entered thereon for the defendants.

9. The catalogue and other documents put in evidence at the trial were to form part of this case, and to be referred to by either party.

The case was argued in the Exchequer Chamber, before Pollock, C. B., Crompton, J., Bramwell, B., Channell, B., Blackburn, J., and Shee, J.

[481] J. Brown (with whom was Lush, Q. C.), for the plaintiff, urged substantially the same arguments that were urged by them in the court below, in addition to the cases referred to upon that occasion citing *Seaman v. Fomereau*, 2 Str. 1183; *Fitzherbert v. Mather*, 1 T. R. 16; *Corrfoot v. Fowler*, 6 M. & W. 358; and also Paley's *Principal and Agent*, 259, and Sudgen's *Vendors and Purchasers*, 13th edit. pp. 621, 623, 626.

Bovill, Q. C. (with whom were Manisty, Q. C., and C. Hutton), for the defendants, referred to *Worsley v. The Earl of Scarborough*, 3 Atk. 392, and *Hirn v. Mill*, 13 Ves. 120, and to 1 Story's *Equity Jurisprudence*, 480, and the notes to *Le Neve v. Le Neve*, 2 Tudor's *Cases in Equity*, 21.

Cur. adv. vult.

POLLOCK, C. B., delivered the judgment of the court:—We are all of opinion that the judgment of the court below ought to be reversed. We think that, in a commercial transaction of this description, where the agent of the buyer purchases on behalf of his principal goods of the factor of the seller, the agent having present to his mind at the time of the purchase a knowledge that the goods he is buying are not the goods of the factor, though sold in the factor's name, the knowledge of the agent, however acquired, is the knowledge of the principal. It seems to be conceded that, if at the time of the sale, the factor of the seller had expressly told the agent of the buyer that the goods were not his property, but the property of his principal, it would not have been a case for a set-off. But, why should the factor tell the buyer's agent that which he was well aware that the agent already knew? The knowledge of the factor of the seller that the buyer's agent was aware that he was only the factor, in our judgment makes the [482] case perfectly clear. But it is not to be understood that we mean to admit that the case would have been different if the factor was ignorant that the knowledge of that fact was present to the mind of the buyer's agent, provided it really was so present.

Judgment reversed.

LEE AND ANOTHER v. JONES. 1864.

[S. C. 34 L. J. C. P. 131; 12 L. T. 122; 13 W. R. 318; 11 Jur. N. S. 8. Discussed, *Phillips v. Forall*, 1872, L. R. 7 Q. B. 673. Followed, *Fletcher v. Krell*, 1872, 42 L. J. Q. B. 55. Not applied, *Lawder v. Lawder*, 1873, 1 R. 7 C. L. 57. Referred to, *Mackreth v. Wainman*, 1884, 51 L. T. 21. Discussed, *London General Omnibus Company v. Holloway*, [1912] 2 K. B. 78.]

One P. had been employed by the plaintiffs in the sale of coals for them on commission, for which he at the end of each month gave them his acceptances, and by the terms of his agreement he was to hand over to them within six days all moneys he received from customers. P. having fallen in arrear to the extent of 1272l., the plaintiffs required him to find security to the amount of 300l., and at his request the defendant consented to guarantee 100l. The agreement of guarantee recited the terms of dealing between the plaintiffs and P.; but the fact that P. was already indebted to the plaintiffs in the large sum above mentioned was concealed from the sureties.—In an action against the defendant upon the agreement, he pleaded that he was induced to make it by the fraudulent concealment by the plaintiffs of a material fact:—Held, by Crompton, J., Channell, B., Blackburn, J., and Shee, J., in the Exchequer Chamber,—affirming the judgment of the court below,—that the non-communication by the plaintiffs to the defendant of the fact that P. was at the time indebted to them, was evidence for the jury in support of the plea,—Pollock, C. B., and Bramwell, B., dissenting.

This was an appeal under the Common Law Procedure Act, 1854, against a decision of the court of Common Pleas discharging a rule nisi to enter a verdict for the plaintiffs for 100l.: see 15 C. B. (N. S.) 386.

The cause was tried before Erle, C. J., at the sittings after Michaelmas Term, 1862, for the county of Middlesex, when a verdict was found for the defendant,—leave being

reserved by the judge at the trial to enter a verdict for the plaintiffs for 100l., if there was no evidence to support the defendant's plea of fraud hereinafter referred to.

The following are the facts of the case:—

1. The plaintiffs, at the time of the making of the agreement upon which the action is brought, were in partnership with one John J. Jerdein (who died before this action was commenced), as coal-merchants.

[483] This action is brought to recover the sum of 100l. on an agreement made between the plaintiffs and John J. Jerdein and the defendant and others.

The following is a copy of this agreement:—

"An agreement made this 3rd day of October, 1861, between Neville Cattlin Sendall, George Theobald, John Gunning Antrobus, Charles Jones, and Hugh William Ruel, of the one part, and Messrs. Lee & Jerdein, of Lancaster Place, Strand, in the county of Middlesex, coal-merchants, of the other part: Whereas, James Packer has for some time past been a salesman of coals upon commission for the said Messrs. Lee & Jerdein, he the said James Packer giving bills of exchange to the said Lee & Jerdein for all such coals as may be delivered to his order, such bills being floating bills to be settled for and paid up at the expiration of the current months during which such bills are respectively running: And whereas the said Lee & Jerdein requiring security from the said James Packer, they stipulated (amongst other things) that the said Neville Cattlin Sendall, George Theobald, John Gunning Antrobus, Charles Jones, and Hugh William Ruel, should give them a floating and continuing guarantee for the term of three years from the date hereof, on behalf of the said James Packer, to secure to them the said Lee & Jerdein the amount of any balance which might at any time or times be due to them the said Lee & Jerdein from the said James Packer upon any such coal-account on bills, to the amount of 300l., in the proportions following, that is to say, the said Neville Cattlin Sendall in the sum of 50l., the said George Theobald in the like sum of 50l., the said John Gunning Antrobus in the like sum of 50l., the said Charles Jones in the sum of 100l., and the said Hugh William Ruel in the sum of 50l., making together the said sum of 300l.; and, in order to induce the said Lee & [484] Jerdein to continue the said arrangement with the said James Packer, the said Neville Cattlin Sendall, George Theobald, John Gunning Antrobus, Charles Jones, and Hugh William Ruel, agreed to enter into this agreement for guarantee in manner hereinafter appearing: Now this agreement witnesseth that, in consideration of the said Lee & Jerdein agreeing to allow the said James Packer a certain commission upon coals, under an agreement between them, and bearing date the 1st of November, 1856, they the said Neville Cattlin Sendall, George Theobald, John Gunning Antrobus, Charles Jones, and Hugh William Ruel, do hereby severally and respectively guarantee, promise, and agree to and with the said Lee & Jerdein, that they the said Neville Cattlin Sendall, George Theobald, John Gunning Antrobus, Charles Jones, and Hugh William Ruel, shall and will pay and make good, in the respective portions hereinbefore mentioned, to the said Lee & Jerdein, or their executors, administrators, or assigns, all such sum and sums of money as may be due and owing to them at any time or times during the said term of three years from the said James Packer in relation to the said agreement or bills of exchange, not exceeding in the whole the said sum of 300l., such guarantee to be a continuing guarantee, and to be made good at any time by the said Neville Cattlin Sendall, George Theobald, John Gunning Antrobus, Charles Jones and Hugh William Ruel, for any balance or amount due to the said Lee & Jerdein in respect of the said agreement between the said James Packer and the said Lee & Jerdein during the said term of three years: And it is hereby declared by the said Neville Cattlin Sendall, George Theobald, John Gunning Antrobus, Charles Jones, and Hugh William Ruel, that giving time to the said James Packer by the said Lee & Jerdein for the payment of any account [485] or balances at any time shall not invalidate this guarantee, but that they shall at all times have it in their full power and discretion so to do, or to make any compromise or arrangement that they might deem beneficial with the said James Packer; and that they the said Neville Cattlin Sendall, George Theobald, John Gunning Antrobus, Charles Jones, and Hugh William Ruel, their executors or administrators, shall remain liable to make good any balance or sum remaining due from the said James Packer to the said Lee & Jerdein, notwithstanding such time so given or such compromise or arrangement as aforesaid; and that further, as between them the said Neville Cattlin Sendall, George Theobald, John Gunning Antrobus,

Charles Jones, and Hugh William Ruel, and the said Lee & Jerdein, any account stated between them and the said James Packer or the account-books of the latter used by them in their regular course of business, shall be taken as conclusive evidence against the said Neville Cattlin Sendall, George Theobald, John Gunning Antrobus, Charles Jones, and Hugh William Ruel, their heirs, executors, or administrators, either at law or equity, of the amount of the balance or balances due to them on the said agreement by the said James Packer: And it is further agreed and declared by and between the said parties hereto, that this agreement is to be taken and considered as supplemental and in addition to an agreement bearing date the 1st of November, 1856, made between Sarah Tinson of the one part, and the said Lee & Jerdein of the other part. In witness," &c.

3. The agreement between Sarah Tinson and Lee & Jerdein was as follows:—

"An agreement made this 1st day of November, 1856, between Sarah Tinson, of, &c., widow, of the one part. [486] and Messrs. Lee & Jerdein, of, &c., coal-merchants, of the other part: Whereas the said Sarah Tinson has a son named James Packer, who is a salesman of coals upon commission for the said Messrs. Lee & Jerdein, he the said James Packer giving bills of exchange to the said Lee & Jerdein for all such coals as may be delivered to his order, such bills being floating bills, to be settled for and paid up at the expiration of the current months during which such bills are respectively running: And whereas the said Lee and Jerdein, when they made the arrangement as to such sale by commission and current bills as aforesaid with the said James Packer, stipulated (among other things) that the said Sarah Tinson should give them a floating and continuing guarantie on behalf of the said James Packer to secure to them the said Lee & Jerdein the amount of any balance which might at any time or times be due to them the said Lee & Jerdein from the said James Packer upon any such coal-account on bills, to the amount of 300l.: and, in order to induce the said Lee & Jerdein to effect the said arrangement with the said James Packer, the said Sarah Tinson agreed to enter into this agreement for guarantie, in manner herein-after appearing: Now, this agreement witnesseth, that, in consideration of the said Lee & Jerdein agreeing to allow the said James Packer a certain commission upon coals under an agreement between them and bearing even date herewith, she the said Sarah Tinson doth hereby guarantee, promise, and agree to and with the said Lee & Jerdein that she the said Sarah Tinson shall and will pay and make good to the said Lee & Jerdein, or their executors, administrators, or assigns, all such sum and sums of money as may be due and owing to them at any time or times from the said James Packer in relation to the said agreement or bills of exchange, not exceeding in [487] the whole the sum of 300l., such guarantie to be a continuing guarantie, and to be made good at any time by the said Sarah Tinson for any balance or amount due to the said Lee & Jerdein in respect of the said annexed agreement between the said James Packer and the said Lee & Jerdein: And it is hereby declared by the said Sarah Tinson that giving time to the said James Packer by the said Lee & Jerdein for the payment of any account or balances at any time shall not invalidate this guarantie, but that they shall at all times have it in their full power and discretion so to do, or to make any compromise or arrangement that they might deem beneficial with the said James Packer, and that she the said Sarah Tinson, her executors or administrators, should remain liable to make good any balance or sum remaining due from the said James Packer to the said Lee & Jerdein, notwithstanding such time so given or such compromise or arrangement as aforesaid: and, further, that, as between her the said Sarah Tinson and the said Lee & Jerdein, and account stated between them and the said James Packer, or the account-books of the latter used by them in their regular course of business, shall be taken as conclusive evidence against the said Sarah Tinson, her executors or administrators, either at law or in equity, of the amount of the balance or balances due to them on the said agreement by the said James Packer. In witness," &c.

4. The agreement between James Packer and Lee & Jerdein was as follows:—

"Memorandum of agreement made the 1st day of November, 1856, between Messrs. Lee & Jerdein, of, &c., coal-merchants, of the one part, and James Packer, of, &c., agent, of the other part: Whereas, the said James Packer is an agent for the sale of coals for Messrs. Lee & Jerdein, and it has been agreed that he [488] shall continue as such agent, upon the following terms, to which they the said Messrs. Lee & Jerdein have consented, viz. that the said James Packer shall obtain customers for

the said Lee & Jerdein, and have coals delivered to his order, for which the said James Packer shall receive at and after the rate of 7l. 10s. upon every 100l. worth of coals so delivered, except when the price of the said coals shall be 28s. and then that the commission of the said James Packer shall be at the rate of 10l. for every 100l. worth of coals so sold or delivered to his order; and, in consideration thereof, that he the said James Packer shall give bills of exchange to the said Lee & Jerdein as security for the amounts in value of the coals so to be delivered, the intention being that the said James Packer shall make himself personally responsible for the payment of such amounts to the said Lee & Jerdein; that the customers so introduced by the said James Packer shall be deemed the customers of Messrs. Lee & Jerdein, and entered as such in their books, and all bills and accounts shall be sent in to them as such, although the said James Packer shall be entitled to the said commission upon the amounts of their respective accounts; that all moneys received by the said James Packer from any of such customers shall be so received by him as their agent, and paid over and accounted for by him within six days after the receipt thereof by him; that such amounts so accounted for shall from time to time be taken off or credited upon the said floating bills so to be given from time to time by the said James Packer as aforesaid: Now, this agreement witnesseth that, in consideration of the said commission of 7l. 10s. and 10l. per cent. as aforesaid, the said James Packer hereby promises and agrees to and with the said Messrs. Lee & Jerdein, that he the said James Packer will duly observe and perform all the [489] foregoing agreements and stipulations; and, further, for the like consideration, that he will not during the continuance of this agreement sell or cause to be sold coals on his own private account or otherwise, or give instructions to any other person whereby any other party may effect a sale or sales of coal, under a penalty of 50l. for every such sale or introduction; and, lastly, it is hereby agreed by and between the said parties hereto, that this agreement may be terminated by one month's notice on either side, when all matters of account shall be settled up between them the said Messrs. Lee & Jerdein and James Packer. In witness," &c.

5. The plaintiffs declared in this action on the agreement A.; and the defendant, amongst other pleas, pleaded that the supposed agreement and promise was obtained from him by the plaintiffs and the said John J. Jerdein by the fraud of the plaintiffs and the said John J. Jerdein, and by their fraudulent and undue concealment of material facts within their knowledge respecting the said James Packer material to be made known to the defendant before he entered into the said agreement.

6. In the life-time of the said John J. Jerdein, and within the said term of three years referred to in the said agreement, and at the time of action brought, there was due and payable and owing in relation to and in respect of the said agreement between Packer and Lee & Jerdein from the said James Packer to the plaintiffs and the said John J. Jerdein, a larger sum of money than 300l., such sum being due and payable as aforesaid in respect of the said coal-account, which sum of money has not been paid to the plaintiffs and the said John J. Jerdein or either of them.

7. The action is brought for the recovery of the sum [490] of 100l., being the defendant's proportion of the said sum of 300l.

8. At the time the agreement between the defendant and others and Lee & Jerdein was entered into, the plaintiffs and John J. Jerdein had supplied coals under the agreement between Packer and Lee & Jerdein, and a balance to the extent of 1332l. was then due in respect thereof, which had not been paid to the plaintiffs and John J. Jerdein in accordance with the terms of such agreement; and the terms of the original agreement between the plaintiffs and John J. Jerdein and Packer had not been carried out, Packer not having for a very considerable term settled for and paid up his floating bills at the expiration of the current months, as stipulated by such agreement; but there was no evidence to shew that the plaintiffs and John J. Jerdein were aware, at the time the agreement declared on was entered into, that Packer had actually received such money from the customers for the coals.

In October, 1861, Mr. John Jerdein, one of the plaintiffs, told Packer the plaintiffs wanted further security, and without it could not continue him in their employment.

9. The plaintiffs and John J. Jerdein had no communication with and never saw the defendant before the agreement declared on was entered into, and did not communicate anything to him respecting the said coals so supplied as aforesaid under the agreement between them and Packer before the agreement declared on was entered

into, or the fact that they were not paid, or that the terms of the original agreement had been departed from. They left it to Packer to get parties to consent to become sureties. Packer gave to the plaintiffs the names of the parties who had so consented. The plaintiffs then caused the agreement to be prepared, and sent the draft agreement [491] to Packer to shew to the parties; and in a week he returned it to the plaintiffs, stating that he had shewn it, and that they would sign. They, the plaintiffs, then sent round the agreement by a collector, for the purpose of getting the defendant's signature thereto; and the plaintiff John Jerdein swore at the trial that he did not authorize such collector to answer any questions. On behalf of the plaintiffs, objection was made at the trial to any evidence of the inquiries made of such collector by the defendant; and such evidence was rejected accordingly.

10. The defendant did not know, when he entered into the agreement declared on, of the said supply of the said coals, or that they were not paid for, or that the stipulations of the agreement between the plaintiffs and Packer had not been carried out.

It appeared at the trial, that, between the 3rd of October, 1861, and the month of July, 1862, coals had been supplied by the plaintiffs to Packer's customers under the agreement, though the amount did not appear; and that the balance due from Packer had been reduced from 1332l. to 1270l.

11. Counsel for the plaintiffs at the said trial submitted to the learned judge that there was no evidence to go to the jury in support of the plea of fraud; but he ruled that there was.

12. The jury found a verdict for the defendant on the plea of fraud.

13. On the 13th of January, 1863, the court of Common Pleas, at the instance of the plaintiffs, granted a rule to shew cause why such verdict should not be set aside, and instead thereof a verdict entered for the plaintiffs for 100l., pursuant to leave reserved, on the ground that there was no evidence to go to the jury in support of the said plea.

14. This rule the court of Common Pleas on the [492] 15th of April, 1863, discharged. The judgment of the court below will be found reported in the 14 C. B. (N. S.) 386.

The question for the opinion of the court of error was, whether or not there was any evidence to go to the jury to support the defendant's plea of fraud. If there was, the verdict for the defendant was to stand: if there was not, the verdict was to be entered for the plaintiffs, for 100l.

The case was argued on the 18th of June, before Pollock, C. B., Crompton, J., Bramwell, B., Channell, B., Blackburn, J., and Shee, J.

The Solicitor General (with whom was Prentice), on behalf of the appellant (the plaintiffs below), contended, — that there was no evidence to go to the jury to support the defendant's plea of fraud, — that there was no duty imposed upon the plaintiffs to inform the defendant of the state of the accounts between them and Packer at the time the agreement on which the action was brought was entered into, — and that there was no evidence of any fraudulent concealment on the part of the plaintiffs.

O'Malley, Q. C. (with whom was Sir G. Honyman), for the respondents (the defendants below) submitted, — that there was evidence to go to the jury in support of the plea of fraud, — and that the facts stated in the case shewed an active misleading of the defendant by the plaintiffs, and a fraudulent concealment by them of material facts.

Cur. adv. vult.

The arguments of counsel and the authorities they referred to will be found fully stated and commented upon in the judgments of the several judges, which, [493] the court not being unanimous, were delivered seriatim, as follows:—

SHEE, J. The question for our decision is, whether, on the facts before us, as stated in the case and in the agreements which are to be taken as part of it, there was any evidence for the jury in support of the defendant's plea, that the supposed agreement and promise were obtained from him by the fraud of the plaintiffs, and by their fraudulent and undue concealment of material facts within their knowledge, respecting James Packer, material to be made known to the defendant before he entered into the agreement.

The facts were as follows:— Under an agreement of the 1st of November, 1856, James Packer had been for five years a commission-agent of the plaintiffs for the sale

of coals to be delivered by them to his order, on the terms that he should from time to time give to the plaintiffs his bills for the amount of the coals so delivered, and pay to them within six days of its receipt, all money received by him from customers for such coals, to be taken off and credited upon the bills so to be given by him. And by an agreement of the same date, between the plaintiffs and Sarah Tinson, the mother of Packer, she had become surety to the plaintiffs to the extent of 300l. for the due performance by Packer of his agreement. Packer, not having for a very considerable time "carried out his agreement by settling for and paying up his bills at the expiration of the months during which they were current," had become debtor to the plaintiffs in the sum of 1332l., and Sarah Tinson on her guarantie for him had become their debtor to the extent of 300l., when the plaintiffs informed Packer that they wanted further security, and could not without it continue him in their employment, and stipulated with him that [494] the defendant and the other parties sureties with him in the agreement sued upon, should by their several and continuing guaranties give the plaintiffs further security to the extent of 300l. against the said James Packer. In pursuance of this stipulation, the plaintiffs caused the agreement sued upon to be prepared. Although, in legal construction, it extends to defaults already made, as well as to defaults which might be in the future made, it gives no intimation in any part of it of an intention that it should operate retroactively, or of any ascertained default on which it could so operate. It is silent on the fact of the breach by Packer of his agreement that he would for the coals delivered to his order give from time to time his acceptances, and take them up at the expiration of the months during which they were current,—on the fact that, by not having done so, he had incurred a debt to the plaintiffs of 1332l., and involved Sarah Tinson in a liability for 300l.,—on the fact that the plaintiffs had informed him that he must give them further security or relinquish their employment,—on the fact that the defendant, on his signature of the agreement, would, not contingently only on future defaults, but at once, become liable for 100l.: and none of these facts, of which the defendant was entirely ignorant, were communicated to him by the plaintiffs. Nor was any opportunity for inquiry of them, or of those who represented them, afforded to the defendant. The plaintiffs personally had no communication with him, and never saw him: it was left to Packer, whose employment and livelihood as well as the liability of Sarah Tinson were at stake, to obtain the consent of the defendant and of the other sureties, in the best way he could, and as he thought proper; and the collector of the plaintiffs, who was sent round with the agreement to procure the signatures of the defend-[495]-ant and of the other sureties, had no authority to answer questions.

It is clear, from the case of *The North British Insurance Company v. Lloyd*, 10 Exch. 523,—correcting a dictum of Lord Truro in *Owen v. Homan*, 3 M.N. & G. 378,—that the rule which prevails in assurances upon marine and life risks, that all material circumstances known to the assured must be disclosed by him, and that the non-disclosure of them, though innocent, and not fraudulent, vitiates the contract, does not apply to contracts of guarantie: but, upon a discussion in which the question is, whether there was any evidence to be left to the jury to support a plea, not of non-disclosure merely, but of fraud and fraudulent concealment, of facts material to be made known to the defendant, this singularity of insurance law is surely little better than an intruder. What place can it have in the argument, unless they who put it forward are at liberty to assume the negative of the plea? Whether there was any evidence of fraud and fraudulent concealment, is the subject of inquiry: and there is no definition of guilty, as distinguished from innocent, silence, or of bad faith and fraud in contracts, which the facts in this case do not exactly fit.

The making one state of things appear to those with whom you deal to be the true state of things, while you are acting on the knowledge of a different state of things (a),—among the oldest definitions of fraud in contracts,—is here exemplified: for, the agreement was prepared by the plaintiffs as a security to them against a defaulter, with whom, on account of his default, except on further security, they had declined to continue their arrangement; and the defaulter is held out by them as their commission-agent, with a five years' character in their service, who had been guaranteeing by his own bills during that time the cus-[496]-tomers introduced by

(a) Aliud simulatum, aliud actum (De Officiis, l. 3, c. 14).

him, under the protection of a pre-arranged system of short reckoning, settlements, and payments, against all temptation to dishonesty, irregularity, or rash dealing.

Sarah Tinson, whom presumably he would be reluctant to imperil, is held out as a person who was willing after five years' experience of the working of her son's commission-agency, to continue liable to the same extent in amount and time with the defendant and the other proposed sureties; whereas, her guarantie, to which theirs is described as "supplemental and additional," was exhausted, the first and immediate office of their guarantie being, to make her's good should she fail in doing so,—they, should she discharge it, continuing liable to the extent of 300l. for the balance remaining due by Packer to the plaintiffs, and any future addition to it.

The only hint in the agreement sued upon, of the real state of things between the plaintiffs and Packer, is to be found in the recital that, "*in order to induce the said Lee & Jerdein to continue the said arrangement with the said James Packer, the said sureties had agreed,*" &c.: the effect of which recital was for the jury, and which, when read with the context, was more likely to lead the proposed sureties to the inference that the existing security had by reason of the increase of Packer's transactions on account of Lee & Jerdein become inadequate, than that it was already forfeited.

"The guilt of fraud," says the Digest, "is not in him only who, for the purpose of deceiving, uses obscure language, but in him who insidiously, and without appearing to do so, dissembles what he thinks" (*a*)¹.

It is difficult to conceive language more obscure [497] and better calculated to mislead, or dissimulation more insidious, than in this agreement. Who would imagine that a recital "that James Parker had for some time past been a salesman of coals on commission for the said Lee & Jerdein, he the said James Packer *giving* bills of exchange to them for all such coals as may be delivered to his order, such bills being floating bills, to be settled for and paid up at the expiration of the current months during which such bills are respectively running," was, if true in any sense, true only in the loose sense that he had contracted five years before to give bills from time to time for such coals as might be delivered to his order, without any stipulation as to their being settled for and paid up at the expiration of the current months during which they were running; or that the course of dealing thus described, if it ever existed, had not, as the case expressly states, been observed by Packer for a very considerable time.

What plain man, bargaining with one whom he thought honest, and did not care to insult, could reasonably be expected to inquire whether the words "should give to Lee & Jerdein a floating and continuing guarantie for the term of three years," might not mean or be intended to mean, that he was to be liable before his signature to the agreement was dry, absolutely and inevitably, to the extent of 100l.? or whether the words in the operative part of the agreement, "do hereby guarantee, promise, and agree that they shall and will pay and make good all such sum and sums of money as may be due to Lee & Jerdein at any time during the said term of three years," might not be intended to mean,—do hereby guarantee, promise, and agree that they shall and will pay and make good to the extent of 300l. a debt of four times that amount now due, and all further debts, not exceeding that amount, which may become due during the term of three years?

[498] "To be silent is one thing, concealment is another. You may be silent respecting facts within your knowledge, without being guilty of concealment: you are guilty of it when the motive of your silence is a wish that others, for your advantage, should be ignorant of that which you know, and which it is for their interest that they should know." Such is the description or definition of undue concealment, in the treatise *De Officiis*, l. 3, 12, 13 (*a*)².

These definitions and maxims, though cited in all the books on the contract of

(*a*)¹ "*Dolus malus non tantum in eo est, qui fallendi causâ obscure loquitur; sed etiam qui insidiosè, obscure, dissimulat.*" Dig. l. 43, § 2, *De Dolo Malo*.

(*a*)² "*Aliud est celare, aliud tacere: neque enim id est celare quicquid reticeas; sed cum quod tu scias, ignorare id emolumenti tui causâ, velis eos, quorum intersit, id scire. Hoc autem celandi genus, quale sit et cujus hominis, quis non videt? Certè non aperti, non simplicis, non ingenui, non justî, non viri boni; versuti, potius, obscuri, astuti, fallaces, mali-tiosi, callidi, veteratoris, vafri; hæc tot et alia plura, nonne inutile est subire nomina?*"

insurance, are of much older date than any certain trace of that contract, and not more applicable to it than to the contract of guarantie.

Is there not in this agreement a studied effort to conceal the truth from those who were interested in knowing it, and whom the plaintiffs and Packer wanted not to know it?

Under this impression, I should on the argument of this case, had it not been for the dissent of my Lord Chief Baron and of most of my learned Brothers, have arrived at a confident opinion that there was not some evidence only, but cogent evidence, of such a suppression of the truth, by a partial, inaccurate, and subdolan setting forth by the plaintiffs in the agreement, of facts within their knowledge, material for the proposed sureties to be informed of, as along with the non-communication of other facts material for them to know, amounted to a misrepresentation to the pro-[499]-posed sureties, that they were asked to come under none but the mere ordinary liability of sureties,—a contingent liability; and that Packer, during his five years' agency, had proved himself to be a man worthy of trust and confidence, a satisfactory guarantor of others, and himself the safe subject of a guarantie.

But it was urged on the part of the plaintiffs, and with the apparent assent of some of my Brothers, that we are concluded on this point by authority, and that, if the cases which have been cited to us had been more maturely considered in the court below, its judgment would have been different. I do not think so. The two cases in the House of Lords, and the case in the court of Exchequer, appear to me to have been rightly understood by the Chief Justice at nisi prius, and by the court of Common Pleas, and to be in favour of the defendant. There is not a word in them tending to weaken the principle, that an undue and fraudulent concealment of matters material to be known by the guarantor, vitiates the contract which is tainted by it.

The case of *Railton v. Matthews*, 10 Clark & Fin. 935, decided that, upon an issue "whether the pursuer was induced to subscribe the bond by undue concealment or deception on the part of the defenders,"—as explained by the summons of reduction of suretyship to mean, "whether, when the defenders accepted and took possession of the said bond, they fraudulently suppressed and concealed the said whole facts and circumstances regarding the conduct and irregularities of the debtor,"—it was a misdirection to tell the jury that "such concealment, to vitiate the bond, must be wilful and intentional on the part of the person obtaining it, and with a view to an advantage to himself."

Undue concealment, though not wilful and intentional, and with a view to the advantage of the person [500] taking a guarantie, being thus held sufficient to vitiate it, the case is strongly in favour of the defendant; for, there was in this case, as it seems to me, evidence that the non-communication to him by the plaintiffs was not merely undue, but wilful and intentional: and it was for their immediate advantage, and, as they knew, and knew that the defendant did not know, for his immediate disadvantage, if an underhand dealing of guarantie by the party taking it can ever be so.

But *Railton v. Matthews* is said to have been qualified by the later case of *Hamilton v. Watson*, 12 Clark & Fin. 109. Quite otherwise, as it appears to me. In *Hamilton v. Watson*,—the true grounds of the decision of which are to be found in the judgment of Lord Cottenham, and in what fell from him in the course of the argument, rather than in the judgment of Lord Campbell,—a cash-credit on the guarantie of sureties had been granted to a man already in debt to the bankers who granted it, and the debt, which had not been mentioned to the sureties, was discharged by a cheque, which but for the new cash-credit the debtor would not have been in a position to draw. There was no allegation, as observed by Lord Cottenham, of fraud or misrepresentation, or of any secret agreement as to the way in which the cash-credit should be applied; but it was pressed upon the House, at the Bar, that it was the duty of bankers taking a guarantie for a cash-credit, to inform the party giving the guarantie of every circumstance in the previous dealings of the party guaranteed, which might influence the consideration whether the guarantie should be given or refused. Lord Cottenham and Lord Campbell combat this contention, in their judgments. The latter suggests, as a criterion of innocent silence on the part of a creditor taking a suretyship bond, whether the fact not disclosed be one the existence of which might naturally be expected by the surety,—as the indebtedness to his bankers or a person asking friends to be sureties for him to those bankers in a new cash-credit would be.

Their decision is that, where there is no fraudulent concealment, it is not necessary to the validity of a *cash-credit surety bond* that all the circumstances of the dealings between the debtor and the creditor taking it should be *voluntarily* disclosed by the latter to the party giving it.

There is a wide difference as respects what might naturally be expected to be the actual state of the account of one man with another, between the case of a suretyship for a man requiring and applying for a cash-credit to bankers with whom he had had previous dealings, and whose business it is to lend capital to penniless persons on the security of sureties, and the case of a suretyship for a surety of others,—a surety between whom as such and his employers short reckonings, as the defendant was led to suppose, had for five years been observed as a rule. But it is unnecessary to dwell upon the distinction: for, in *Hamilton v. Watson*, neither fraud nor fraudulent concealment was charged; whereas, here, they are charged, and the only question is, whether there was any evidence to be left to the jury of them.

The case of *The North British Insurance Company v. Lloyd*, 10 Exch. 523, would not probably have been cited, had it not been for the distinction re-established in it by my Lord Chief Baron between the contracts of insurance and of guarantie. The fact not disclosed in that case was considered by the jury not to have been one material for the surety to have been informed of: and the court concurred in their decision upon that point.

It is stated in the case, that there was “*no evidence* to shew that the plaintiffs were aware at the time the agreement of the 3rd of October, 1861, was entered [502] into, that Packer had *actually* received payment from the customers for the coals delivered to his order.”

This seems to imply that Packer *had* received such payment: and, though we are not at liberty to infer the plaintiffs’ knowledge of it, we are at liberty to infer that, while contemplating the obtaining of the suretyship of the defendant and of the other sureties, the plaintiffs were deliberately and grossly negligent of a duty which for the sake of the proposed sureties it was incumbent upon them to discharge,—the duty of ascertaining the cause of Packer’s default; whether he had received payment for the coals delivered to his order, and, if so, whether the money which he ought to have paid over to the plaintiffs within six days of its receipt, had been applied by him to other uses. “*Dissoluta negligentia prope dolum est*.” Dig. l. xvii., t. 1, § 29.

If Packer with the plaintiffs’ authority had actually received payment for the coals delivered to his order, the observation of one of my learned Brothers in the course of the argument, that the customers, notwithstanding Packer’s intervention, were, as well as he, and they primarily, responsible to the plaintiffs, would have less weight than it might otherwise be entitled to, though this double liability of Packer and of the customers to the plaintiffs, could in no case, as it appears to me, countervail the inherent ugliness of the transaction.

Upon the whole, I am of opinion that the judgment of the court of Common Pleas should be affirmed.

BLACKBURN, J. I am of opinion that in this case the decision of the court below should be affirmed.

The question is, whether, under the circumstances stated in the case, there was evidence to go to the jury in support of the averment of fraud; for I think that the averments of undue concealment carry the case no [503] further, and that, unless actual fraud was proved, the substance of the issue was not proved.

It was decided in *The North British Insurance Company v. Lloyd*, 10 Exch. 533, that the rule that all material circumstances known to the assured must be disclosed, is peculiar to contracts of insurance, and that it does not extend to contracts of guarantie.

I concur in this, which I think founded upon principle as well as authority. It was pointed out by the Chief Baron in the argument in the present case, that a surety is in general a friend of the principal debtor, acting at his request, and not at that of the creditor; and, in ordinary cases, it may be assumed that the surety obtains from the principal all the information which he requires: and I think that great practical mischief would ensue if the creditor were by law required to disclose everything material known to him, as in a case of insurance. If it were so, no creditor could rely upon a contract of guarantie, unless he communicated to the proposed sureties everything relating to his dealings with the principal, to an extent which would in the

ordinary course of things be so vexatious and annoying to the principal and his friends, the intended sureties, that such a rule of law would practically prohibit the obtaining of contracts of suretyship in matters of business. This is well pointed out by Lord Campbell in his judgment in *Hamilton v. Watson*, 12 Clark & Fin. 118. But I think, both on authority and on principle, that, when the creditor describes to the proposed sureties the transaction proposed to be guaranteed (as in general a creditor does), that description amounts to a representation, or at least is evidence of a representation, that there is nothing in the transaction that might not naturally be expected to take place between the parties to a transaction such as that described. And, if a representation to this effect is made to the intended surety by one who knows that [504] there is something not naturally to be expected to take place between the parties to the transaction, and that this is unknown to the person to whom he makes the representation, and that, if it were known to him, he would not enter into the contract of suretyship, I think it is evidence of a fraudulent representation on his part.

I think that it appears in *Hamilton v. Watson* that such was the opinion of Lord Campbell; and I think that on this principle are founded the judgments of Lord Eldon in *Smith v. The Bank of Scotland*, 1 Dow, 273, and of the court of King's Bench in *Pidcock v. Bishop*, 3 B. & C. 605, 5 D. & R. 505.

In the present case, the plaintiffs had no personal communication with the defendant, the surety: and, when they sent the agreement to him for execution, they sent it by an agent who had no authority from the plaintiffs to make any statement whatever, or to do anything more than obtain the defendant's signature to the agreement thus sent.

The argument for the plaintiffs before us was, in substance that, under such circumstances, though there might be a concealment or non-disclosure of material facts, there was not and could not be any misrepresentation on the plaintiffs' part; and that, without it, there could be no fraud: and, during the argument, I was inclined to be of that opinion; but, on consideration, I have come to the conclusion that in this case there was evidence of intentional deceit, by a false representation of the kind I have above referred to, amounting to actual fraud.

The written agreement which before it was executed the plaintiffs sent to the defendant, recites that Packer, the principal, had been for some time salesman to the plaintiffs on terms by which he was, in substance, to be a del credere agent, settling and paying for what he had sold monthly, and that they had required from [505] him security to induce them to continue him in the employment, and stipulated that the defendant and others should give them a floating and continuing guarantie for the term of three years from the date thereof, to secure the amount of any balance which might at any time be due to them on the coal account.

I think this was evidence of, or rather, if not qualified by other matters, amounted to a representation that there was nothing in the transaction between the plaintiffs and Packer which might not in the ordinary course of affairs be expected to have taken place between them as parties to such a transaction.

It is stated in the case (par. 8), that, at the time when this agreement was sent to the defendant, a balance of 1332l. was actually then due from Packer; he not having for a *very considerable time* settled for and paid up at the expiration of the current months, as stipulated by the agreement. It is, however (in favour of the plaintiffs), further stated that there was no evidence that the plaintiffs were aware that Packer had actually received the money from the customers.

Now, whether the handing the agreement by the plaintiffs to the defendant amounted to an inaccurate representation or not, depends, as I think, on the question whether in such a transaction as that described in the agreement, it might or might not naturally be expected that the masters might have allowed a balance of this extent to accumulate, and might have allowed the account to stand over unsettled for so long a time. In *Hamilton v. Watson*, 12 Clark & Fin. 118, the transaction was a security for a banker's cash account; and the decision of the House of Lords was that, in such a case, it might be so naturally expected that the proposed principal had already overdrawn his account, that there was no evidence of a representation that he had not.

[506] In *Smith v. The Bank of Scotland*, 1 Dow, 272, where the security was given for the good behaviour of a bank agent, it was held that an allegation that the bank knew that the principal had misconducted himself in his office, and that this

fact was concealed from the sureties, ought to have been admitted to proof in the court below. I think the effect of Lord Eldon's judgment in that case is, that it was so little to be expected that a bank would continue in their service an agent who had already by breach of trust run into their debt, that the application for security amounted, as he says, to "holding him forth to the sureties as a trustworthy person:" 1 Dow, 292.

I think that it must in every case depend upon the nature of the transaction, whether the fact not disclosed is such that it is impliedly represented not to exist; and that must generally be a question of fact proper for a jury. If in this case the amount of the balance already due had been small, or the period during which the accounts were left unsettled short, there would in my opinion have been such a mere scintilla of evidence as would not have warranted the jury in finding the verdict of fraud; and the judge would have been justified in withdrawing the question from their consideration. But, as it is, the amount of the balance already due being, relatively to the amount of the security, so large, and the period during which no settlement had taken place being so considerable, I think the judge could not have withdrawn the case from the consideration of the jury, who might well come to the conclusion that the sending of the agreement in these terms amounted to an inaccurate representation. This would not be enough to support the verdict on the plea of fraud, unless it was further established that the plaintiffs made the inaccurate representation, intending to deceive the defendant, [507] and induce him to enter into the contract, in the belief that what was represented did exist, whilst the plaintiffs knew it did not exist. But of that also I think there was sufficient evidence.

The improbability that any one could suppose that sureties would have entered into such an agreement if they had known the truth, is so great that the jury might well think that the plaintiffs knew that the defendant was in ignorance of it: and, if the jury so thought, they might from that alone draw the inference that the representation was fraudulently intended to deceive. This is strengthened by the facts that the plaintiffs apparently avoided having any personal communication with the proposed sureties, and sent the agreement for execution by an agent who had no authority from them to make any statements; from which the jury might perhaps draw the further inference that the plaintiffs took pains to avoid the risk of the sureties asking questions and being undeceived.

It is not essential, to constitute fraud, that there should be any misleading by *express words*: it is sufficient if it appears that the plaintiffs knowingly assisted in inducing the defendant to enter into the contract, by leading him to believe that which the plaintiffs knew to be false, the plaintiffs knowing that, if he had not been thus misled, he would not have entered into the contract.

For the reasons above given I think there was in this case evidence to support the verdict: and consequently the judgment in my opinion should be affirmed.

BRAMWELL, B. I think this judgment should be reversed. It is clear that nothing turns on the defendant's being a surety. The question raised, and properly raised, by the pleadings is, was the defendant's [508] engagement obtained by the plaintiff's fraud,—actual, moral fraud! The question argued before us was, was there evidence of such fraud! The court below says there was, but unfortunately does not point out in what it consisted. With very great respect, I *see* none; and I think it can be shewn there *is* none. To constitute fraud, there must be,—first, the assertion of something false: which is not the case here,—or, secondly, the suppression of something true, where there is a duty or profession of stating everything material; and here there is no such duty,—or, thirdly, what perhaps is included in one of the foregoing, a suggestion of falsity, by statement of some facts, and suppression of others which would qualify those stated: as, if one should say A. was seised and died, B. was eldest son, entered, and enjoyed, and suppress that A. made a will and gave B. a life estate. To my mind, there is nothing of that here. Perhaps, but most improbably, the defendant inferred or guessed that no arrears were due to the plaintiffs. I should not have so concluded. On the contrary, I should have concluded that there was some change in the circumstances of the parties, which induced the plaintiffs to require further security. But, supposing the defendant's was a right conclusion, and supposing that, if he could not inform himself further, he was justified in acting on it, I say that here he was not so justified, because he might, if he cared to know them, have informed himself of the actual facts from the plaintiffs, or, if they refused to tell

him, he might have refused to be surety. I think a man has great right to complain of another who charges him with fraud because he the accuser has not taken the trouble to make a few inquiries. I really can see no evidence of any fraud, of anything dishonest in this case. There is nothing inconsistent with the plaintiffs' honesty. But [509] when the facts are equally consistent with a conclusion one way or the other, they are no evidence either way. I think the opinion that there was evidence of fraud is founded on a misapprehension. Packer was not a *dishonest* defaulter, to the knowledge of the plaintiffs. He was liable to them to a large amount, every shilling of which might have been due from solvent debtors. The plaintiffs continued him a long time after in their service. They sent the agreement of suretyship to the defendant, and left it with him several days for him to make such inquiries as he thought fit. He makes none. Suppose he had asked, and been told the truth, could anybody say there had been any fraud or attempt at fraud? Suppose he had employed an attorney, would any one say there was an attempt to deceive the attorney? The notion of fraud arises from the defendant being likely to behave foolishly, to make no inquiry, making none, and being a surety. I think this very mischievous; that a man should have his carelessness rewarded by liberty to call out fraud! Very mischievous, that people should be charged with fraud by careless persons simply on account of their carelessness. No one is safe, if this is allowed. No one can ever know that he has sufficiently guarded against the rash conclusions and folly of those he deals with, and saved himself from the uncharitable and foolish conclusions a jury may be disposed to come to in favour of a surety.

CROMPTON, J. The judgment I am about to read is one in which my Brother Channell concurs.

The question in this case is, whether the court of Common Pleas were wrong in holding that there was some evidence of fraud to go to the jury. It is quite clear that the mere non-disclosure of material facts will not operate so as to avoid a contract of the nature [510] of the one in this case: such defence being, as pointed out in the case of *The North British Insurance Company v. Lloyd*, 10 Exch. 535, peculiar to the contract of insurance. Such non-communication avoids the contract of insurance, without fraud, and however innocent the conduct of the party may be, on grounds peculiar to the contract of insurance, and not applicable to the case of a guarantie.

I cannot say that the court below were wrong in holding that there was some evidence of fraud to go to the jury in this case, or that the learned judge who tried the cause could properly have withdrawn it from the jury.

To constitute a fraudulent misrepresentation, it need not be made in terms expressly stating the existence of some untrue fact: but, if it be made by one party in such terms as would naturally lead the other party to suppose the existence of such state of facts, and if such statement be so made designedly and fraudulently, it is as much a fraudulent misrepresentation as if the statement of the untrue facts were made in express terms.

It seems to me that the defendant in the present case would be naturally led by the guarantie, and the original agreement with Packer annexed thereto, and the reference to the agreement with Mrs. Tinson referred to in the guarantie, which is said to be supplemental to that agreement, to suppose that a different state of things existed from the real state of things known to the plaintiffs. It was known to the plaintiffs that Packer, the principal, had not carried out his original agreement with them, and that there was a large sum due from him on his floating bills. By his agreement with them, the moneys to be received by him from the customers, from time to time, were to be paid over and accounted for within six days, and were [511] to be applied to the floating bills. Surely, on perusing such documents as were sent, the proposed sureties would be led to suppose that the moneys to be received from time to time would be applicable in the first instance to the bills to be given from time to time, and not to a large deficit on the old bills. In truth, none of the money to be received would be applicable to the new transactions till the large balance was wiped off: and it is very unlikely that the surety would have joined in the new guarantie, had he been aware of the existence of the old debt.

I think also that the new sureties would naturally be led to suppose from the draft guarantie, and from its being stated that their engagement was to be supplemental and in addition to Mrs. Tinson's, that her guarantie was practically applicable to the new dealings; whereas, whether the defendant's suretyship was applic-

able retrospectively or not, hers would really be in effect absorbed by the large balance.

I think, therefore, that there was evidence that the defendant was led by the sending of the documents in question to the belief in an untrue state of facts, where the knowledge of the true state of facts would have prevented him from joining in the contract of suretyship.

It was said, indeed, that the plaintiffs' sending the documents in this shape may have been without any intentional fraud on their part, and that they may merely have got the documents drawn by their professional advisors in a proper state, and forwarded them without moral fraud. This seems, however, to me to be a question which the jury were to determine: and it is not necessary for me to consider whether in their place I should have found the fraud. We are only to decide whether there was evidence to go to the jury. The sending the documents to the defendant, [512] and leaving them with him, the largeness of the sum in arrear, the improbability that the defendant would have become surety if he had known the real facts of the case, on the one hand, and, on the other hand, the circumstance of the plaintiffs not having seen the proposed sureties, and merely having sent the papers to them, and the other circumstances referred to in the argument, were, as it seems to me, matters entirely for the jury: and I cannot say that the court of Common Pleas were wrong in holding that there was some evidence for their consideration.

I therefore think that the judgment of the court below should be affirmed.

POLLOCK, C. B. The question in this case is simply whether there was any evidence of fraud on the part of the plaintiffs, such as to prevent them from recovering from the surety the amount guaranteed.

The facts are very short and plain. James Packer acted as commission-agent for the plaintiffs, selling goods which they supplied, and receiving payment for them, charging a commission upon each transaction. He gave bills to the plaintiffs, which were to be paid at stipulated times. As this involved considerable responsibility on the part of Packer, he originally gave security to the plaintiffs, by his mother, Sarah Tinson, to the amount of 300*l.* The business went on, and his accounts became in arrear to some extent: upon which the plaintiffs told him they could not allow his employment to go on, unless he found further security: whereupon he undertook to do so, and procured the defendant and others to undertake to sign the agreement on which this action was brought. This was a further security for 300*l.* more, *expressed* to be supplemental and in addition to the former: so that the new sureties were to be liable for whatever [513] Sarah Tinson was to be liable to; and this was *distinct notice that the suretyship was to be retrospective*. The plaintiffs never had any communication with the defendant, and never interfered in any way, beyond sending the agreement to be signed, which they had been told by Packer the defendant had approved of, and which was true.

It is said there was in this matter *concealment* or *misrepresentation*. In fact there was *no representation at all*: and therefore there could not be *misrepresentation*: and, as to concealment, the plaintiffs never undertook to make any disclosure, and in my judgment were not under any legal or moral obligation to make any disclosure, under the circumstances.

It must be taken that the occupation of Packer was a profitable one,—one in which a prudent man might have recovered himself, though he had fallen into some difficulties. The plaintiffs say to him,—“If you can procure from your relations or friends a further guarantie, we will allow you to continue, notwithstanding the present state of your accounts: but, if you cannot, we will stop now.” He undertakes to procure, and does procure, a further guarantie: and the business, therefore, went on. Whether Packer made to his sureties a faithful and true representation of the state of his affairs, is entirely a matter of indifference. If he did, then they have no ground of complaint *at all*: if he did not, it is no fault of the plaintiffs. The defendant has trusted Packer, whom the plaintiffs would trust no longer; and Packer has deceived the defendant. But the plaintiffs never, directly or indirectly, made any communication to the defendant on the subject of the state of the accounts. It was, however, manifest that the plaintiffs required further security, and retrospective security. It was, therefore, the duty rather of the sureties to inquire than of the [514] plaintiffs to inform them what was the state of the accounts.

In my opinion there is a total absence of any evidence of fraud; and, I should

add, no just ground for any suspicion of it. I think the rule ought to be made absolute.

I cannot help adding that I think it is somewhat hard upon the plaintiffs that they should not only lose their money and incur the costs of an expensive litigation, but also be abused into the bargain.

The majority of the court being in favour of the defendant, the judgment of the court below was affirmed.

Judgment affirmed.

HANS RINGLAND, THE YOUNGER, BY WILLIAM RINGLAND, HIS PROCHEIN AMY,
v. JOSEPH LOWNDES, Clerk of the Burslem Local Board of Health. June
17th, 1864.

[S. C. 33 L. J. C. P. 337 : 10 Jur. N. S. 850 : 12 W. R. 1010.]

Held,—reversing the judgment of the Court of Common Pleas,—that a party who attends before an arbitrator under protest, cross-examines his adversary's witnesses, and calls witnesses on his own behalf, does not thereby preclude himself from afterwards objecting that the arbitrator was proceeding without authority.

This was an appeal against a decision of the court of Common Pleas.

Under the Public Health Act, 11 & 12 Vict. c. 63, where a disputed claim to compensation is to be settled by arbitration, the award is, by s. 124, to be made "within twenty-one days after the appointment of the arbitrator, or within such extended time, if any, as shall have been duly appointed by him for that purpose." By s. 125, it is provided that, in case the arbitrators neglect or refuse to appoint an umpire [515] for *seven days* after being requested so to do by any party, the sessions shall, on the application of such party, appoint an umpire. And by s. 126 it is further provided that the time for making an award under the act shall not be extended beyond the period of three months from the date of the submission or *from the day on which the umpire shall have been appointed*, as the case may be.

In 1856, the plaintiff sustained damage from the construction of works by a local board, and in 1858 made a claim for compensation. He afterwards obtained a rule for a mandamus commanding the board to make compensation. Arbitrators were afterwards (in January, 1864) appointed to assess the amount, under s. 123. These having refused to appoint an umpire, the plaintiff applied to the Easter sessions to appoint one, but failed in consequence of the want of a notice of his intention to make such application. The required notice having been given, a second application was made at the Midsummer sessions, and one Johnson was named as umpire; but, as his consent had not been obtained, no formal appointment was then made. A third application was made at the Michaelmas sessions, and Johnson was *on the 14th of October*, appointed umpire, and accepted the appointment. *On the 13th of November*, the umpire (not having enlarged the time for making his award) appointed the 29th for entering upon the arbitration. The counsel for the board, being informed of this objection, *protested* against the umpire's going on with the reference, but still attended, cross-examined the plaintiff's witnesses, and called witnesses for the board; and at the close of the business *intimated to the umpire that the board would rely upon their protest, in case the award should be against them*. The umpire made his award in favour of the plaintiff on the 30th of December. In an action upon the award, it [516] was held by the court of Common Pleas,—consisting of Byles, J., and Keating, J.,—first, that the *appointment* of the umpire in reality took place at the Michaelmas sessions, and was in time, and consequently the award was duly made within three months from the umpire's appointment,—secondly, that, although the umpire had failed to comply with the requirement of the 124th and 126th sections of the act, by enlarging the time for making his award within twenty-one days of his appointment, that defect was cured by the attendance of the board and their taking part in the subsequent proceedings (a).

The defendant appealed against this decision, and the case was argued at the

(a) See the report, 15 C. B. (N. S.) 173, where the case is fully set out.

sittings in error after last Easter Term, before Bramwell, B., Blackburn, J., Channell, B., Mellor, J., Pigott, B., and Shee, J.

Lush, Q. C. (with whom was McMahon), for the appellant (defendant below). It may be assumed to be conceded that the appointment of Johnson as umpire took place at the October sessions (*b*). But the question is, whether the time for making the award was duly enlarged by the umpire; and, if not, whether the objection on that score was waived by the conduct of the parties who represented the local board in attending before the umpire under protest. The 85th section of the Public Health Act, 11 & 12 Vict. c. 63, impowers the local board to make contracts for carrying the act into effect, "in the case of a non-corporate district, as this is,—by writing under their seal and the hands of any five or more of their number: and a contract [517] which does not comply with this condition cannot be enforced: *Fieul v. Dennett*, 1 C. B. (N. S.) 576. The 123rd section, which is the first of the arbitration clauses, enacts, that, "in case of dispute as to the amount of any compensation to be made under the provisions of this act (except where the mode of determining the same is specially provided for), and in case of any matter which by this act is authorized or directed to be settled by arbitration, then, unless both parties concur in the appointment of a single arbitrator, each party, on the request of the other, shall appoint an arbitrator, to whom the matter shall be referred; and every such appointment when made on the behalf of the local board of health shall (in the case of a non-corporate district) be under their seal and the hands of any five or more of their number, or under the common seal in case of a corporate district, and, on the behalf of any other party, under his hand, or, if such party be a corporation aggregate, under the common seal thereof: and such appointment shall be delivered to the arbitrators, and shall be deemed a submission to arbitration by the parties making the same; and, after the making of such appointment, the same shall not be revoked without the consent of both parties, nor shall the death of either party operate as a revocation; and if for the space of fourteen days after any such matter shall have arisen, and notice in writing by one party who has himself duly appointed an arbitrator to the other party, stating the matter to be referred, and accompanied by a copy of such appointment, the party to whom notice is given fail to appoint an arbitrator, the arbitrator appointed by the party giving the notice shall be deemed to be appointed by and shall act on behalf of both parties: and the award of any arbitrator or arbitrators appointed in pursuance of this act shall be binding, final, and conclusive upon [518] all persons and to all intents and purposes whatsoever." The 124th section enacts, amongst other things, that, "in case a single arbitrator die or become incapable to act, before the making of his award, or fail to make his award *within twenty one days after his appointment, or within such extended time, if any, as shall have been duly appointed by him for that purpose*, the matters referred to him shall be again referred to arbitration under the provisions of this act, as if no former reference had been made." The 125th section provides for the appointment of an umpire, and enlargement by him. And the 126th section provides that the time for making the award shall not be extended beyond three months from the date of the submission, or from the day on which the umpire shall have been appointed, as the case may be. The decision of the court below proceeded mainly on the ground that the appearance of the defendant under protest operated as a waiver. [Bramwell, B. We are to assume that, if he had not appeared, the umpire would have had no jurisdiction?] Yes. This is not like the waiver of a forfeiture. If the award can be upheld at all, it must be upon the ground that the appearance before the umpire amounted to a new appointment: but, though that argument might avail in the case of an individual, it cannot apply to this board, who could only contract under seal. An individual is bound by his attending before the arbitrator, by reason of such attendance amounting to a new parol submission: but here, the statutory authority once gone, nothing short of a new contract could be binding on the board. [Bramwell, B. What is the meaning of waiver? Is it to be said that the board by attending before the arbitrator as they did, gave him permission to go on for ever and ever? Channell, B. An irregularity may be waived. But the question is, whether this is not something more than irregularity.] The [519] umpire had no more authority to make this award than if he had been a perfect

(*b*) Channell, B., referred to *Holdsworth v. Wilson*, 2 Best & Smith, 480, in error 4 Best & Smith, 1.

stranger. In *Davis v. Price*, 6 Law T. (N. S.) 713, it was held that an objection that arbitrators were exceeding their authority in going into the question of damages, was not waived by the defendant's attending under protest and cross-examining when the question of damages was gone into. The distinction between waiver and new contract is well pointed out in *Russell v. Thornton*, 6 Hurlst. & N. 140. The plaintiff, the agent in London of the foreign owners of a steam-ship "Butjadingen," being instructed by them to cause the ship to be insured for a year from the 21st of January, 1857, employed H. & Co., insurance-brokers, to effect the insurance. On the 15th of January, H. & Co. applied to the defendant to become an insurer. On that day the plaintiff received a letter from the captain of the ship, informing him that the vessel had been aground and had received some heavy blows, and had made her way in a sinking state to the port of Carthagena, where she then was. On the same day, the plaintiff communicated this letter to H. & Co., but they did not communicate it to the defendant. On the 16th, the defendant agreed to become an insurer for 3000*l.*, and debited H. & Co. with the premiums. On the 22nd, the plaintiff sent an extract from the captain's letter to Lloyd's. The defendant, who was then for the first time informed of the fact that the ship had been ashore, wrote to H. & Co. as follows,—“Understanding that the ship ‘Butjadingen’ has been on shore, I do not consider that my risk commences until the vessel has been surveyed and repaired.” This letter was not answered by H. & Co. The debit of H. & Co. in the books of the defendant remained until after the loss. On the 2nd of April, the vessel was surveyed, and reported to be perfectly tight and in a condition to undertake a voyage of any description. After several [520] intermediate voyages, she was totally lost on the 9th of October, 1857. It was held by the Exchequer Chamber (affirming the judgment of the court of Exchequer),—first, that there was no waiver of the objection to the policy by reason of the concealment of the information that the vessel had been ashore,—secondly, that there was no evidence of a new contract founded on the defendant's letter of the 22nd of January. Even if this had been an arbitration between two ordinary individuals, the defendant's attendance *under protest* would be no waiver. Appearing under protest cannot give *jurisdiction*: *Holt v. Meddowcroft*, 4 M. & Selw. 467.

Hayes, Serjt. (with whom was Beasley), for the respondent. [Blackburn, J. Persuade us, if you can, that an award made under such circumstances would have been good if the case had been that of a private individual.] The enlargement of the time for making an award need not, unless the submission expressly requires it, be in writing or communicated to the parties. It must be assumed that the time was duly enlarged. [Bramwell, B. To what time is it to be presumed it has been enlarged?] To the time of the making of the award. In *Burley v. Stephens*, 1 M. & W. 156, a cause was referred by order of nisi prius to the decision of an arbitrator, so as he made his award on or before the fourth day of Easter Term, with power to enlarge the time; but the order did not direct in what mode the time was to be enlarged. Two days before the time had expired, the arbitrator, in the presence of both parties, appointed another meeting on the 29th of June, on which day, one of the parties not having attended, the arbitrator made his award: and it was held that the appointment of a further day for the reference, neither party making any objection to it, amounted to a due enlargement of the time. The case does not shew that [521] this award was not made within twenty-one days from the time of the umpire's appointment: for, it does not shew when the order of sessions was drawn up: it might not have been drawn up until long after the October sessions: and the time for making the award or umpirage only begins to run from the period at which the duty devolves upon the arbitrator or umpire,—*Sherrett v. North Staffordshire Railway Company* 2 Phill. 475: *Re Bradshaw and the East and West India Docks and Birmingham Junction Railway Company*, 12 Q. B. 562. The defendant here makes a formal protest and then allows the umpire to go on with the reference, attending for two days cross-examining the plaintiff's witnesses, and calling witnesses on behalf of the board. That, it is submitted, was a clear admission that the time had been duly enlarged and that the umpire had authority to make the award. In *Tyerman v. Smith*, 6 Ellis & B. 719, it was held that, on a compulsory reference under the Common Law Procedure Act, 1854, 17 & 18 Viet. c. 125, it is no objection to entering up judgment on the award, under s. 3, that the award was made more than three months after the arbitrator entered on the reference (see s. 15), though the order of reference names no time, and no written consent for enlarging the time has been given by the parties, if it appear that the parties have

within a month before the making of the award acted upon the reference as still subsisting: such acting estopping them from saying that the circumstances necessary to give jurisdiction to the arbitrator did not exist. [Blackburn, J. Did the party there attend under protest?] That does not appear: but it cannot be material. *Andrews v. Elliott*, 5 Ellis & B. 502, is precisely in point. The cause was tried without a jury before a commissioner of nisi prius, not a judge of the superior courts. [522] The parties had consented; and the judge in open court sanctioned this course; but there was neither a judge's order, nor a consent in writing. The unsuccessful party having moved for a new trial, it was held by the court of Queen's Bench that, the commissioner having general jurisdiction to try, the parties were precluded by their conduct from questioning the verdict on account of the absence of these preliminaries. And this decision was affirmed by the Exchequer Chamber: 6 Ellis & B. 338. Lord Campbell, in *Therman v. Smith*, cites that case with approbation, saying,—"I think that the plaintiff is estopped from saying that there was not such a written consent as was essential to the statutable authority. *Andrews v. Elliott* is expressly in point. Mr. Bramwell (and the case would have been the same had he then been a judge of the superior courts) had no jurisdiction without certain statutory requisites; and, had it been competent to the plaintiff to shew that those requisites had not been fulfilled, the proceeding would have been void: but the principle of personal exception applied to the plaintiff. So, here, the plaintiff cannot be heard to say that there was no written consent: and we must therefore assume that the arbitrator proceeded under the statutable powers, and that the award is good, and the judgment properly signed." [Blackburn, J. I must confess I could not discover the principle on which that case of *Andrews v. Elliott* was affirmed in the Exchequer Chamber. Under s. 15 of the Common Law Procedure Act, 1854, the objection might have been cured. Where the objection might have been cured, and the party by attending prevented that, it may be that he would be bound.] In *The Caledonian Railway Company v. Lockhart*, 19 Court of Sessions Cases, 527, 3 Macq. 808, the time had been improperly enlarged, and yet the parties, having at- [523]-tended the reference, were held to be bound by the award: and that was the case of a corporation. In *Palmer v. The Metropolitan Railway Company*, 31 Law J., Q. B. 259, it was held by Mellor, J., in the bail court that, if on a reference under the Lands Clauses Consolidation Act, 8 & 9 Vict. c. 18, the parties consent to enlarge the time for making the award beyond the statutable term of three months, the court will not set the award aside on the ground that it is made beyond the prescribed time and that the parties cannot by consent dispense with the provisions of the statute. [Mellor, J. I thought the party intended to avail himself of the award if it should turn out to be in his favour: and that therefore he was either estopped from objecting, or his conduct amounted to a new parol submission.] Here, the subsequent conduct of the board was at variance with their protest: by the course they pursued, they succeeded in cutting down the amount of the claim. In *Holt v. Medlowcroft*, 4 M. & Selw. 467, the trial was a nullity. So also in *Lyett (or Blissitt) v. Tenant*, 4 N. C. 168, 5 Scott, 479. And that was the ground upon which the court of Exchequer distinguished *Holt v. Medlowcroft* in *Fawcett v. Cockerton*, 3 M. & W. 169. The protest here was conditional only: the board meaning to take the benefit of the award if it should turn out to be in their favour. In *Coore v. Newmeyer*, 9 M. & W. 290, where the date of the writ of summons and the recital of the writ itself were omitted in the issue, but the writ of trial was correct in these particulars, and the defendant at the trial protested against the irregularity, and refused to take any part in the proceedings, —a rule afterwards obtained to set aside the issue and all subsequent proceedings was discharged with costs, on the ground that the defendant ought to have returned the issue when delivered, or applied before [524] the trial to set it aside. "The defendant," said Lord Abinger, "must have known of the defect in the issue when it was delivered, and he ought then to have applied to set it aside: but, instead of objecting to it, he allows the plaintiff to go on, and makes the proceedings a vehicle for incurring costs, which may have to be paid by his own client." And Alderson, B., said: "If a defendant wishes to take advantage of an irregularity in the proceedings, he should not appear at all at the trial, but should allow the plaintiff to go on at his peril." [Shee, J. You assume that your client would have been bound if the award had been against him?] No doubt: he was bound by his waiver. [Bramwell, B. Waiver of what?] It is extremely difficult in such a matter to tie oneself to any very precise

expression. [Blackburn, J. Lord Wensleydale, in *The Caledonian Railway Company v. Lockhart*, says (3 Macq. 822): "I think that the principle 'Quilibet potest renunciare jure pro se introducto' applies, and that it was competent for both parties to agree to enlarge the time. Further, there is no doubt that they did so by the enlargement to a day in blank (which in effect by the Scotch law is for one year and a day), and also by their subsequent conduct." It would not matter much what was the form of the agreement.] Attendance imports an agreement [Blackburn, J. It would be strong evidence of an agreement.] The subsequent conduct of the defendant is in truth an abandonment of his protest. [Bramwell, B. Suppose one of the witnesses had been indicted for perjury, could he have been convicted under the circumstances?] The same objection might have been urged in the case of *The Caledonian Railway Company v. Lockhart*.

McMahon, in reply. In *Tyerman v. Smith*, 6 Ellis & [525] B. 719, and the other cases where the conduct of the party has been held to amount to a waiver, the party appears to have attended without objection. Not only was this so in *Andrews v. Elliott*, 5 Ellis & B. 502, but the defendant led the other side to believe that he would not take the objection. Here, however, notice was given that it would be taken and insisted on. [Mellor, J. Judges should not be astute to aid unjust objections.] "It is much more important that a statute should receive its proper construction, than that justice should be doled out to suit the circumstances of each particular case:" per Maule, J., in *Martindale v. Falkner*, 2 C. B. 718. In *The Caledonian Railway Company v. Lockhart*, 3 Macq. 808, there was complete acquiescence. Lord Campbell, C., in giving judgment (p. 811), says: "Here, by the mutual consent of both parties, the time was enlarged in writing in a way familiarly known according to Scotch procedure; and the enlargement of the 6th and 9th November, 1846, amounted to a fresh submission, giving the arbiter, in the most express language, 'at his pleasure further to enlarge the time, both parties binding and obliging themselves to acquiesce in and fulfil his award, and homologating and confirming the by-gone prorogations.' Accordingly, the appellants continued to attend the arbiter, and acquiesced in his authority till the interim award was executed." Nothing could be more express. The cases of *Burley v. Stephens*, 1 M. & W. 156, and *Palmer v. The Metropolitan Railway Company*, 31 Law J., Q. B. 259, are altogether beside the present. It is plain that the statute here was not complied with, and that the board by their officer did all they could to resist the proceeding of the umpire. *Holt v. Meddowcroft*, 4 M. & Selw. 467, has never been overruled. Lord Ellenborough there says: "What might have been the effect of the defendant's [526] appearing at the trial and making a defence without any protest against trying the issue, it is unnecessary at present to inquire, because we find that the defendant did protest, and did all in his power to resist the proceeding. I cannot agree that it amounts to a consent on the part of the defendant, because, being as it were tied to the stake, and dragged on to trial, he endeavours to make the best of it. The language of the statute does, I think, import a negative, and it may be very doubtful whether the witnesses would be indictable for perjury upon a trial such as this." That was acted upon in *Lyeatt v. Tenant*: and there the irregularity was such that the judges all held that the party was right in protesting. *Farwig v. Cockerton*, 3 M. & W. 169, and *Cooze v. Neumegen*, 9 M. & W. 290, were cases of mere irregularity. [Mellor, J. I know of no case where a protest in the form here adopted has been held available.] Nor is there any case where such a protest has been held to be insufficient. It is difficult to determine at the moment whether the objection be one of substance or a mere irregularity: it would be hard, therefore, to hold the party bound at his peril to stand upon his protest. It has never yet been held that attending before an arbitrator under protest is a waiver of an objection founded upon the absence of jurisdiction.

BRAMWELL, B. We will suspend our judgment until next term. And we do hope that in the interim some settlement will be come to. We all think the case should not have gone as far as it has done.

Cur. adv. vult.

The case of *Davies v. Price* came before the Exchequer Chamber, on appeal, on the 14th of June, [527] 1864. There, in an indenture of lease between the plaintiffs and the defendant, it was agreed that, if any difference or doubts should arise respecting the construction of the lease, or any thing therein contained, or respecting any matter or thing connected therewith, they should be referred to arbitration. A dispute arose

as to whether the defendant was bound to give land for certain purposes mentioned in the deed, and whether the plaintiffs were entitled to damages by reason of his not having done so. Arbitrators and an umpire were appointed, but the defendant's arbitrator, E. M., was appointed with the limited authority to determine all differences or doubts of construction only. The plaintiffs' arbitrator and umpire awarded that the defendant by the indenture covenanted and agreed to give the said land for the purposes aforesaid, and that the defendant had not given the said land, and they assessed the plaintiffs' damages at 2000*l.*, and directed the defendant to pay the plaintiffs' costs. The defendant objected during the reference to the plaintiffs going into the question of compensation or damages, but did under protest attend when that question was gone into, and cross examined some of the witnesses. To an action on the award, in which the declaration stated that doubts had arisen as to the construction of the lease, and as to whether the plaintiffs had sustained any and what damages, the defendant pleaded (*inter alia*) that he did not choose the said E. M. to whom the said difference or doubts should be referred. It was held by the Exchequer Chamber, —affirming the judgment of the court below,—that the plea was proved, and was an answer to the action. See 11 Law T. (N. S.) 203.

BRAMWELL, B., now delivered the judgment of the court :—

[528] We are all of opinion that the judgment of the court of Common Pleas must be reversed. We think the case is governed by the decision pronounced by this court the other day in *Davis v. Prier*, on appeal from the court of Queen's Bench, which we conceive to be exactly in point. The question in this case is not one of waiver, but whether an authority which did not otherwise exist is given by a party appearing and protesting against the umpire going on.

We are of opinion such an appearance under protest does not give any authority ; and that there is no waiver, no estoppel ; and consequently that the award was unauthorized and void. We come to this conclusion upon the authority of the case above referred to.

Judgment reversed.

TOBIN v. HARFORD. June 18th, 1864.

[34 L. J. C. P. 37 ; 10 L. T. 817 ; 10 Jur. N. S. 859 ; 12 W. R. 1062. Followed, *Denoon v. Home and Colonial Assurance Company*, 1872, L. R. 7 C. P. 341.]

By a time policy the ship valued at 2000*l.* and goods valued at 8000*l.* were insured on a barter voyage to the coast of Africa ; and it was stipulated that "outward cargo should be considered homeward interest twenty-four hours after arrival at first port or place of trade,"—"with liberty to extend the valuation of the homeward cargo."—The vessel with the outward cargo on board arrived at Kinsembo, the first place of trade on the coast of Africa, and there landed a portion of her cargo, and, after remaining at Kinsembo more than twenty-four hours, she sailed thence with the remainder, without having received any other goods there, and was totally lost :—Held,—affirming the judgment of the court of Common Pleas,—that the assured were only entitled to recover upon this policy the value of that portion of the cargo which was actually on board at the time of the loss.

This was an appeal against a decision of the court of Common Pleas, ante, vol. xiii., p. 791. The statement of the case was as follows :—

1. The action was brought by Thomas Tobin (since deceased) and James Aspinall Tobin against the defendant as one of the underwriters of a policy of insurance on the ship "Shark" and her cargo.

[529] 2. The cause was tried before Erle, C. J., at the sittings in London after Trinity Term, 1862, when the following facts were proved and admitted :—

3. The plaintiffs were merchants and ship-owners at Liverpool, trading with various ports on the west coast of Africa.

4. On the 21st of June, 1861, the plaintiffs, through their agents, effected the policy in question on the ship "Shark" and her cargo, then about to sail from Liverpool for the coast of Africa.

5. The policy was subscribed in the usual way by the defendant, who is an underwriter at Lloyd's Coffee House for 100*l.*

6. The policy was for twelve months, commencing on the day of the vessel's leaving the dock at Liverpool, in port or at sea, in all places, at all times, and in all services, including the risk of craft, boats, and cranes to and from the vessel, upon any kind of goods and merchandizes, and also upon the body, tackle, apparel, and furniture, &c., of the good ship called the "Shark," and so to continue and endure during her abode at Liverpool, and further until the ship had moored at anchor twenty-four hours in good safety, and upon the goods and merchandizes until the same be there discharged and safely landed: and it was to be lawful for the ship to proceed and sail to and touch and stay at any ports or places whatsoever and wheresoever, with leave to discharge, load, unload, re-load, sell, barter, exchange, and trade all or either goods and property upon the coast of Africa and African islands, and with any vessel or vessels, boat or boats, factories, and canoes, in port and at sea, and to transfer interest from this to any other vessel or vessels, and from any other vessel or vessels to this vessel, all or any the risk to continue by the "Shark" and boats as above only, in port and at sea, and at any ports and [530] places she might call at or proceed to, without being deemed any deviation, without prejudice to that insurance: and it was agreed that the vessel might be towed or otherwise assisted by steam-vessels or any other vessels during the voyage; and *outward cargo to be considered homeward interest twenty-four hours after arrival at first port or place of trade.* The policy was declared to be on ship valued at 2000*l.*, and on the cargo valued at 8000*l.*, with liberty to extend the valuation of the homeward cargo, and with liberty for the ship to move from dock to dock.

7. By a subsequent memorandum, it was agreed to continue the risk on the "Shark," at the same rate of premium, until her arrival back, on the same conditions.

8. The "Shark" belonged to the plaintiffs, and she sailed from Liverpool on the 24th of June, 1861, with the cargo mentioned below for Kinsembo and the river Congo and other ports on the coast of Africa.

9. When the ship sailed she had on board a cargo, shipped at Liverpool, belonging to the plaintiffs, consisting of woollen and cotton goods, hardware, fire-arms, gunpowder, and a great variety of articles suited to the African trade, the invoice cost of which was admitted to be 6226*l.* 5*s.* 10*d.* [A copy of the bill of lading was annexed.]

10. The residue of the plaintiffs' interest in the ship and cargo not insured by the policy sued upon, was covered by other policies similar in form, except that they did not contain the clause, "outward cargo to be deemed homeward interest twenty-four hours after arrival at first port or place of trade."

11. No objection was made to the valuation of the ship and cargo in the policy.

12. The "Shark" arrived at her first port on the coast of Africa, namely Kinsembo, on the 14th of August, [531] 1861; and there at different times, on the 15th, 16th, and 17th of August, landed and delivered to the plaintiffs' agents a part of the cargo. The invoice cost of the part so landed was 2952*l.* 8*s.* 3*d.*

13. There was no cargo taken on board at Kinsembo; but the vessel sailed from there with the remainder of the cargo shipped at Liverpool, on the 17th of August, 1861, for the river Congo, and was by the perils of the seas wrecked and totally lost, with all the remaining cargo, on the 21st of August, 1861, in attempting to reach the river.

14. At the river Congo and other places on the coast of Africa there was some homeward cargo ready to put on board the "Shark," and intended to be shipped by her.

15. The African trade is conducted almost wholly by barter, there being no coin in circulation.

16. African produce varies greatly in value. Ivory is worth 700*l.* a ton. Gum is worth 120*l.* a ton. Palm-oil is worth 40*l.* a ton. Dye-woods, 3*l.* a ton.

17. The value of a cargo of African produce consequently varies greatly, according to the quantity of the more precious commodities, on board.

18. Vessels in the African trade commonly call at several ports on the coast, both to land parts of the outward cargo and to take on board part or all of the homeward cargo, as it may happen to be provided or obtained by the owners' agents at such ports.

19. The plaintiffs have for many years traded to the African coast, and have factories at various places there.

20. After the loss of the ship and goods on board, as above-mentioned, the defendant settled and paid a total loss of 20*l.* upon his subscription on the ship.

21. The plaintiffs claimed also for a total loss on the cargo, in which case the defendants' liability to them on the policy would amount to 80l.

[532] 22. The defendant disputed his liability as for a total loss, but admitted a partial loss, namely, to the extent of the goods actually lost with the ship, and paid 43l. into court as for that partial loss.

23. For the purposes of this appeal only, it was agreed between the parties that the said sum of 43l. should be taken to be sufficient to cover the defendant's liability, if he was only liable for a partial loss,—reserving right to the plaintiffs to proceed with the reference hereinafter mentioned should the judgment of the court below be confirmed.

24. Upon the above state of facts a verdict was taken, by consent, for the plaintiffs for 37l., being the difference between the 43l. paid into court and the 80l. above mentioned; the defendant having leave to move to enter a verdict for him, if the plaintiffs were not entitled to claim as for a total loss on the cargo, and if the money paid into court was sufficient in that event to cover the plaintiff's claim: and the sufficiency or not was to be referred to the award of Mr. Richards, the average-stater.

25. In Michaelmas Term, 1862, the defendant obtained a rule calling upon the plaintiffs to shew cause why the verdict should not be set aside, and a verdict entered for the defendant, or a nonsuit, on the ground that, on the true construction of the policy, the defendant was not liable for a total loss.

26. The rule was argued in Hilary Term, 1863, and the court of Common Pleas decided that the plaintiffs were only entitled to recover a partial loss, and ordered a verdict to be entered for the defendant.

The question for this court was, whether that rule ought to have been made absolute or discharged.

The case was argued in the Exchequer Chamber, before Pollock, C. B., Crompton, J., Bramwell, B., Channell, B., Blackburn, J., and Shee, J.

[533] Bovill, Q. C. (with whom was J. Brown), for the plaintiffs, submitted that they were entitled to recover as on a total loss, according to the valuation in the policy,—citing *Shaw v. Felton*, 2 East, 109, *Hill v. Patten*, 8 East, 373, *Forbes v. Aspinall*, 13 East, 323, and *Rickman v. Carstairs*, 5 B. & Ad. 651.

Mellish, Q. C. (with whom were Lush, Q. C., and Sir G. Honyman), for the defendant, submitted that the court below were right in holding that the plaintiffs were only entitled to recover in respect of the "cargo" actually on board at the time of the loss,—relying on some passages from 2 Arnould on Insurance, 2nd edit. 365 et seq.

Cur. adv. vult.

POLLOCK, C. B. With the exception of my Brother Bramwell (who entertains some doubt upon the matter, though I believe he does not differ from the judgment we are about to pronounce), we are all unanimous in thinking that the judgment of the court below ought to be affirmed. I will merely add for my own part that the question as stated by Mr. Mellish seems clearly to be, what is the meaning of the word "cargo" in this policy. Does it mean such goods as may accidentally be on board the vessel at a particular moment? or must it not have reference to the anticipation of that which the vessel is intended to carry? Applying to the word the ordinary rule of construction, I think there cannot be a doubt that it means, not the goods which happen to be on board at the time,—which may no doubt be called the "cargo" in one sense, but that it must have reference to something more, to be derived from the known employment of the vessel, and not to that which really is a mere matter of accident.

CROMPTON, J. I am of the same opinion, for the rea-[534]sons given in the judgment of the court below, and not given by the Lord Chief Baron.

BRAMWELL, B. Although my Lord has said he thinks there is not much doubt about the matter, I am sorry to say that to my mind there is considerable doubt, and that my own unassisted judgment would not have led me to the conclusion which the court below came to. This is the case of a valued policy on ship and goods, and it is upon a voyage on which the vessel is to sail with more or less of cargo on board, and to return with an uncertain amount of homeward cargo. The character of the African trade is such that it is impossible for the assured to say at any time what is the quantity of cargo on board, and what its nature and value. They can tell what is on board when the vessel starts upon her voyage out: and probably also when she has started upon the voyage home: but they cannot possibly know the quantity or

value of the goods whilst the vessel is sailing between the intermediate ports. To provide for this uncertainty, they effect a policy for a gross sum as the assumed value which will at any time be on board. It is objected that this makes it a gaming policy. But I see no other way in which the parties can protect themselves by an insurance. These contracts should be construed with reference to what is likely to happen, rather than with reference to remote possible contingencies. It certainly might be, as was suggested in argument, that there was little or nothing on board at the time of the loss. But that was not a very likely thing to happen. It was almost certain that the vessel would throughout have on board a substantial cargo. I see nothing unreasonable in assuming that. The parties manifestly intended that the policy should cover the ship and the goods on board at any time: and they agree that the ship shall [535] be valued at 2000l., and the goods on board at 8000l. It was conceded by Mr. Mellish that "cargo" here does not mean a full cargo. If the vessel took out only a partial cargo, and was lost on her outward voyage, it is admitted that the assured would be entitled to recover the 8000l. So, if lost on her voyage home with a cargo short of a full one. It is plain, therefore, that the word "cargo" does not mean a full cargo. What, then, does it mean? I have some difficulty in saying. It is suggested that it means the destined cargo, and not an incomplete cargo. Why so? Possibly, if the vessel had arrived at a port where a quantity of cargo was awaiting her, and having received some on board, was blown out to sea before the residue could be shipped, and lost, it might for ought I know be said that the intended cargo was not lost. Here, the vessel had on board all that she was at the time intended to have. She went out with a great quantity of goods, landed some of them at Kinsembo, and was lost with the residue on board. Suppose the goods remaining on board had been all the vessel started with, and none had been landed at Kinsembo, if I understand Mr. Mellish's concession right, the assured would have been entitled to recover the whole amount. She would then have had on board her destined cargo, and, none of it having been put out, it would have been a cargo lost within the meaning of this policy, and the assured would have been entitled to recover the agreed value. But for the unanimous judgment of the court below, and the opinion of my learned Brethren, I must own that these considerations would have led me to think that the word "cargo" was simply identical with goods, and consequently that the true construction of the policy should be in conformity with the contention of Mr. Bovill. The authorities, too, I should have thought, are in favour of that [536] view. [The learned Baron observed upon *Shawe v. Felton*, 2 East, 109, *Forbes v. Aspinall*, 13 East, 323, and *Rickman v. Carstairs*, 5 B. & Ad. 651.]

BLACKBURN, J. I agree with the majority of the court that the judgment of the court below is correct; and I also agree in what I understand to be the reasons on which that judgment is founded. With regard to the real point to be decided, the fact that this is a valued policy is, in my mind, a mere accident, and does not affect the question. The question whether there was a total or a partial loss, is in this case, as I think it ought in every case to be, quite independent of whether the policy was valued or not. The question is, what is the subject-matter that is covered by the insurance? and whether the whole of the subject-matter is lost, in which case it would be a total loss: or whether only a part of it is lost, in which case it would be a partial loss only, the amount of which would depend upon the proportion which the part that was lost bore to the whole subject-matter of the insurance. Then, if that is a valued policy, the value being admitted, the sum when reduced to figures is proved: if it be an open policy, you must prove the value of the whole subject-matter. When that is proved, it comes to the same result: the fact of the policy being valued merely dispenses with proof of value. There is some obscurity in the framing of this policy: but this much is clear, viz. that it is partly on ship and partly on goods. With the former, we are not now concerned; and, as to the latter, it seems to me to be immaterial whether the word used was cargo or goods. They mean the same thing. The ship sailed from Liverpool on this time policy: and it attached on the cargo which she had on board. She was bound for the west coast of Africa. The nature of the adven-[537]-ture was, that the cargo taken on board at Liverpool was intended to be substituted and exchanged by barter for cargo the produce of that country. The words of the policy were intended to meet that primitive style of trading. The effect of it is, that the insurance attaches on all the goods on board, as well those originally shipped as those which may from time to time be substituted. It appears that

the cargo which went out from Liverpool arrived at Kinsembo, on the coast of Africa, where 57 per cent. of it was landed, and the ship was afterwards lost with the remaining 43 per cent. on board, nothing having been substituted for that part of the cargo which was landed. The proportion, therefore, which the goods lost bore to the goods which formed the subject-matter of the insurance was only 43 per cent. And that is in effect what was decided by the judgment of the court below. For these reasons, I am of opinion that the decision was right, and ought to be affirmed.

Judgment affirmed.

End of Trinity Vacation.

[538] CASES ARGUED AND DETERMINED IN THE COURT OF COMMON PLEAS, IN MICHAELMAS TERM, IN THE TWENTY-EIGHTH YEAR OF THE REIGN OF VICTORIA.

The judges who usually sat in banco in this term, were, Erle, C. J., Byles, J., and Keating, J.

MEMORANDA.

In consequence of severe illness with which he was seized at Exeter during the last Summer Assizes, Mr. Justice Williams was unable to take his seat in Court during this Term.

On the 10th day of November, 1864, the Right Hon. Thomas Erskine, formerly one of the Judges of this Court, died, in his 76th year.

John Bridge Aspinall, Esq., of the Middle Temple, having been appointed one of Her Majesty's Counsel learned in the law, took his seat within the Bar on the first day of this Term.

[539] JOHN TAYLOR, *Appellant*; RICHARD HUMPHRIES, *Respondent*.
Nov. 18th, 1864.

[S. C. 34 L. J. M. C. 1; 11 L. T. 376; 10 Jur. N. S. 1153; 13 W. R. 136. Followed, *Davis v. Scrace*, 1869, L. R. 4 C. P. 172; *Penn v. Alexander*, [1893] 1 Q. B. 532.]

Persons walking from their residences in a town to enjoy the country air on a Sunday morning, and in the course of such walk resorting to an inn for refreshment, are "travellers" within the exception in the 11 & 12 Vict. c. 49, s. 1, although the inn be within two miles of their place of abode, provided they do not go abroad for the mere purpose of indulging a propensity for drink.—And as the exception of "refreshment for travellers" is contained in the clause creating the prohibition, the burthen of shewing that the prohibition has been infringed, and that the case is not within the exception, is cast upon the informer: and, if the inn-keeper believes, and has reason to believe (of which the magistrates are the judges), when he supplies the liquor, that he is supplying refreshment for a "traveller," he ought not to be convicted.

This was a case stated for the opinion of the court of Common Pleas pursuant to the 20 & 21 Vict. c. 43, s. 2:—

At a petty-sessions held at King's Heath, in the county of Worcester, on the 6th of May, 1864, John Taylor, a licensed victualler carrying on business at Moseley, in the parish of King's Norton, in the county of Worcester, appeared before John T. Lawrence and James Hunt, Esq., two of Her Majesty's justices of the peace, in answer to an information under the 11 & 12 Vict. c. 49, s. 1, charging him that he did, on Sunday the 17th of April then last, at the parish of King's Norton, in the said county, otherwise than for the refreshment of travellers, open his house and premises for the sale of wines, spirits, beer, and other fermented and distilled liquors, before half-past twelve o'clock in the afternoon.

It was proved by the evidence of Thomas Place, a police-constable, that, at 20 minutes past 11 in the forenoon of the day mentioned in the information, he went to the defendant's house, and, finding the door closed, but unfastened, opened it, and walked in, and found that thirty-two men and women were in the house, of whom

some were seated in the tap-room, others standing in the passage leading from the front-door, and in which the bar-window is situated: some were drinking or had ale before them, and some of the male portion were smoking. The defendant's daughter was engaged in drawing beer for the company. The [540] defendant told Place that they were all strangers, upon which Place replied,—“I suppose you call them travellers.” He (the defendant) said,—“Yes: they are travellers.” Several got up and said they came from Birmingham. They were strangers to the witness, and had the appearance of Birmingham artisans: and it was assumed or admitted that they came from Birmingham. Their conduct was orderly.

The defendant's house is situated a little more than two miles and a half from the centre of the town of Birmingham: and the borough extends to within about a mile and a half, and is built upon up to the boundary, and rows of houses or detached villas stretch to the village of Moseley.

Two of the customers on the occasion were called as witnesses, and proved that they were inhabitants of Birmingham, and had walked from the town through lanes and fields that morning, thereby extending their walk, the one to *seven miles*, and the other to *eight miles*, before reaching the defendant's house, where they had ale and bread and cheese on their way home; and that they did not leave home with the intention of visiting the defendant's house.

It was also proved by them that they were asked if they were travellers before being supplied, and that they replied that they were.

These witnesses were at that time within about two miles of their residences; and the few whose addresses were ascertained appeared to be inhabitants of that part of Birmingham nearest to Moseley, and within a mile and a half or two miles of it: of course, some might have come a greater distance.

Mr. Suckling, for the defendant, cited *The King v. Ivens*, 7 C. & P. 242, *Tennant v. Cumberland*, 23 Justice of the Peace, 51, *Atkinson, App., Sellers, Resp.*, 5 C. B. (N. S.) 442, and *Taylor, App., Humphreys, Resp.*, [541] 10 C. B. (N. S.) 429, and contended,—first, that there was not sufficient evidence of opening, as no distinct opening had been proved. The justices were of opinion that the fact of persons being in the house, especially in the entrance passage, and at the bar, although the policeman had not actually seen the door opened, was sufficient to enable them to draw an inference that the house had been opened: and, considering also that the witnesses for the defence proved that admission had been obtained without difficulty, were of opinion that the evidence was sufficient on this point.

It was then contended that the company were travellers, that they lived in another parish, and that, on their representing themselves to be such, the landlord was bound to supply them.

On the whole case, the justices were of opinion that, for all that appeared to the contrary, the company assembled had come from Birmingham, many of them a distance of less than two miles; that, although the fact of a man being a traveller was not actually a question of distance, they considered they must be on a journey, or wayfarers; that, firstly, in the case of such as they assumed had only come from the near end of Birmingham, proceeding on foot a distance of less than two miles did not constitute a journey; and next, that the others who were shewn to have taken a longer walk, and stopping a distance so near their home, had ceased to be travellers in the same degree as if the same individuals had arrived in Birmingham and applied for refreshments at a tavern in the same street as their own residences. They were of opinion that the fact of the public house not being in the same parish as the residence of the customer was unimportant; and that, under the circumstances, the persons were not travellers, and that the inquiry made on the entrance of the customer could not be considered [542] *bonâ fide*: and they fined the defendant in the sum of 2l. and costs.

The case concluded with a statement that the defendant, being dissatisfied with the decision, requested the justices to state and sign a special case for the consideration of one of Her Majesty's courts of law at Westminster, and they the justices thereby did so accordingly (a).

(a) Byles, J., remarked upon the informality of the case in not presenting a question for the decision of the court: see *Buckmaster, App., Reynolds, Resp.*, 13 C. B. (N. S.) 62.

Hayes, Serjt., for the appellant. The conviction in this case turns upon the 1st section of the 11 & 12 Vict. c. 49, which, after reciting that "the provisions in force within the Metropolitan police district, and in some other places in England, against the sale of fermented and distilled liquors in the morning of the Lord's Day have been found to be attended with great benefits," enacts "that no licensed victualler or person licensed to sell beer by retail to be drunk on the premises, or not to be drunk on the premises, or other person, in any part of Great Britain, shall *open his house for the sale of wine, spirits, beer, or other fermented or distilled liquors, or sell the same*, on Sunday, before half-past twelve o'clock in the afternoon, or, where the morning Divine Service in the church, chapel, kirk, or principal place of worship of the parish or place shall not usually terminate by that time, before the time of the termination of such service; and that no licensed victualler or other person in England shall open his house for the sale of wine, spirits, beer, or other fermented or distilled liquors, or sell the same, on Christmas Day or Good Friday, or any day appointed for a public fast or thanksgiving, before the respective times aforesaid, *except*, in all the [543] cases aforesaid, *as refreshment for travellers*" (a). Do the facts stated in this case shew that the people who were found taking refreshment in the appellant's house were "travellers," within the exception? [Keating, J. Are we to judge of the bonâ fides of the inquiry made of the parties before they were supplied with refreshment?] The appellant is not responsible for the form of the case. That is drawn by the clerk to the magistrates: the parties have nothing to do with it. It may be assumed here that the house was opened: the only question then is, whether the persons found therein were travellers. That question has already been before this court upon two occasions. In *Atkinson, App., Sellers, Resp.*, 5 C. B. (N. S.) 442, the court repudiated the distinction sought to be made between a journey for business and a mere drive for pleasure: and Cockburn, C. J., said: "Of course a man could not be said to be a traveller, who goes to a place merely for the purpose of taking refreshment. But, if he goes to an inn for refreshment in the course of a journey, whether of business or of pleasure, he is entitled to demand refreshment (b), and the inn-keeper is justified in supplying it." There, the parties were distant from their [544] home (Liverpool) about five miles and a half, having driven a round of eight or nine miles. Again, in *Taylor, App., Humphreys Resp.*, 10 C. B. (N. S.) 429, the court held that a man who goes to a place a short distance from his home for the mere purpose of taking refreshment, is not a "traveller" within the meaning of the exception in the 18 & 19 Vict. c. 118, s. 2; but that one who goes to an inn for refreshment in the course of a journey, whether of business or of pleasure, and whether on foot or otherwise, is a "traveller" within the statute. There, the appellant's house was distant from Birmingham about four miles, and some of the parties who were supplied with refreshment had walked from Birmingham, and the others had gone thence to the public-house by a public conveyance. Erle, C. J., in giving judgment, there says: "I am extremely desirous of giving effect to the intention of the legislature, which was, to prevent publicans from keeping open their houses during the hours of Divine Service, and also of giving effect to the intention of the magistrates, in endeavouring to prevent persons who are not travellers resorting to houses of entertainment at a short distance from their own homes, for the mere purpose of procuring drink. But, however, desirous I may be to carry out these laudable intentions, I am unable to arrive at any other conclusion than that the facts stated in this case do not authorize the conviction. It appears that the three individuals who are charged to have been improperly supplied with refreshment, had walked from Birmingham, a distance of four miles. Now, whether they walked that

(a) The 17 & 18 Vict. c. 79, and 18 & 19 Vict. c. 118, relate to the sale of beer, &c. in the afternoon of Sunday, Christmas Day, Good Friday, and days of fast or thanksgiving.

(b) See *Lee v. Irwin*, 7 C. & P. 213, where it was held that an indictment lies against an inn-keeper who refuses to receive a guest, he having room in his house at the time, and that it is not necessary for the guest to tender the price of his entertainment, if his rejection is not on that ground; and that it is no defence for the inn-keeper that the guest was travelling on a Sunday, and at an hour of the night after the inn-keeper's family had gone to bed; nor is it any defence that the guest refused to tell his name and abode, as the innkeeper had no right to insist upon knowing those particulars.

distance on business, or for the purpose, for instance, of visiting a sick relative, or for pleasure, I do not think the legislature intended that they should be precluded from demanding, or the innkeeper be precluded from furnishing them with, necessary refreshment. In so [545] deciding, I think we give effect to the decision of this court in *Atkinson, App., Sellers, Resp.* [Byles, J. The facts are not the same as to all the persons found in the house.] As to some, the magistrates assume that they had merely walked from their own homes to the defendant's house: and, as to two of them, that they had ceased to be travellers when they got there. There was no evidence before them to justify their conclusion in either respect. The defendant could not know that they were other than "travellers," as they represented themselves. [Byles, J. If the innkeeper mistakes, and refuses to entertain them, he incurs the risk of an action.] Or an indictment: *Reg. v. Inns*, 7 C. & P. 213. [Keating, J. The magistrates came to the conclusion that the inquiry of the parties as to whether or not they were travellers, was not made *bonâ fide*.] There was nothing to warrant them in so assuming. In *Taylor, App., Humphreys, Resp.*, 10 C. B. (N. S.) 433, Erle, C. J., says: "I do not think the legislature intended to cast upon the innkeeper the burthen of proving in every case that the party refreshed is really a traveller. Before a man is convicted of the offence here charged, it seems to me that the complainant is bound to establish that he had the purpose of entertaining a person who was not a traveller." To constitute an offence within this statute, there must be a wilful opening of the house to a person other than a traveller: and that must be made out by facts which fairly warrant the conclusion.

Keane, Q. C., for the respondent. By the 14th section of the Summary Convictions Act, 11 & 12 Vict. c. 43, the burthen of establishing an exception is cast upon the accused,—“Provided always that, if the information or complaint in any such case shall negative any exemption, exception, proviso, or condition in the [546] statute on which the same shall be framed, it shall not be necessary for the prosecutor or complainant in that behalf to prove such negative, but the defendant may prove the affirmative thereof in his defence, if he would have advantage of the same.” This defendant, therefore, was bound to shew that his house was opened for the accommodation and the beer, &c. supplied for the refreshment of “travellers.” Thirty-two persons were found in this house drinking and smoking and eating bread and cheese. An account is given of two of them: the remaining thirty are unaccounted for; and the door of the house is found open. The magistrates found that the conduct of the appellant was not *bonâ fide*. The only question now is, whether there was any evidence to warrant their conclusion. What constitutes a traveller, has always been felt to be a question of difficulty. The obvious intention of the legislature was, that those only should be entitled to demand refreshment within the prohibited hours, who had as travellers or wayfarers encountered such a degree of toil as to render refreshment a positive necessity. [Erle, C. J. Are we bound to hold that these persons could not be travellers, because they are within two miles of their homes?] The question is whether there was not evidence upon which the magistrates were justified in convicting the party. [Erle, C. J. You want us to insert the words “needing refreshment.”] That, it is submitted, is involved in the word “traveller.” [Byles, J. The meaning of the words “except as refreshment for travellers” may be, that the innkeeper is not to supply an unreasonable quantity, but only so much as may suffice for the reasonable refreshment of a traveller.] In a case of *Tennant v. Cumberland*, 23 Justice of the Peace, 51, it was held that the burthen of proof lay upon the innkeeper. [Byles, J. The case does not state by whom the wit-[547]-nesses were called. If they were called by the prosecutor, we must assume that the facts stated as to the two would apply equally to all the others.] If the burthen of disproof is upon the innkeeper, there can be no reason for assuming that. The court can only assume that the case before the magistrates was conducted in the usual way.

Hayes, Serjt., in reply. This case is not in substance distinguishable from that of *Taylor, App., Humphreys, Resp.*, 10 C. B. (N. S.) 429. The court will not, it is submitted, depart from that decision: but, in a case which applies to so large a number of meritorious trades-people, and which affects in so inconvenient and arbitrary a manner the comforts of the artisans of this country, will endeavour to lay down some clear and definite principle by which this statute may in future be construed. The intention of the legislature evidently was, to promote the due observance of the Lord's Day, and to prevent persons from resorting during the hours of Divine Service to

public-houses for the purpose of indulging in excessive drinking, and not to deprive of the opportunity of obtaining needful refreshment those who, after spending six days in toiling in the close and unwholesome atmosphere of a large town, resort to the country for relaxation and amusement. And, as the exception of "refreshment for travellers" is contained in the clause which creates the prohibition, the burthen of proving that the prohibition has been infringed, and that the case is not within the exception, is cast upon the informer.

Cur. adv. vult.

ERLE, C. J., now delivered the opinion of the court: (a)—

[548] In this case the question is, whether the evidence supported the information: and the answer depends mainly upon the meaning of the word "traveller" in the statute.

It has been contended, for the appellant,—that, as the persons admitted into the house were artisans of Birmingham, walking into the country on Sunday morning, and needing refreshment by reason of the walk, therefore they were travellers taking refreshment, within the words of the act,—that the inhabitants of Birmingham and other similar towns may well desire to emerge from a crowded region covered with bricks and smoke, and are legally and morally right in gratifying that desire by taking a walk into the country during the hours best suited for a sight of the sun, on the only day on which artisans are free, in other words, on Sunday morning,—that the prohibition against supplying any fermented liquor, and indeed any sustenance whatever on Sunday till half-past twelve, imposed upon all throughout Great Britain who have any licence whether to sell cyder or beer or wine or spirits, attaches on a very large part of the class that gain their livelihood by supplying food to the stranger and the homeless,—and that the habits and the wants of the persons maintaining themselves in the area over which the statute has operation are infinitely various, and, as this extensive prohibition is subject to an exception, the exception was probably intended to be capable of extensive application in proportion to the extent of the prohibition, that the intention of the legislature in the prohibition evidently was, to promote the better observance of the Lord's day in general, and in particular by excluding those who yield too much to the attraction of the public-house from their accustomed haunts, to bring them to places of worship, and so to the paths of piety and virtue,—that this intention of the [549] legislature might also be in part promoted by promoting resort to the beauties of nature at proper seasons, and allowing wholesome refreshment needful for the comfortable enjoyment thereof,—that this intention would probably be in part defeated by confinement in noisome air and deprivation of wholesome sustenance where needed,—and that therefore the word "travellers" ought to be construed to include all who fare abroad, either from a desire to enjoy country sights and sounds, or from any other motive of business or pleasure except desire for excessive drinking: and that any supply of refreshment needed by reason of such faring abroad ought to be construed to be refreshment to a traveller.

He further contended that, as the exception of refreshment to a traveller is contained in the clause creating the prohibition, the burthen of proving that the prohibition has been infringed, and that the case is not within the exception, is cast on the informer (*The King v. Pratten*, 6 T. R. 559; *Gill v. Scriven*, 7 T. R. 27); and that, if the publican believed, and had reason to believe, when he supplied the drink, that he was supplying refreshment to a traveller, he ought not to be convicted.

In this argument we think the appellant is well founded, and that the statute ought to be construed on the principles that he has contended for. We think that a person would be a traveller within the exception, if he came abroad from any of the motives above suggested as legitimate, and by reason thereof needed refreshment: but, if he came abroad merely because he desired to go to a public-house and obtain drink, he would not.

The circumstances under which the guest was admitted and supplied would be matter for consideration in deciding whether the publican had reason to believe [550] and did believe that he was a traveller within this description either when he admitted him or when he afterwards supplied him; such as, whether he was a stranger or a neighbour, whether he delayed longer or took more than was consistent with the need of refreshment. The distance also would be relevant: but no rule can be laid down

(a) The judges present at the argument were, Erle, C. J., Byles, J., and Keating, J.

for a defined distance, as that which may be short for the vigorous may be long for the weakly.

The cases decided on this matter support the appellant's argument. In *Atkinson, App., Sellers, Resp.*, 5 C. B. (N. S.) 442, the magistrates convicted, because the guests had taken a drive of a few miles for pleasure on Sunday afternoon, — being of opinion that business was necessarily included in the idea of travelling; but the court quashed the conviction. Cockburn, C. J., says that a man cannot be said to be a traveller, who goes to a place merely for the purpose of taking refreshment; but that, if he goes to an inn for refreshment in the course of a journey, whether of business or pleasure, he is entitled to demand, and the inn-keeper is justified in supplying it: and Crowder, J., says that the only real distinction is, between a man living in the neighbourhood at a distance; and that, whether he is travelling for pleasure or on business, cannot make any difference. In *Taylor, App., Humphreys, Resp.*, 10 C. B. (N. S.) 429, the magistrates convicted, where the guests had walked out on Sunday afternoon about four miles, for their pleasure: but the court quashed the conviction, on the ground that a man might be a traveller, though he was walking for pleasure, and had not exceeded the distance above mentioned, and adopted the reasons given by the Chief Justice in the last-mentioned case.

The context of the statute supports the appellant's argument. Section 1 prohibits every licensed victualler [551] and every beer-house keeper in Great Britain from opening his house for the sale of, and from selling, any fermented or distilled liquor, on Sunday, before 12.30 p.m., except as refreshment for travellers. Section 3 prohibits every licensed victualler and beer-house keeper, and every person licensed or authorized to sell any fermented or distilled liquor, and every person claiming to sell wine by retail by reason of being free of the vintners' company or any other right or privilege, from opening a house for sale of any article whatsoever during the prohibited hours, except as refreshment for travellers. Section 4 prohibits every person from opening any house or place of public resort for the sale of fermented or distilled liquors, or from selling such liquors, during the prohibited hours, except as refreshment for travellers. Section 5 empowers constables to enter any house or place of public resort for sale of such liquors at any time. Section 6 makes every person offending against this statute liable to a penalty not exceeding 5l. for each offence, and declares that every separate sale shall be a distinct offence.

These provisions are very stringent. For example, this appellant might have been fined 160l., that is, 5l. for each guest. They do not bear upon the rich, who have refreshment at their command; but they coerce the poorer classes throughout the island, — salutary, where they check the disorderly; pernicious, where they molest the discreet: and we consider that, by construing the exception in a wide sense, we save from vexatious restriction many who have a right to be trusted with self control, and at the same time leave the prohibition in force as far as the interests of real piety are concerned.

The result is, that the case should be sent back. We place great reliance on the local knowledge of the magistrates. They can tell whether the appellant be [552] — lied with reason that his guests were travellers, taking refreshment according to the description above given, or were making a pretence to that character for the purpose of profaning Sunday and passing it in drinking.

Probably it would not be worth while to proceed further against the appellant upon the present facts, because, unless he raises the question again by his future conduct, the information will not have been without effect. If it does raise the question again, the principles here explained may probably guide to a decision in accordance with our view of the law.

Rule accordingly (a).

(a) See *Fisher, App., Howard, Resp.*, 5 New Rep. 118. There, several persons having taken their tickets at 12.30 p.m. on Sunday at a railway station within the metropolitan police-district, for a train by which at 12.50 p.m. they afterwards proceeded to a place nine miles distant, were served in the interval with fermented liquors at the refreshment-rooms inside the railway-station, which were opened at 12.40; and it was held that they were travellers within the meaning of the 42nd section of the 2 & 3 Vict. c. 47, which enacts that "no licensed victualler or other person shall open his house within the metropolitan police-district for the sale of wine,

[553] HELPS AND ANOTHER v. J. W. CLAYTON AND CHARLOTTE MARY HENRIETTA his Wife. Nov. 10th, 1864.

[S. C. 34 L. J. C. P. 1; 11 L. T. 476; 10 Jur. N. S. 1148; 13 W. R. 161. Referred to, *In re Gray*, [1901] 1 Ch. 244. See *Steeden v. Walden*, [1910] 1 Ch. 400.]

1. In the case of a settlement of personal property, the practice is for the lady's solicitor to draw the settlement, and for the husband to pay for it.—2. Where the lady was an infant residing with and forming part of the family of her father, and the instructions for the settlement were given by the father, under circumstances from which the court (exercising the functions of a jury) inferred that such instructions were given by her father as her agent,—Held, that she, sued jointly with her husband, was liable for the expenses as for a debt contracted by her for *necessaries* before the marriage.

This was an action brought by the plaintiffs for money payable by the defendant Charlotte Mary Henrietta, whilst she was sole and unmarried, to the plaintiffs, for work done and materials provided by the plaintiffs for the said Charlotte Mary Henrietta, whilst [554] she was sole and unmarried, at her request, for fees due and of right payable from the said Charlotte Mary Henrietta, whilst she was sole and unmarried, to the plaintiffs in respect thereof, and for money paid by the plaintiffs for the said Charlotte Mary Henrietta, whilst she was sole and unmarried, at her request.

The defendants pleaded,—first, never indebted,—secondly, that, at the time of contracting the alleged debt, the defendant Charlotte Mary Henrietta was an infant,—thirdly, payment.

The plaintiffs replied to the plea of infancy, that the debt was in respect of necessities: and upon this replication and the other pleas issue was joined.

The cause came on to be tried before Erle, C. J., at the sittings at Westminster after Hilary Term, 1864, when, by consent, a verdict was found for the plaintiffs for 73l. 5s. 6d., subject to a special case, which stated as follows:—

1. The plaintiffs are attorneys and solicitors practising at Gloucester. The defendant, Captain J. W. Clayton was, in the summer of 1862, engaged to be married to his present wife, then about eighteen years of age, and residing at Gloucester with her father, Colonel Somerset, with whom she had always resided since her birth. On the

spirits, beer, or other fermented or distilled liquors on Sunday, Christmas Day, and Good Friday, before the hour of one in the afternoon, except refreshment for travellers.”

It was there contended that a person could not be considered a “traveller” when he had not *commenced* a journey: nor when he had *completed* it, if his home were near. But Crompton, J., observed,—“Is a man not a traveller who has started on his journey and taken his ticket, simply because he prefers having refreshment before the train starts, to having it at an intermediate station? Is a man who has taken his ticket and got into the carriage, not a passenger, simply because the train has not yet moved? The common sense of all mankind will say that these persons were clearly travellers.” And Mellor, J., said: “The object of the statute was, to [553] prevent persons sitting and drinking in public-houses during these hours. It would be an abuse of the statute to say that a man who has taken his ticket, as in this case, is not a traveller within the meaning of the section.”

The magistrates at Preston recently, under Jervis's Act, 11 & 12 Vict. c. 43, s. 5, which enacts “that every person who shall aid, abet, counsel, or procure the commission of any offence which is or hereafter shall be punishable on summary conviction, shall be liable to be proceeded against and convicted for the same, either together with the principal offender, or before or after his conviction, and shall be liable on conviction to the same forfeiture and punishment as such principal offender is or shall be by law liable to, and may be proceeded against and convicted either in the county, riding, division, liberty, city, borough, or place where such principal offender may be convicted, or in that in which such offence of aiding, abetting, counselling, or procuring may have been committed,”—convicted two persons who were found drinking in a public-house on Sunday during the prohibited hours, for “aiding and abetting” the publican in a breach of the statute.

14th of August, 1862, Colonel Somerset called at the office of the plaintiffs, who had occasionally previously acted as his (Colonel Somerset's) solicitors, with a letter from the defendant J. W. Clayton, containing proposals for a settlement, in the terms following:—

“11 Portman Square.

“Dear Colonel Somerset,—I am not a rich man; but am able to settle on your daughter the sum of 10,000*l.* on my marriage. As all the rest of my property is entailed, provision is made under my father's will for my wife and children. [555] I shall be much obliged if you will nominate a trustee; and I refer you to my solicitor, Mr. Charles Barnard, 4 Gray's Inn Place. I can also allow the young lady 100*l.* per annum for pin-money.
“J. W. CLAYTON.”

2. Colonel Somerset instructed the plaintiffs to take the necessary steps in the matter for the lady, his daughter, and named his cousin, Mr. Granville Somerset, as trustee on behalf of the lady, and requested Messrs. Helps to put themselves in communication with him. The plaintiffs acted accordingly; and Mr. Granville Somerset, on behalf of the lady, corresponded with them on the requirements of the settlement.

2. On the 14th of August, 1862, the plaintiffs wrote as follows, to Mr. Barnard, the then attorney for Captain Clayton:—

“Gloucester, 14th August, 1862.

“Dear Sir,—We are instructed by our client Colonel Somerset to prepare the settlements on the approaching marriage of his daughter with Captain Clayton. We understand Captain Clayton's father proposes to settle 10,000*l.* on the young people, and to allow the lady 100*l.* a year for pin-money. Colonel Somerset has been asked to name a trustee, and we are instructed to name his relative Granville Somerset, of 3 Tanfield Court, Temple, barrister-at-law. Will you kindly at once prepare proposals for the settlement, and supply us with an abstract of any will or family settlement (if any such abstract should be required), to shew the title to the money. We understand the marriage is to take place very shortly; we shall therefore be glad to see you as soon as possible.—Yours very faithfully,
“RICHARD HELPS & SON.

“Charles Barnard, Esq.,
“4 Gray's Inn Place, Gray's Inn, London.”

[556] 4. To this letter Mr. Barnard replied as follows:—

“4 Gray's Inn Place, Gray's Inn,
“18th August, 1862.

“Gentlemen,—I have to acknowledge the receipt of your letter of the 14th instant, and I would have answered it before, but that I was out of town.

“Captain Clayton some time since instructed me as to the settlement, the draft of which I have already prepared, and it is now before conveyancing counsel for settlement. I would submit (independently of the fact of my having already prepared the draft) the doing so would devolve on me as representing the intended husband, whose money is to be settled. From my instructions, I did not understand the lady would bring anything into settlement. I will with the draft settlement forward you an abstract of the will of Captain Clayton's father, under which the captain takes an estate for life in certain freehold and leasehold estates, with trusts afterwards for the children of the captain's marriage; and a power is also given to the captain to appoint a life-interest to his wife. You will also be furnished with an abstract of a settlement already made by Captain Clayton, in 1854, on his attaining his majority. This settlement he has the power of revoking on his contemplating marriage.—Yours faithfully,

“Messrs. Helps & Son.

“CHARLES BARNARD.”

5. To this, the plaintiffs replied, as follows:—

“1 Barton Street, Gloucester,
“20th August, 1862.

“*Somerset—Clayton.*

“Dear Sir,—After I left you, I discussed the question raised as to whose duty it was to prepare the settlement, with my friend and agent Mr. Lucas, of 8 [557] New

Square, Lincoln's Inn. He states that the lady's solicitor always prepares the settlement, unless there are two, a personalty settlement, and a settlement of the husband's real estate. The settlement on the intended wife is always prepared by her solicitor or the solicitor of her family; and her intended husband has the privilege of paying for her settlement.

"I am quite satisfied that this is the rule: but, if you are not convinced, I shall be happy to leave the question to the president or council of the Incorporated Law Society; and Mr. Lucas will arrange the matter with you, to ask the question personally or by letter.

"I ought to have mentioned to you that Mr. Granville Somerset, the intended trustee for the lady, has serious objections to trust-funds being invested in ordinary shares or stock in any railway; but would not object to Indian railway-stock guaranteed by the Indian government.—Yours very faithfully,

"Charles Barnard, Esq.

"RICHARD HELPS."

6. The matter was accordingly referred to Mr. Cookson; and that gentleman decided that beyond all doubt the practice in the profession is, that the lady's solicitor should draw the settlements, and that the gentleman has the privilege of paying for them.

7. In this decision Mr. Barnard acquiesced; and the plaintiffs prepared the settlements, and, at the request of Mr. Barnard, sent their bill to the defendant, Captain Clayton. Mr. Barnard did not, however, at any time previously to the plaintiffs' sending in their bill as hereinafter stated, inform the defendant Captain Clayton thereof; nor did he obtain his concurrence therein or assent thereto.

8. On the 1st of September, 1862, the plaintiff Richard Sumner Helps attended Miss Somerset, at her [558] father's house, to make an appointment with her for the execution by her of the settlements; and, on the 3rd of the same month, the plaintiff Richard Helps attended with the defendant Captain Clayton's then attorney, Mr. Barnard, at Enfield Court, where Miss Somerset and her father Colonel Somerset signed the settlements after Mr. Richard Helps had explained to the defendant C. M. H. Clayton, that they had been approved by her relative and trustee Mr. Granville Somerset. The agents for the plaintiffs had upon the same day attended upon Captain Clayton at Mr. Barnard's office, and attested his execution of the settlement in duplicate. Save as above, the plaintiffs had no communication with the defendant C. M. H. Clayton on the subject of the said settlement.

9. The marriage took place on the 4th of September, 1862.

10. In the month of April following, the plaintiffs sent in to the defendant Captain Clayton their bill for the settlements; when it was returned to them, accompanied by the following letter:—

"14 Portman Square, April 24th, 1863

"Gentlemen,—I beg to return you the inclosed account. As I did not retain you to act for me, I must decline paying it.—Your obediently,

"Messrs. Helps & Son.

"J. W. CLAYTON."

11. In consequence of this letter, the plaintiffs took advice as to enforcing their claim against Captain Clayton, and were advised that, although the defendant was liable to pay for his settlement, yet, inasmuch as there was no privity between the plaintiffs and Captain Clayton, Colonel Somerset should pay the amount claimed, and that Captain Clayton should [559] be sued in the name of Colonel Somerset as for money paid to his use. The defendant Richard Helps communicated this opinion to Colonel Somerset, and requested him to pay the amount. Colonel Somerset then gave to the plaintiffs a cheque for 73l. 5s. 6d., the amount of the bill, and instructed the plaintiffs to sue the defendant J. W. Clayton for money paid to his use; but the plaintiffs in no other way than as above-mentioned claimed the money from Colonel Somerset, or from any person other than the defendant.

12. An action was commenced accordingly: but, before it came on for trial, a case was submitted to counsel, who advised that the action as brought by Colonel Somerset was not maintainable, and that Colonel Somerset's daughter, the defendant C. M. H. Clayton, was in point of law the employer of the plaintiffs, and that the money should be refunded to Colonel Somerset. Acting upon this advice,

the plaintiffs returned the said money to Colonel Somerset, and brought the present action.

13. The court was to be at liberty to draw any inferences which a jury would be warranted in arriving at from the facts above stated.

14. On behalf of the plaintiffs it was contended that the plaintiffs were retained by and on behalf of the defendant C. M. H. Clayton, and that the charge for the settlements was as for a necessary supplied to her suited to her degree and condition, and so was a debt due from her at the time when she intermarried with the defendant J. W. Clayton, and for which the said J. W. Clayton was therefore liable, as her husband.

15. On behalf of the defendants, it was contended that the plaintiffs were not retained by or on behalf of the defendant C. M. H. Clayton as alleged, and that the charges sought to be recovered by the plaintiffs [560] were not for necessities supplied to the said defendant Charlotte Mary Henrietta Clayton, as alleged.

If the court should be of opinion that the defendants were liable, the verdict was to stand for the plaintiffs for 73l. 5s. 6d. If otherwise, the verdict was to be set aside, and a verdict entered for the defendants.

Gray, Q. C. (with whom was O'Malley, Q. C.), for the plaintiffs. Three questions arise upon this special case.—first, whether the plaintiffs were retained to prepare the settlement by Mrs. Clayton or by Colonel Somerset, her father,—secondly, whether the giving the cheque by Colonel Somerset operated as payment so as to discharge the debt, assuming it to be a debt of the husband,—thirdly, whether the lady, who was an infant at the time the instructions for the settlement were given, was liable as upon a contract for “necessaries.” 1. It is submitted that Colonel Somerset incurred no liability. It is true that it was he who first put the plaintiffs in motion: but, in point of fact, the credit was given to the lady, the plaintiffs being employed by Colonel Somerset as her agent, and they relying upon the well-known rule of the profession, that the settlement is prepared by the solicitor of the lady, and paid for by the husband. The lady was aware that the plaintiffs were acting on her behalf, and assented thereto: the law, therefore, would imply a promise on her part to pay. [Byles, J. Suppose the negotiation goes off, who would be liable?] The lady, of course. [Byles, J. Then, the reason of the rule seems to be this, that the husband becomes liable where the marriage takes effect, because it is his wife's debt.] The ground of the rule is shewn in the case of *Haywood v. Fiat and Wife*, 8 C. & P. 59. 2. Then, was there a payment? When the bill was sent to Captain Clay- [561]-ton, he returned it, saying that he never employed the plaintiffs. Colonel Somerset thereupon sent the plaintiffs a cheque for the amount, upon the understanding that he was to sue Captain Clayton for it. Being afterwards advised that Colonel Somerset could not maintain an action, the payment was treated as a payment under a mistake, and the money was returned. It was not a payment by Colonel Somerset at the request or on behalf of either his daughter or Captain Clayton. There was no privity. It was like a payment by a stranger. 3. Then, was this a contract for necessities? Marriage is a contract which the law allows an infant to enter into: and an infant is liable for necessities supplied to his children. In *Chapple v. Cooper*, 13 M. & W. 252, it was held that an infant widow was bound by her contract for the furnishing of the funeral of her husband, who had left no property to be administered,—on the ground that the contract for the burial of the husband was the same as a contract by the widow for her own personal benefit. There can be no reason, therefore, why an infant should not pledge her credit to a solicitor employed to see that the arrangements for a settlement (which is an essential part of the contract of marriage) are properly carried out. It is difficult to conceive a contract more clearly for the infant's benefit. [Byles, J. Captain Clayton, no doubt, would have married the lady without any settlement. Is it a “necessary” for a lady to have 10,000l. settled upon her?] Having an offer of a settlement of 10,000l., it is necessary that she should have legal advice as to the mode of effecting it. [Williams, J. No doubt it is reasonably necessary that she should have the legal assistance of some one in whom she could confide, to look to her interests in the arrangement of the terms of the contract.] In ascertaining what are “necessaries,” regard [562] must always be had to the position of the infant. [Byles, J. And the occasion.] “Necessaries,” says Vaughan, J., in *Brayshaw v. Eaton*, 5 N. C. 231, 234, 7 Scott, 180, “is a word of relation: what is necessary in one station is not necessary in another.” [Williams, J., referred to

Rainsford v. Fenwick, Carter, 215, where the question was whether wedding-clothes were necessities for an infant.] The infant might be an orphan, without friend or relation. What would be her position then?

Huddleston, Q. C. (with whom was Inderwick), for the defendants. To entitle the plaintiffs to succeed in this action, they must establish two propositions, first, that the infant made a contract, secondly, that it was a contract for "necessaries."

1. The first is a question of fact: and here the court are to draw inferences as a jury. There are three parties,—the father, the lady, and the intended husband. To which of these did the plaintiffs give credit? Looking to the facts stated, can the court for a moment doubt that the plaintiffs gave credit either to Colonel Somerset or to Captain Clayton, and not to the lady? Then, see whether the circumstances do not shew a contract with Colonel Somerset? The plaintiffs were his solicitors. He goes to them with Captain Clayton's letter in his hand, gives them instructions to prepare the settlement, and names a trustee, with whom he puts the plaintiffs in communication. By whom did the plaintiffs consider they were instructed when they wrote the letter of the 14th of August, 1862, to Captain Clayton's solicitor? Could they after that turn round and charge Captain Clayton? [Willes, J. Is it not very much like the case of landlord and tenant? The landlord's solicitor prepares the lease, and the tenant pays for it; or, at least, the landlord pays his attorney, [563] and sues the tenant for money paid to his use. The liability in the first instance, I should think, rests between Colonel Somerset and the lady.] Colonel Somerset set the plaintiffs in motion. Probably, if Colonel Somerset had paid the bill, he might have been entitled to recover against Captain Clayton. But, as between *these* parties, the credit clearly was given to Colonel Somerset. [Keating, J. The letter of the 14th of August, it must be observed, was written by a person who was fully cognizant of the usage of the profession. Byles, J. The letter of the 20th bears the most strongly against you on this part of the case.] Those letters only shew that the plaintiffs considered that they were to look for payment either to Colonel Somerset or to Captain Clayton. [Byles, J. Captain Clayton might be liable in two ways, personally upon the usage, or in right of his wife.] In no case, it is submitted, could the lady be liable. Suppose the marriage had not come off, could there be a doubt that the plaintiffs would have had a good claim against Colonel Somerset? Down to the 20th of August, there is no suggestion that any one but Colonel Somerset could be liable. Captain Clayton had at that time employed his own attorney, Barnard. There being a controversy as to which of the solicitors should draw the settlement, the matter was referred to Mr. Cookson, a gentleman of great experience. That gentleman having decided the practice to be, as it undoubtedly is,—for the lady's solicitor to prepare the settlement, and for the gentleman to pay for it, the plaintiffs did the work, and sent in their bill to Captain Clayton (a)¹. Suppose the marriage went off, and the lady (being of full age) was sued, would there be any evidence to go to the jury of a retainer by her? Down to the time of bringing this [564] action, there was no suggestion that credit had been given to her. [Willes, J. The parties probably acted upon the case of *Grissell v. Robinson*, 3 N. C. 10, 3 Scott, 329 (a)². 2. Then, as to the question of necessities. [Byles, J. That presents the greatest difficulty.] In Com. Dig. *Infant* (B. 5), it is laid down that "necessaries for an infant's wife are necessities for him; but not if provided in order to the marriage: *Turner v. Trisby*, 1 Stra. 168." In *Wharton v. Mackenzie* and *Cripps v. Hills*, 5 Q. B. 606, D. & M. 545, upon a replication to a plea of infancy, that the goods were necessities suitable to the degree, estate, circumstances, and condition of the defendant, an under-graduate of the university, it was held that his rank or allowance is not so much to be considered as his situation in statu pupillarii at college, with most things necessary for his sub-

(a)¹ Gray stated that this bill was made out charging the husband and wife.

(a)² There, one P. orally agreed to grant the defendant a lease for sixty years: the defendant paid part of the consideration, but P. died before the contract was carried into effect. The plaintiffs, P.'s executors, then granted the lease, which recited that P.'s agreement had been treated as void by the court of Chancery, and that the lease was granted pursuant to a proposal of the plaintiffs thereafter mentioned. The plaintiffs having paid their own attorney his charges for drawing the lease,—it was held that they were entitled to sue the defendant for money paid, and that in their own right.

sistence found for him. And in *Smith v. Gibson*, Peake's Add. Cas. 52, it was held that money advanced to place out a female infant apprentice is not recoverable (in an action against her and her husband, she having subsequently married), on a promise by her to re-pay the money, as not being for necessities. It is difficult to see how a settlement can be a benefit to an infant unless she marries: and then it would not be a benefit which endured to her dum sola. [Willes, J. In *Chitty on Contracts*, 7th edit. 140, it is said that an infant [565] may, with the approbation of the court of Chancery, make a marriage-settlement, or a contract for a marriage-settlement: and in a note it is added,—“It seems that a feme infant, before the 18 & 19 Vict. c. 43, s. 1, might sometimes be bound by a marriage contract properly settling her property, and fairly entered into with the consent of her friends and relations:” citing *Ainslie v. Medlicott*, 9 Ves. 13, and *Melner v. Lord Harwood*, 18 Ves. 259.] On neither ground, it is submitted, can the plaintiffs be entitled to sue Captain Clayton.

Gray, in reply. There was abundant evidence of a request by Miss Somerset to the plaintiffs to prepare the settlement, and that they looked to Captain Clayton as the paymaster, through his wife. There is no pretence for saying that the lady would not have been liable as upon a contract for necessities, if the marriage had never taken place.

WILLES, J. This case has been most satisfactorily argued; and, as it involves points of some nicety, we will take time to consider our judgment.

Cur. adv. vult.

WILLES, J., now delivered the judgment of the court (a):—

This case was well argued at the sittings after Trinity Term, by Mr. Gray for the plaintiffs and Mr. Huddleston for the defendants, before my Brothers Byles and Keating and myself, when we took time to consider.

It was an action brought by solicitors, to recover the costs of preparing a settlement upon the marriage of [566] the defendants, claimed as a debt payable by the defendant Mrs. Clayton, her husband being made a defendant for conformity only.

The pleadings raise two questions,—first, whether there was any debt incurred by Mrs. Clayton in respect of these costs,—secondly, whether, if it was incurred by her, infancy is a bar. The plea of payment was properly abandoned.

These are the only questions; and they affect the liability of the wife alone. No question as to who is liable, if she be not, is directly in issue.

The marriage took place in September, 1862. At that time Mrs. Clayton was about eighteen; and up to that time she had from her childhood lived in her father's house as one of his family, and, as must be presumed in the absence of any statement to the contrary, upon the same terms as an unmarried daughter without property of her own usually lives under her father's roof, that is to say, at his expense.

The settlement was altogether of personal property of the husband, viz. 10,000*l.*, and 100*l.* a year for pin-money. It must be taken to have been a proper settlement, and such as was beneficial to the lady as well as the gentleman: and we should therefore feel little difficulty in dealing with the question of infancy, assuming that of retainer to be decided in favour of the plaintiffs.

The instructions for the settlement were given to the plaintiffs by the lady's father, who had occasionally previously employed them as his solicitors. At the time, he handed them the letter of the intended husband proposing the settlement, and referring to his solicitor.

A correspondence ensued between the plaintiffs and the solicitor named by the husband, in which each claimed the right to prepare the settlement. In the [567] end, they agreed to refer the matter to Mr. Cookson, who decided that beyond all doubt the practice in the profession is, the lady's solicitor should draw the settlements, adding that the gentleman should have the privilege of paying for them.

Of the correctness of this opinion, as to settlements of personal property, such as that under consideration, no doubt was or properly could be suggested. Accordingly, the husband's solicitor gave way, and the settlement was prepared by the plaintiffs under the direction of the trustee named by the father on behalf of the lady; and it was executed by both the defendants previous to their marriage.

In allowing the settlement to be prepared by the plaintiffs, the husband's solicitor

(a) Willes, J., Byles, J., and Keating, J.,—Williams, J., having heard only a portion of the argument.

acted, it is true, without any positive or express authority from his client ; but he did so in the exercise of a just discretion, and acting within the scope, as it appears to us, of his retainer to act for the intended husband, which involved an authority to do what was right and usual on his behalf in the business.

We think the reference by Captain Clayton to his solicitor cannot properly be construed as excluding the ordinary usage. Indeed, his employing a solicitor of his own in the first instance, if he thought the settlement was to be prepared by that gentleman, shews that he knew the expense was in some shape to fall upon himself. He might naturally employ a solicitor to see that the settlement, by whomsoever it was prepared, was properly expressed. His reference to "his solicitor, Mr. Charles Barnard," in his letter proposing the settlement, moreover, was of itself a warrant for the lady's friends to deal with Mr. Barnard as having authority, acting on his behalf, to do and consent to all that was right and usual in such a transaction ; and no secret instructions could affect that *prima facie* [568] authority. That Captain Clayton ought to pay the plaintiffs, therefore, we entertain no doubt. And we further consider that the duty to do so is not merely an honorary obligation on his part, but also a legal liability arising out of the ordinary course of business, by which in such a case the solicitor employed on the part of the lady is to prepare the settlement, and the gentleman is to pay the bill.

In order to determine the present case, it will be necessary to consider in the first place the origin of this liability, whether as upon an original liability of the husband to the solicitor, who is to be considered his for this purpose, or only as a liability to reimburse the expenses of the settlement which the lady or her father, or person standing in the place of a parent, may have incurred.

We think the latter to be the correct view. The employment of the lady's solicitor to prepare the settlement is not a mere compliment or matter of patronage : it has also the substantial object of satisfying the lady's friends that all proper care has been exercised on her behalf by some person in whom they confide, and of giving a remedy for negligence by action against the solicitor. He does not the less act as the solicitor of the lady or her parent, because the intended husband is to be ultimately liable, in the event of the marriage taking place.

The proper conclusion, therefore, is that the retainer is to be considered as that of the lady or her parent, as the case may be, but that usage makes the husband liable to indemnify whosoever on the part of the wife has properly incurred expense by retaining the solicitor to prepare a settlement in the propriety of which the latter has so large an interest.

This precise question is, as might be expected, bare [569] of authority : but the ordinary case of a lease, which in practice is prepared by the landlord's solicitor, and paid for by the tenant, furnishes an analogy. In such a case, if the landlord pays, upon the default of the tenant, the former may upon the usage maintain an action against the latter for the money paid : *Grissell v. Robinson*, 3 N. C. 10, 3 Scott, 329.

Such was the nature of the action brought by Colonel Somerset in this case, to which there was no answer, if the retainer was by him on his own account, and not as agent on the behalf of his daughter.

That action was abandoned, upon the notion that in point of law the retainer was by Mrs. Clayton before her marriage, and that the claim therefore should be made in the present form.

From the above it follows that either the defendant was liable in the abandoned action, or that the defendants are liable in this. It further follows that the liability turns upon the question whether the work was done upon the retainer of Colonel Somerset as acting for himself or as agent for and on behalf of his daughter. In the former case, judgment for the defendants upon the ground that Mrs. Clayton is not liable, though Captain Clayton is. In the latter, judgment for the plaintiffs, upon the ground that Mrs. Clayton is liable.

The question upon which the decision of the case thus turns is one of fact, which a jury, upon ascertaining that Captain Clayton was at all events ultimately liable, would probably make short work of. The parties, however, have substituted the court for the jury ; and we are bound to give a verdict upon that question of fact, in accordance, so far as the form of the question allows, with the merits of the case, and such as, if given by a jury, we should not have felt dissatisfied with or set aside as being contrary to the weight of evidence.

[570] Now, the evidence to make out that Colonel Somerset was the proper and only client of the plaintiffs, was, his instructing them in person in the first instance, and naming the trustee, taken in connection with the fact that the young lady was a minor and a member of her father's family, living as to all ordinary wants at his expense.

The evidence to prove Mrs. Clayton liable, on the other hand, was that the instructions were given by her father and by the trustee on her behalf that, knowing, as she must have done, that a settlement was being prepared, she authorized and ratified those instructions by signing the settlement when prepared, and that after all she was the person most and principally interested.

The expense thus incurred was not part of the ordinary continuous outgoings for clothing, food, and such like, for which the paterfamilias would have the bills sent in to him as a matter of course. It was an occasion of a single and, though not extraordinary exceptional character, in which it was not unreasonable or improbable that the person to be chiefly benefited should incur a liability which the fact of the marriage would transfer to the shoulders of the person who ultimately ought to bear it.

In these circumstances, we think it may justly be concluded that there was a retainer by Mrs. Clayton as a principal, through her father, who acted on her behalf as her agent, and disclosed his principal at the time.

Upon the remaining question, that of infancy, we have already stated our opinion. The principal contract of marriage was one which it was competent for an infant to enter upon. She had no property to settle, and would have had no certain provision without the settlement, and the preparation of the settlement [571] was therefore beneficial, as securing to her, at her election, a proper provision, which may justly be considered a necessary suitable to her estate and condition.

It would be a perversion of the law for the protection of infants, to hold that under these circumstances an infant could not contract for the preparation of such a settlement.

Whether the provisions in the settlement may be said absolutely to bind her, it is unnecessary to consider; because, so far as all other parties are concerned, she is thereby secured against want.

For these reasons, our judgment is for the plaintiffs.

Judgment for the plaintiffs.

WALKER, Clerk, v. BROGDEN. Nov. 10th, 1864.

It is no ground for changing the venue in an action for a libel contained in a local newspaper, that the defendant, the proprietor, possesses much influence in the county in which the venue is laid, and has since the commencement of the action evinced a disposition to exercise it to the plaintiff's prejudice.—But the court intimated that they would interfere if the defendant should before the trial publish anything in relation to the matter of the action reflecting upon the plaintiff.

This was an action of libel. The declaration stated that the defendant falsely and maliciously printed and published of the plaintiff, and of him as vicar of Bradney (which he then was), in a public newspaper called the *Lincoln Gazette*, the words following, that is to say, "Bradney. To the Editor. On Sunday morning last, accompanied by a few friends who were visiting us, I attended our parish church. When I entered, there were only some eight or ten persons present; and, after having got comfortably seated, I saw our worthy Divine (meaning the plaintiff) escorting the school-mistress of Southrey up the aisle. After passing some twenty empty pews, his Reverence [572] (meaning the plaintiff) halted at the one he had appropriated to my use in consequence of some dispute which had occurred twelve months ago. I immediately rose, and requested him to shew the lady into another pew; explaining to him that there were plenty of empty pews, and that, had we another introduced into our pew, we should be inconveniently full. 'Shure,' says he (meaning the plaintiff), 'get in now; ye'll get in here:' at the same time giving me a slight push. I remonstrated with him (meaning the plaintiff); telling him not to assault me in the church. 'Shure,' says he (meaning the plaintiff), 'I'll assault ye immediately.' I, not wishing for any disturbance with the gentleman (meaning the plaintiff) retired: but, before I had got three yards from the pew, he (meaning the plaintiff) had laid his hands upon one

young lady, and pushed her completely out of one particular corner, although there was ample room where I had been sitting, after I had left the pew. So thoroughly disgusted was I with his (meaning the plaintiff's) ungentlemanly and ridiculous conduct, that I left the church, as also did my friends. Surely there is some law to prevent such conduct to a churchwarden, or I shall use my best endeavours to obtain a sufficient sum of money to present him with something if he will resign, or at any rate make a tour and endeavour to find another specimen of humanity like unto himself, as it is a pity two places should be troubled with such a man. Let him (meaning the plaintiff) remain until we send for him again. John R. Malthy." "To the Editor. Our Vicar (meaning the plaintiff) has committed a slight mistake, in turning the churchwarden out of his own pew last Sunday morning. I may be wrong: but I think he (meaning the plaintiff) did. I can hardly reconcile his practice with his profession. He (meaning the plaintiff) pro-[573]-fesses to be a follower of the Great Apostle's example, and a successor of His apostles in a direct line: but I think there must have been a link broken in the chain which connects our Divine (meaning the plaintiff) with our Apostle. He (meaning the plaintiff) professes to be moved by the Holy Ghost to preach the gospel; and there can be no doubt that he (meaning the plaintiff) was moved by the *spirit* when he came to the churchwarden, and turned him out of his place in a towering passion. Strange preparation for that solemn service! Is not the inconsistent conduct of the professed followers of Christ enough to make infidels of us all? The Church in all ages has suffered most from her professed friends. What is the use of a Bishop, if he cannot stop the vagaries of a Divine? Churchman." Claim 500l.

Simon, Serjt., for the plaintiff, moved for a rule nisi to change the venue from Lincolnshire to London. A similar application had been made, but without success, to Keating, J., at Chambers. No affidavit was used on that occasion. The learned Serjeant now produced an affidavit of the plaintiff, in which he deposed as follows:— 1. I am a clergyman of the Church of England, and for the last twelve years have been vicar of Bradney, in the county of Lincoln. 2. The defendant in this action is the registered printer and publisher, and is, I believe, the editor, of a newspaper called the *Lincoln Gazette*. 3. This action is brought by me against the defendant, for a libel published by him concerning me in the said newspaper of the 25th of June last, and which said libel was and is contained in two letters which appeared in the said paper on the said 25th of Junelast, and are the letters set out in the declaration. 4. Both such libels being not only entirely false, but malicious, my attorneys, by my [574] direction, wrote to the defendant, and requested him to apologize for such libels, and to state who was the author of the libel signed "Churchman." 5. The defendant, instead of complying with such request, did, as I verily believe, immediately on receipt of such letter, go over to Bradney, and induce the said J. R. Malthy to take out a summons against me for the alleged assault mentioned and referred to in the said letters. One of the reasons for such belief is, that such assault was alleged to have been committed ten days before the defendant received such letter from my attorneys, yet no summons was taken out by the said J. R. Malthy until after the defendant had received such letter: and the other of such reasons is, that the said J. R. Malthy stated on oath before the magistrates who heard the said summons, that one of his motives for taking out such summons was with a view to assisting the defence of this action, which it was expected would be commenced, or words to that effect. 6. The defendant after, as I so believe, having induced the said J. R. Malthy to take such proceedings, wrote to my attorneys, in answer to their said letter, that he understood that he (Malthy) had taken such proceedings, and that he the defendant should abide the result thereof; but he wholly refused or neglected to state who was the author of the letter purporting to be signed by a churchman, in which drunkenness was imputed to me in the church of which I am the vicar: whereupon this action was brought on the 18th of July; and the declaration was delivered on the 10th of August last. 7. The said summons was heard before the magistrates at the Wragley petty sessions on the 1st of September last, when the said J. R. Malthy and two witnesses called on his behalf were examined: but, being incompetent myself to give evidence, I was not then in a condition satisfactorily to rebut the evi-[575]-dence of the said J. R. Malthy and his witnesses by the testimony of the witnesses whom I called: whereupon, the magistrates considering that the weight of evidence was on the side of the complainant, I was convicted, and fined 5l. 8. It was

my intention and wish to appeal against the said conviction: but, upon consulting with my attorneys, and after taking counsel's opinion on the matter, was advised that I had no appeal against the said conviction. 9. I distinctly and positively say that I never assaulted the said J. R. Maltby, and that I was not and am not guilty of the conduct imputed to me in the said letters, and that the said libel is in every part of it wholly and utterly false. 10. A report of such hearing before the magistrates has been published in the *Lincoln Chronicle*, and various garbled and unfair reports have also been published by the defendant in his paper called the *Lincoln Gazette*, which is stated by him to be circulated extensively and generally throughout the county of Lincoln. 11. I verily believe that the defendant, in publishing the said libel, has been actuated solely by malice and by the desire and intention to injure and if possible to effect the ruin of my character: and my reasons for such belief, among others, are that, in reference to an application lately made by my attorneys to Byles, J., on a summons for leave to amend the declaration in this action by altering the venue from Lincoln to London, the defendant has caused to be printed and published in his paper of the 29th of October last a paragraph as follows,—“Bradney. The Rev. William Walker again. This dear lover of litigation has been at his old work during the past week. Most people are aware that the Reverend gentleman has commenced an action against the proprietor of the *Lincoln Gazette*, for publishing a letter from Mr. Maltby, one of the churchwardens of the [576] parish, affirming that he had been assaulted by the pious Divine in his own pew on a Sunday. Notwithstanding that Mr. Walker was convicted by the magistrates and fined 5*l.* for this very offence, he the other day endeavoured to prevail upon the court to allow the action to be tried in London. This motion was opposed by Mr. Tweed's agent: and the Reverend gentleman was defeated. Mr. Walker must therefore appear before those who are likely to know him best: and, if he is afraid of the verdict of a Lincolnshire jury, we think his case must be a weak one.” 12. The said libel has been not only injurious to my personal character, but has seriously affected my influence, and has been and is highly detrimental to my ministrations as a clergyman; and, the said conviction being considered as a confirmation of the imputations contained in the said libel, great prejudice has been excited, and I believe exists in consequence against me throughout the county, as well as in the city of Lincoln, and in the said parish and neighbourhood. 13. Independently of the circumstances mentioned in the last paragraph, the defendant, by means of his said paper, which is extensively circulated as aforesaid, has excited and greatly increased, and, from the spirit which he has displayed, will, as I believe, continue to excite and increase the prejudice now existing against me, as in the last paragraph mentioned. 14. For the reasons and circumstances stated in this affidavit, it is of the utmost importance that I should have the earliest opportunity of vindicating my character, appearing myself as a witness, and shewing before a jury that the said libel is wholly false and malicious, and that the evidence upon which I was convicted before the magistrates produced on the trial of this action was and is wholly unworthy of credit; for which purpose I am desirous of having the cause tried in [577] Westminster or London at the sittings after this present Michaelmas Term; and, unless the venue be changed from Lincoln to London, it cannot be tried until the next Spring Assizes; and, for the reasons already stated, I verily believe that it could not be so fairly and independently tried at Lincoln as it would be in London.

The learned Serjeant submitted that it was obvious that the plaintiff's chance of having an impartial trial in the county of Lincoln was much impaired by the local influence which the proprietor of the *Lincoln Gazette* must necessarily possess, and which he seemed disposed to exercise so unscrupulously.

ERLE, C. J. We are of opinion that there should be no rule. At the same time, we are well aware of the power of the local press, and that it may be exercised so as unduly to influence the jury on a trial of this sort. We therefore think it right to add to our refusal of the rule an intimation that, if there should appear in the paper in question, at any time before the trial, any publication of a disrespectful character in relation to the matters involved in this action, the venue shall be immediately changed either by the court or by a judge at Chambers.

Rule refused.

[578] LINDLEY v. LACEY. Nov. 3rd, 1864.

[S. C. 34 L. J. C. P. 7; 11 L. T. 273; 10 Jur. N. S. 1103; 13 W. R. 80.]

Upon a negotiation between the plaintiff and the defendant for the sale of the fixtures, furniture, and goodwill of a business (the agreement for which was afterwards reduced into writing), a distinct and separate promise was made by the defendant, in consideration of the plaintiff's signing the agreement, that he the defendant would settle an action then pending against the plaintiff at the suit of one C. :—Held, that evidence of this prior oral agreement was admissible, notwithstanding the written agreement contained an authorization to the defendant to settle C.'s action out of the purchase-money.

The defendant, who had formerly occupied a coffee-house, No. 3 Agar Street, Strand, underlet the premises to the plaintiff, and sold him the furniture, fittings, and utensils therein. The plaintiff, having exhausted all his capital in the purchase of the business, and becoming embarrassed, and being sued by one Chase, to whom he had given an acceptance for 25l., upon which he was being sued by Chase, applied to the defendant for assistance. The defendant thereupon promised that, if the plaintiff would abstain from calling his creditors together (as he contemplated doing), and would induce the landlord of the premises to forbear to press for payment of the rent then due (and for which the defendant remained liable), he, the defendant would settle Chase's action. Some further negotiation took place between the parties, and ultimately the defendant proposed to re-purchase the furniture, fittings, &c., and re-take the premises. This negotiation resulted in the following agreement being drawn up and signed by the plaintiff and defendant :—

"It is agreed by and between the parties hereto that Lindley shall sell and Lacey shall purchase of Lindley, all the furniture, fittings, fixtures, and utensils and other things now on the premises No. 3 Agar Street aforesaid, for the sum of 145l., to be paid for on Lacey finding a customer and being paid for the property, or on his receiving the amount of life-policy, whichever event first happens; the said goods not to be considered as Lacey's property until the said sum of 145l. be paid to Lindley, but remain vested in Lindley until such sum of 145l. be paid, and be merely in [579] Lacey's care on Lindley's behalf until paid for as aforesaid. In the meantime, Lindley authorizes Lacey to settle the action *Chase v. Lindley*, and also to pay the rent now due to Mr. Phythian, such payments to be on account of the 145l. and form part of the same: but the whole of the goods to continue absolutely the property of Lindley until the sum of 145l. be satisfied. Lacey hereby releases Lindley from the tenancy of the premises from this day, and Lindley gives up to Lacey possession thereof. And it is declared by Lindley that he has full power and right to dispose of the goods to Lacey as aforesaid, that he has no judgment or incumbrance thereon which may vitiate the sale to Lacey; so that, on the amount of 145l. being satisfied, the goods shall then be the property of Lacey absolutely."

Before this memorandum was signed, the plaintiff said to the defendant, "Am I to understand that Chase's bill is to be settled? because that is the ground-work of the whole." To this the defendant replied, "Yes: I will see it settled:" and thereupon the plaintiff signed the agreement; and, in pursuance thereof the defendant took possession of the premises, but, failing to settle Chase's action, the goods were seized under a *fi. fa.* and sold. For the breach of this oral agreement, amongst things, this action was brought.

On the part of the defendant, it was objected at the trial, which took place before Erle, C. J., at the sittings at Westminster after last Easter Term, that the written memorandum did not contain any undertaking by the defendant to settle Chase's bill; and that evidence of a previous parol agreement could not be received, the bargain between the parties having been reduced into writing.

For the plaintiff it was insisted that it was com-[580]-petent to him to shew that there was a prior oral agreement with regard to the settlement of Chase's action, which was collateral to and independent of the subsequent written agreement.

To this proposition his Lordship assented; and he left it to the jury to say whether or not there had been such an oral agreement as that relied on by the plaintiff. The jury found in the affirmative.

A verdict was thereupon entered for the plaintiff, damages 104l., and leave was reserved to the defendant to move to enter a verdict for him, if the court should be of opinion that evidence of the prior oral agreement was not admissible, or to reduce the damages.

Joyce, in Trinity Term last, obtained a rule calling upon the plaintiff to shew cause why a verdict should not be entered for the defendant: or why the verdict should not be reduced to 26l. on the money counts, subject to a set-off, on the grounds, amongst others, that there was no evidence to support any part of the plaintiff's claim under any count of the declaration, that evidence of any oral bargain was not admissible, as the contract was subsequently reduced into writing, that, if there was any agreement other than that reduced into writing, it was an agreement required by law to be in writing,—and that there was no sale other than that under the written contract.

Hayes, Serjt., and Grantham, now shewed cause. The question is whether there was a distinct and collateral verbal promise by the defendant to settle the action on Chase's bill; for, if there was, the plaintiff was not precluded by the subsequent written agreement from suing upon it. The argument that the written agreement overrides the oral one, is founded [581] upon the assumption that the parties intended the former to express the whole bargain between them. The rule of law is clear that a collateral oral agreement, whether prior to or contemporaneous with the written agreement, is not excluded, provided the two may consistently stand together. The rule is thus stated in Roscoe's *Nisi Prius*, 10th edit. 16,—"There are cases in which a parol agreement may exist between the parties to a written agreement on a matter collateral and superadded to it, so that both may well subsist together. In such cases parol evidence of the collateral matter is admissible; for the original contract is unaffected by it. Thus, where the parties to an indenture of charterparty afterwards agreed by parol for the use of the ship at a period before the charterparty attached, parol evidence of this was held admissible in an action on this latter agreement,"—citing *White v. Parkin*, 12 East, 578. In *Pym v. Campbell*, 6 Ellis & B. 370, in an action on an agreement for sale, the plaintiff at the trial produced an agreement signed by the defendant. The latter thereupon gave evidence that the plaintiff and defendant, having negotiated as to the purchase, agreed on the terms, and it was arranged that they and one A. should meet, and that, if A. approved of the property, they would make a bargain on those terms; that at the proposed meeting the plaintiff did not attend until A. had gone; that it was then arranged that the plaintiff and defendant should draw up and sign a memorandum of an agreement of sale, but that it should not be a bargain until A., on being consulted, approved; and that A. did not approve. The judge, upon this evidence, directed the jury to find for the defendant, if satisfied that it was arranged that the writing should be no agreement until A. approved: and it was held a right direction. So, in *Davis v. [582] Jones*, 17 C. B. 625, it was held that parol evidence was admissible to shew that a written contract, which had no date, was not intended to operate from its delivery, but from a future uncertain period. "A written instrument," said Jervis, C. J., "does not necessarily operate from delivery: it is competent to a party to shew that it was delivered as an escrow, and that, though it appears upon the face of it to be presently operative, it was in reality not intended to operate until the happening of a given event. That was expressly decided in *Murray v. The Earl of Stair*, 2 B. & C. 82, 3 D. & R. 278. It was perfectly competent to the plaintiff, the agreement being silent on the subject, —to shew by parol testimony that it was not intended to take effect until the happening of something else." To the same effect is *Harris v. Rickett*, 4 Hurlst. & N. 1. There, a trader, being indebted to various persons, procured from A. an advance of 200l., for which he verbally agreed to give a bill of sale of all his property, if called upon to do so. On receiving the advance, he gave to A. a promissory note for 200l., a memorandum of agreement to assign some property expectant on the death of his wife's father, together with a policy of insurance, and also another memorandum of agreement to pay 10l. yearly as bonus. At a later period, on being requested, he executed a bill of sale of all his property to A.: and it was held that evidence of the original verbal agreement was admissible, inasmuch as the subsequent written agreement did not contain and was not intended to contain the whole agreement between the parties. Again, in *Green v. Saddington*, 7 Ellis & B. 503, the plaintiff and defendant agreed by word of mouth that the

plaintiff should pay 37l. for the interest of the defendant in premises occupied by him as a slaughter-house, and for the fixtures; the defendant to return 10l. if the [583] plaintiff were refused a licence to use the premises as a slaughter-house. The premises and fixtures were transferred to the plaintiff, and the defendant received the 37l. The action was afterwards brought to recover 10l. on an allegation that the licence to use the premises as a slaughter-house had been refused to the plaintiff. A nonsuit was directed, on the ground that the contract was for an interest in land, and was void under the 4th section of the Statute of Frauds. Upon a rule to set aside the nonsuit, it was held by Wightman, J., and Erle, J. (Crompton, J., not concurring), that, the contract being executed as far as regarded the land, and the promise sued on relating wholly to money, the plaintiff might recover, though the contract was not in writing. [Keating, J. The principle you are contending for was recognized in a still more recent case in this court, — *Hallis v. Littell*, 11 C. B. (N. S.) 369. There, the plaintiff declared upon an agreement by the defendants to transfer to him a farm which he (the defendant) held under Lord Sydney, "upon the terms and conditions of the agreement under which the same was held by the defendant under Lord Sydney." The defendant pleaded that the agreement declared on was made subject to the condition that it should be null and void if Lord Sydney should not within a reasonable time after the making of the agreement consent and agree to the transfer of the farm to the defendant; and it was held that it was competent to the defendant to prove by extraneous evidence this contemporaneous oral agreement,—such oral agreement operating as a suspension of the written agreement, and not in defeazance of it. In giving judgment, Erle, C. J., said: "In *Pym v. Campbell*, 6 Ellis & B. 370, and *Davis v. Jones*, 17 C. B. 625, it was decided that an oral agreement to the same effect as that relied on by the defendant might be admitted, [584] without infringing the rule that a contemporaneous oral agreement is not admissible to vary or contradict a written agreement. It is in analogy with the delivery of a deed as an escrow; it neither varies nor contradicts the writing, but suspends the commencement of the obligation." Byles, J. All these cases proceed upon the principle that extraneous evidence is always admissible to apply the agreement.] Procuring the landlord's forbearance here was ample consideration for the defendant's promise to meet Chase's bill.

Joyce (with whom was Hawkins, Q. C.), in support of the rule. This was a bargain for the sale of goods above the value of 10l.; it was a contract concerning an interest in land; and it was an engagement to pay the debt of another: there were three reasons, therefore, why it should be in writing. The whole was clearly one agreement. The circumstance of Lindley having been sued by Chase was the whole foundation and motive for the negotiation. [Byles, J. The jury have found that there was such a collateral agreement as suggested. The only question for us is, whether there *can* be such an agreement in point of law.] The supposed oral agreement was only a part of the agreement between the parties, which by law must be in writing. It was plainly contemplated that the payment of Chase's bill was to be taken as part-payment of the purchase-money for the fixtures, furniture, and goodwill of the premises: it is so stipulated in the agreement itself. It might be that Lacey never would become liable to pay the 145l. at all. All was conditional. None of the cases referred to have any bearing upon the question raised here.

ERLE, C. J. I am of opinion that this rule ought to be discharged. The plaintiff and the defendant had a [585] treaty respecting the sale of certain goods from the former to the latter. That treaty originated in an action brought by one Chase against the plaintiff as the acceptor of a bill of exchange for 25l. which became due on the 16th of June, 1863, in which Chase had signed judgment and was about to issue a fi. fa., under which the goods which were the subject of this action would have been seized. As this would have destroyed the goodwill of the plaintiff's business, which the defendant was desirous of preserving, the latter proposed and it was ultimately agreed *in writing* that the goods should be sold to the defendant upon certain terms of credit. At the time of the negotiation there was a distinct collateral verbal agreement between the plaintiff and the defendant for something to be done before the sale of the goods by the plaintiff to the defendant should be carried into effect, viz. that the defendant should pay the acceptance in the hands of Chase and so stay the action of *Chase v. Lindley*. This was a thing which was totally collateral and distinct from the agreement for the sale of the goods and the transfer of the posses-

sion of the premises. The jury found that that which the plaintiff deposed to as to the preliminary treaty was a true representation of the transaction, viz. that there was a distinct collateral agreement by the defendant that he would take up the bill if the plaintiff would forbear from calling his creditors together, and would persuade the landlord not to press for payment of the rent, for which the defendant remained liable. The words used were perfectly clear to that effect. The defendant said, "I will purchase the goods, and I will see Chase's matter made right." On a subsequent day, there was a treaty between the parties as to the amount to be paid for the goods; and it was ultimately settled upon the terms contained in the written memorandum. Before sign-[586]-ing that agreement the plaintiff said to the defendant, "Am I to understand that Chase's bill will be settled, for that is the ground-work of the whole?" To which the defendant replied, "Yes: I will see it settled:" and thereupon the agreement was signed. Taylor, a witness who was present at the time, corroborated the evidence of the plaintiff. I think, therefore, the intention of the parties was that this settlement of Chase's bill should form the subject of a distinct collateral promise,—a preliminary matter to be done at once. I take it to be substantially the same as if, the agreement for the sale of the goods being before them, Lacey had said to Lindley, "In consideration of your signing that agreement, I will settle Chase's action." A long stream of cases has been referred to by my Brother Hayes: but they all reduce it to a question of fact, as does almost every case which turns upon the construction of a written contract. If the instrument shews that it was meant to contain the whole bargain between the parties, no extrinsic evidence can be admitted to introduce a term which does not appear there. But, if it be clear that the written instrument does not contain the whole, and the jury find that there was a distinct collateral verbal agreement between the parties, not inconsistent with the written contract, the law does not prohibit such distinct collateral agreement from being enforced. In some of the cases,—as in *Harris v. Rickett*, 4 Hurlst. & N. 1,—there was a prior verbal agreement. In *Davis v. Jones*, 17 C. B. 625, the oral and the written agreement were contemporaneous. So, in *Wallis v. Littell*, 11 C. B. (N. S.) 369, there was a contemporaneous oral agreement that the farm was not to be transferred unless Lord Sydney consented to accept the plaintiff as his tenant. It is clear, therefore, that, if there be a distinct collateral oral agreement between the [587] parties, it is immaterial whether it precedes or is contemporaneous with the written agreement. I think it is clear from the evidence here that there was a distinct collateral agreement that Chase's action should be settled by the defendant, and that evidence of that agreement, which was perfectly consistent with the written agreement, was admissible. The rule, therefore, will be discharged.

BYLES, J. I am of the same opinion. I think there was a prior collateral oral agreement relating to the bill, which the subsequent written agreement did not in any manner interfere with. The written agreement is altogether silent as to the payment of that bill: and there is nothing therein which is at all inconsistent with the prior agreement. The case of *Harris v. Rickett*, 4 Hurlst. & N. 1, seems to me to be precisely in point. But, independently of that, it appears that the original agreement between the parties was that the bill in the hands of Chase should be taken up by Lacey: and that was to be the ground-work of the subsequent arrangement. That being so, *Pym v. Campbell*, 6 Ellis & B. 370, *Davis v. Jones*, 17 C. B. 625, and two recent cases in this court, viz. *Wallis v. Littell*, 11 C. B. (N. S.) 369, and another which has not been referred to, shew that evidence may be given of a prior or a contemporaneous oral agreement which constitutes a condition upon which the performance of the written agreement is to depend. If evidence may be given of an oral agreement which affects the performance of the written one, surely evidence may be given of a distinct oral agreement upon a matter with respect to which the subsequent written agreement is altogether silent: more especially if, as here, in addition to its being a stipulation, it was also a condition. The justice of the case is evidently in accordance with our view of the law.

[588] KEATING, J. I am of the same opinion. The question is whether the facts shew that was the intention of the parties to make a distinct collateral agreement such as the jury have found. It seems to me that the facts do most strongly shew that such was their intention. The first intention of the plaintiff was to call his creditors together. The defendant had a strong interest in preventing that, seeing that he was liable to the landlord for the rent of the premises; and therefore he

proposed to re-purchase the fittings, fixtures, and furniture from the plaintiff. The latter, however, declined to enter into any arrangement unless the bill upon which Chase was suing him was first paid. This the defendant agreed to do: and that of necessity was an agreement which was preliminary and collateral to the written agreement, which was then allowed to proceed. I think the jury came to a right conclusion; and that the law enables us to sustain it.

Rule discharged.

MALLAN v. RADLOFF. Nov. 11th, 1864.

[S. C. 11 L. T. 381; 10 Jur. N. S. 1132; 13 W. R. 139.]

1. A., after inspection of the separate parts, bought of B. soap-frames which were by the contract warranted to be "new frames, with all nuts and bolts complete and perfect." In an action for a breach of this warranty, the declaration alleged that the plaintiff warranted the frames to be fit for the purpose of making soap: and at the trial it was proved, and found by the jury, that, though new, and having the proper number of nuts and bolts, the frames were not reasonably fit for the purpose of making soap:—Held, that the evidence sustained the declaration.—2. Upon the sale of an ascertained article, a known machine, the component parts of which have been inspected by the buyer, *—Quære*, whether there is any implied warranty that the thing is fit for the purpose for which it professes to have been constructed?

This was an action brought by the plaintiff, a soap-manufacturer, against the defendant, an oil-refiner, to recover damages for the breach of an alleged warranty on the sale of certain soap-frames.

[589] The declaration stated that the defendant, by warranting that certain soap-frames were then fit and proper to be used for the purpose of making or manufacturing soap, sold the same to the plaintiff to be used for the purpose aforesaid: yet that the said frames were not then fit and proper to be used for the making or manufacturing soap: whereby the plaintiff, after having used the said frames in the making or manufacturing of soap, suffered great loss and damage, and the soap of the plaintiff was spoiled and rendered useless, and the plaintiff was prevented from carrying on his business as a soap-manufacturer for three weeks, and was obliged to buy new soap-frames, and to remove at great expense the soap-frames which he had bought of the defendant: Claim, 100l.

The defendant pleaded,—first, that he did not sell to the plaintiff the said soap-frames, as alleged,—secondly, that he did not warrant, as alleged,—thirdly, that, at the time of the alleged warranty, the said soap-frames were fit and proper to be used for the purpose of making or manufacturing soap. Issue thereon.

The cause was tried before Keating, J., at the sittings at Westminster after last Term. The facts which after some controversy were ultimately established were as follows:—The plaintiff was a soap-maker, and the defendant a person engaged in the oil trade. The latter being possessed of certain soap-frames, some of which were old and some new, and having no use for them, was desirous of selling them. One Lazarus, the foreman of the plaintiff, a person skilled in the manufacture of soap, having learned through a plant-broker that these frames were for sale, went to the defendant's premises, on the 14th of February last, for the purpose of inspecting them. The frames not being put together, Lazarus inspected the various disjointed parts, [590] and on the following day the defendant received from the plaintiff the following letter:—

"Mr. Radloff.

"St. Luke's Soap Work,
"63 Golden Lane.

"Sir,—Please send to the above address the six new iron frames which were seen yesterday, on the following condition, viz. they are to be warranted *new frames, with all nuts and bolts complete*, and to be delivered free of expense on Monday next, between 12 and 2 o'clock. Please send a receipt for 24l., as cash will be sent on delivery.

"Pro J. MALLAN, C. B. FOSBROKE."

The frames were accordingly sent, accompanied by an invoice and receipt in the following form,—

“London, Feb. 15, 1864.

“Mr. J. Mallan bought of Mr. Arton.

“Six new soap-frames, with bolts and screws complete
and perfect

2½ per cent. discount . £24 0 0
0 12 0

£23 8 0”

At the foot of the invoice was the following receipt, “Paid at same time to W. Arton, 23l. 8s.”

The evidence shewed that the frames were new, and had all the bolts and nuts complete; but that, when put together at the plaintiff's works, it was found that the joints were so ill fitted that they would not contain the liquid soap, and so the plaintiff sustained great loss. One of the defendant's witnesses, however, stated that, though not adapted for the making of soap such as the plaintiff made (which was unusually thin), the frames were quite sufficient for the manufacture of ordinary soap.

There was contradictory evidence as to whether or [591] not the words “and perfect” had been interlined in the invoice after the completion of the bargain.

On the part of the defendant, it was submitted that, assuming the words “and perfect” were part of the bargain, they made no difference: for that the warranty, if any was to be implied from the circumstances, was performed by the delivery of the articles which the plaintiff's foreman had inspected, with all the bolts and nuts complete.

The learned judge left it to the jury (subject to the question of law, upon which the defendant had leave to move) to say whether the invoice was part of the contract,—whether, looking at all the circumstances, the word “complete” meant having the requisite number of bolts and nuts, or, as alleged in the declaration, “fit and proper for the manufacture of soap,”—whether the words “and perfect” were part of the contract of warranty at the time of the bargain,—whether the warranty was broken,—and what damages the plaintiff had sustained by the breach.

The jury found that the words “and perfect” formed part of the contract, that there was a warranty as alleged, and that it was broken; and they assessed the damages at 30l.

Digby Seymour, Q. C., on a former day in this term, obtained a rule calling upon the plaintiff to shew cause why a verdict should not be entered for the defendant, pursuant to the leave reserved, on the ground that the warranty proved did not support the warranty as laid in the declaration. He referred to *Chanter v. Hopkins*, 4 M. & W. 399, and *Ollivant v. Bayley*, 5 Q. B. 288, 1 D. & Meriv. 373.

Petersdorff, Serjt., and Kenealey, shewed cause. The sole question is, whether the declaration is supported [592] by the evidence. The documents, it is submitted, established an express warranty on the part of the defendant that the soap-frames sold were complete and perfect, and fit for the purpose for which they were sold, viz. the making of soap. In truth, the evidence imposed upon the defendant a more extensive obligation than that alleged in the declaration. The defendant professed to sell soap-frames with bolts and screws complete and perfect. That must necessarily mean fit,—reasonably fit, for the purpose for which they were bought. [Bytes, J. The difficulty is that the plaintiff got the specific articles which he bought, after they had been inspected by his foreman. The question is, whether, under such circumstances, there is an implied warranty that the frames were fit for the making of soap.] This was not a purchase of an article of which the buyer could form a correct judgment upon a mere inspection. [Keating, J. The frames, when seen by the plaintiff's foreman upon the defendant's premises, were in pieces. Their fitness for the purpose of making soap could not be judged of until they were put together upon the premises of the plaintiff.] The things sold were soap-frames, and they were warranted complete and perfect. This they could not be unless, they could be used for the purpose of making soap. In *Jones v. Bright*, 5 Bingh. 533, 3 M. & P. 155, on a sale of copper-sheathing, it was held that there was an implied warranty that the

article was fit for sheathing ships. [Byles, J. There, the defendant was the manufacturer of the article: that case has no application here. Erle, C. J. Where the contract is for a known article, to be made, the seller is bound to furnish a thing which is reasonably fit for the purpose to which such an article is known to be intended to be applied: *Brown v. Edgington*, 2 Scott, N. R. 196, 2 M. & G. 279; *Shepherd v. Pylus*, 3 M. & G. 868, 4 Scott, N. R. 434.]

[593] Digby Seymour, Q. C., and J. A. Russell, in support of the rule. This was a sale of a specific and ascertained article, of which the plaintiff by his foreman had such inspection as he deemed sufficient. The case, therefore, falls precisely within *Chanter v. Hopkins*, 4 M. & W. 399, where it was held that, upon such a sale, no warranty can be implied. Lord Abinger, in delivering judgment, there says,—“I agree with the authority which Mr. Byles has referred to, of *Jones v. Bright*, 5 Bingh. 533, 3 M. & P. 155, that, if an order is given for an *undescribed and unascertained* thing, stated to be for a particular purpose, which the manufacturer supplies, he cannot sue for the price, unless it does answer the purpose for which it was supplied. The case may be illustrated by the example which has been already referred to. Suppose a party offered to sell me a horse of such a description as would suit my carriage; he could not fix on me a liability to pay for it, unless it were a horse fit for the purpose it was wanted for: but, if I describe it as a particular bay horse, in that case the contract is performed by his sending that horse; and it appears to me that the present is a similar case. The order is,—‘Send me your patent hopper and apparatus, to fit up my brewing-copper with *your smoke-consuming furnace*.’ The purchase is of a defined and well-known machine. The plaintiff has performed his part of the contract by sending that machine; and it is the defendant’s concern whether it answers the purpose for which he wanted to use it or not.” That doctrine was acted upon by this court in *Prideaux v. Bunnell*, 1 C. B. (N. S.) 613, and also by the court of Queen’s Bench in *Ollivant v. Bagley*, 5 Q. B. 288, 1 D. & Meriv. 373. In *Rigge v. Parkinson*, 6 Hurlst. & N. 955, the plaintiffs having entered into an agreement with the East India Company for the conveyance of troops to Bombay, the [594] defendant undertook to supply the plaintiffs with troop stores “guaranteed to pass survey of the East India Company’s officers;” and it was held by the Exchequer Chamber that this express warranty did not exclude the warranty implied by law that the stores should be reasonably fit for the purpose for which they were intended. That, however, was the case of an unascertained article: and the judgment of Cockburn, C. J., well exemplifies the rule. “The principle of law,” says his Lordship, “is correctly stated in the passage cited from Chitty on Contracts, 6th edit. p. 399, ‘Where a buyer buys a specific article, the maxim ‘caveat emptor’ applies: but, where the buyer orders goods to be supplied, and trusts to the judgment of the seller to select goods which shall be applicable to the purpose for which they are ordered, there is an implied warranty that they shall be reasonably fit for that purpose.’” Here, the purchase was of specific articles: the buyer did not trust to the judgment of the seller. This is the case of an express warranty: and none other can be implied. What is the meaning of the warranty into which the defendant entered? That these soap-frames should be complete with all bolts and screws,—and also, if you will, perfect. [Erle, C. J. It is found that they are not fit for the making of soap.] The defendant did not warrant them fit for that purpose: he was not a maker of or dealer in soap-frames. All he warranted, was that the frames were new, and that they were complete, with all bolts and screws. [Erle, C. J. Can a soap-frame be said to be perfect or complete which will not hold soap? These were not in the condition of “soap-frames” when they were inspected by the plaintiff’s foreman; but the elements or component parts of soap-frames, upon which no judgment could on the mere view be formed. There [595] was a case of *Parsons v. Sexton*, 4 C. B. 899, where a breach of warranty was relied on, where there had been a sale of a specific engine which had been inspected by the buyers’ foreman while lying unerected and in pieces.] That case is singularly like the present. The contract there was contained in a proposal by the plaintiff, and an acceptance by the defendants, in the following terms:—“I, James Parsons, do hereby agree to provide a fourteen-horse engine and sixteen horse boiler, with fittings and everything complete, for the sum of 260l., and to deliver and erect the same at the mill of Messrs. Sexton and Co., and to set the same to work: to be complete in a workman-like manner on or before the 1st of October next,” &c. That proposal was accepted in the following terms,—“In consideration of your supplying us with a certain

fourteen-horse engine, which our foreman has inspected, and putting the same in thorough repair, and supplying a new sixteen-horse boiler, commonly called a Cornish boiler, with fire-place, valves, steam-cocks, and gauges complete, and delivering and erecting the whole, and setting the whole at work, according to the undertaking signed by you and left with us, we agree to pay for the same 260l.," &c. The narrative of the facts and the conclusion of law, as they appear in the judgment of the court, are as follows:—"After some correspondence upon the engine, the defendants' foreman went over to inspect it: and, although it was not then put up, but was in different pieces,—as it had been removed from Gresley's premises, where it had been at work,—yet the whole of the engine was there, and the foreman had as good an opportunity of forming a judgment respecting it, as if it had been put together. Then, the plaintiff offered to provide a fourteen-horse engine, put it in repair, and find all fittings, &c., and a sixteen-horse boiler, for 260l. The defendants, in answer, [596] agree to take on these terms the fourteen-horse engine which their foreman had inspected. The evidence shewed that the fittings were not part of the engine. Upon this state of facts, we think that the defendants bargained for and bought the specific engine which was afterwards erected on their premises: and, assuming that there was a warranty as to its power, and that the warranty was broken, that was no answer to the action, according to *Street v. Blay*, 2 B. & Ad. 456. The case of *Chanter v. Hopkins*, 4 M. & W. 399, also establishes that, where a known and ascertained article is ordered and sent, it must be paid for, although it do not answer the purpose for which it was ordered: and *Ollivant v. Bayley*, 5 Q. B. 288, 1 D. & Meriv. 373, is to the same effect. The defendants then could not reject the engine because it was not of fourteen-horse power; and the direction of the learned judge in that respect was wrong." So here this was in fact and in law a sale of a specific and ascertained article, which the purchaser had an opportunity of inspecting before the purchase, and which consequently he had no right afterwards to reject. In *Budd v. Fairman*, 8 Bingh. 48, 1 M. & Scott, 74, the proof of a warranty upon the sale of a horse was contained in the following memorandum,—“Received of B. 10l. for a grey four-year-old colt, warranted sound:” and it was held that the warranty was confined to soundness, and that, without proving fraud, it was no ground of action that the colt was only *three* years old. Tindal, C. J., there said: “In this case a written instrument was produced by the plaintiff to shew the nature of the contract between him and the defendant, and we are to interpret that instrument, like all others, according to the intention of the parties. The instrument appears to be a receipt for 10l. ‘for a grey four-year-old colt, warranted sound.’ I should say that, [597] upon the face of this instrument, the intention of the parties was, to confine the warranty to soundness, and that the preceding statement was matter of description only. And the difference is most essential. Whatever a party warrants he is bound to make good to the letter of the warranty, whether the quality warranted be material or not: it is only necessary for the buyer to shew that the article is not according to the warranty: whereas, if an article be sold by description merely, and the buyer afterwards discovers a latent defect, he must go further, allege the scienter, and shew that the description was false within the knowledge of the seller. And, where there is an express warranty as to any single point, the law does not beyond that raise an implied warranty that the commodity sold shall be also merchantable.” [Byles, J. Suppose the defendant had said at the time of the contract, “I sell you these *good* soap-frames,” would that have been more than simplex commendatio?] It is submitted not. Upon principle, as well as upon authority, there is no pretence for saying that the evidence here supported the charge in the declaration. The description of the article was not wrong. These were soap-frames. They were new. And they were furnished with all bolts and screws complete. [Erle, C. J. They were soap-frames to the eye; but they were found when put together to be incapable of being used as soap-frames.]

ERLE, C. J. This was an action upon a contract by the purchaser of certain soap-frames against the vendor. The plaintiff in his declaration alleged that the vendor contracted that the frames were fit for the purpose of making soap. The jury found a verdict for the plaintiff, on the ground that the soap-frames were not fit for the purpose of making soap: and the defendant [598] has moved to set aside the verdict, and to enter it for him, on the ground that there was no evidence to justify the finding of the jury that the soap-frames were so warranted. It appeared that the plaintiff was a soap-maker, and the defendant an oil-refiner, who had become possessed of some

soap-frames for the purpose of entering upon the manufacture of soap, which he had contemplated: that the plaintiff's foreman called at the defendant's premises, and there saw the pieces of metal which when fitted together would constitute the soap-frames: and that, after the foreman had inspected the constituent parts, the plaintiff ordered them to be sent to his premises, on condition that they were "warranted new frames with all nuts and bolts complete *and perfect*," and accepted and paid for them: and it was found by the jury that these latter words were part of the contract. The question is, whether these facts support the allegation in the declaration that the defendant warranted the soap-frames to be fit and proper to be used for the making or manufacturing of soap. I am of opinion that they do. The construction of every contract depends upon the intention of the contracting parties as it is to be gathered from the language they have used. In making the bargain, the seller used words upon which the buyer acted, "I warrant the soap-frames to be new, and with nuts and bolts complete and perfect." Can it be said that the buyer ever intended to have soap-frames which would not make soap, but would allow the material to run out and be lost? I think it is obvious from the use of the words "perfect soap-frames," and must be assumed, that the parties were contracting for a sale and purchase of frames fit to be used in the making of soap. Those words, coming after the words "warranted new and complete," import something more than that the frames shall be new and complete [599] in structure. The governing rule for the construction of all contracts is that they shall be read so as if possible to effectuate the intention of the parties: and I think these parties could have had no other intention than such as I have above suggested. As to the case of *Budd v. Fairman*, 8 Bingh. 48, 1 M. & Scott, 74, it may very well be that there was some known usage in regard to the sale of horses; otherwise I should protest against the words of a contract not receiving their ordinary interpretation, by reason of their collocation in the instrument in which they are found. Effect should be given if possible to every word of the contract. In *Bahn v. Barnes*, 3 Best & Smith, 76, 32 Law J., Q. B. 204, my learned Brother Williams brought together a great many cases to shew where words may be considered as surplusage, and where an operative part of the contract, and where a condition makes the contract void if not complied with (*a*). A reference to that case very much confirms my mind in the conclusion to which I have arrived. A great deal has been said by Mr. Russell as to the articles in question having been ascertained by inspection. No doubt, where the subject-matter of the contract is ascertained, by inspection or otherwise, the sale is subject to different incidents from the case of a sale of an unknown and unascertained chattel. One instance is the case of *Ollivant v. Bayley*, 5 Q. B. 288, 1 D. & Meriv. 373. There, the plaintiff was the patentee and manufacturer of a patent machine for printing in two colours. The defendant saw the machine on the plaintiff's premises, and ordered one, the plaintiff undertaking by a written memorandum to make him "a two-colour printing-machine on my patent principle." In an action for the price, the defendant sought to excuse himself from liability, on the ground that the machine had been [600] found useless for printing in two colours. The learned judge, in summing up, told the jury that, if the machine described was a known, ascertained article ordered by the defendant, he was liable, whether it answered his purpose or not: but that, if it was not a known, ascertained article, and the defendant had merely ordered and the plaintiff agreed to supply a machine for printing two colours, the defendant was not liable unless the instrument was reasonably fit for the purpose. It was held that this was a proper direction: and, the jury having found for the plaintiff under it, the court refused to disturb the verdict. Where the sale is of a specific and ascertained article, the property passes by the sale; and, if there be any stipulation in the contract which is not complied with, the buyer cannot on that account repudiate it, but must bring his action for such breach. If the plaintiff here had attempted to repudiate the contract on the ground that the frames did not answer the description, perhaps Mr. Russell might have succeeded in shewing that the sale was of an ascertained article, and therefore the plaintiff's only remedy was by an action for the breach of contract. I say perhaps, because I wish to reserve to myself the consideration of the case where the subject of the contract is a machine, and the inspection has been, not of the machine itself, but only of the several parts which when put together will constitute the machine. If the component parts were of such a nature that a skilful person could by the mere

(a) And see *Bannerman v. White*, 10 C. B. (N. S.) 844.

inspection of them in that condition tell the quality and condition of the machine when put together, I incline to think it might be treated as a sale of an ascertained article, according to the authority of *Parsons v. Serton*, 4 C. B. 899, by which I should probably feel myself governed. But this is an action for the breach of a stipulation in the contract which goes beyond the name of the article: the [601] frames are warranted complete and perfect. The sale of a horse may be and commonly is subject to additional stipulations as to soundness and the like: so, soap-frames may be sold subject to an additional stipulation such as is found here: and I am very clear that such additional stipulation, if found in the contract, is affected by the circumstance of whether the subject-matter of the sale is an ascertained or an unascertained article. Here, there is that additional stipulation, and that affords ground enough for disposing of this rule.

BYLES, J.(a). I am of the same opinion. I go a long way with Mr. Russell in his very able argument: but I think he deceived himself in the place where he inserted the words "complete and perfect." They are not found in that part of the contract which relates to matter of description, but in that part which contains the warranty. Reading the two documents (the letter and the invoice) together, the contract reads thus, "Send me the six new soap-frames which were seen yesterday, on the following conditions, viz. they are to be warranted new frames, with all nuts and bolts, and to be delivered complete and perfect. The question of implied warranty does not arise here: it is a case of express warranty. That consists of two words. The soap-frames are to be new, they are to be complete, with all nuts and bolts, and they are to be perfect. The rule for the construction of contracts is, that every word shall have effect if possible. The word "perfect" implies either moral or physical or mechanical perfection. Here we have to deal with mechanical perfection. The word "perfect" imports something more than mere goodness of quality. I must own I [602] entertained a different opinion at first; but I now entertain no doubt whatever that the construction which my Lord has put upon the contract is the true one.

KEATING, J. I am of the same opinion. At the trial, I entertained considerable doubt as to how far the warranty alleged in the declaration was established by the evidence offered on the part of the plaintiff. But, after the able argument of Mr. Russell, I no longer doubt that there was good evidence to go to the jury in support of the warranty as alleged, and that the warranty has been broken. It seems to me that the documents upon which the warranty rests are capable of the construction which my Brother Byles has put upon them. I entirely agree with him that the word "perfect" removes any doubt which might have arisen if the word "complete" only had been found in the contract, and does import that these soap-frames were of such a description as to be capable of being used for the making of soap. The jury found that they were not capable of being so used. Under these circumstances, I agree with my Lord and Brother Byles that this rule should be discharged.

Rule discharged.

[603] FRAY v. FRAY. Nov. 21st, 1864.

The plaintiff declared upon a letter written by the defendant, in which it was alleged that the former had for years, without cause, systematically done everything to annoy the latter, and had unnecessarily dragged him into the court of Chancery and put him to great expense:—Held, on demurrer, that the court could not so clearly see that the latter could not be libellous, as to justify them in withdrawing the case from a jury.

This was an action for a libel. The declaration stated that the defendant falsely and maliciously wrote and published of the plaintiff, in the form of a letter addressed to the clerk to the guardians of a certain poor-law union, in respect of an allowance by the said guardians towards the maintenance of his, the defendant's, mother, being also the mother of the plaintiff, the words following, that is to say, "I (meaning the defendant) do not know what grounds she (meaning the said mother of the plaintiff

(a) Willes, J. had heard only a portion of the argument, and therefore gave no opinion.

and the defendant) can have to claim off your board out-door relief. You will find that she (meaning the said mother of the plaintiff and the defendant) does not belong to your parish: in fact, Mr. Phillips, your relieving officer, informed me (meaning the defendant), by letter, more than twelve months ago, that her (meaning the plaintiff's and defendant's said mother's) parish was Llanfair, Waterdine, Salop, a more fitting place for her (meaning the plaintiff's and defendant's said mother) to end her days than Newtown: but her removal would not suit Miss Fray's (meaning the plaintiff's) purpose. Again, I (meaning the defendant) say if she (meaning the plaintiff's and the defendant's said mother) is a pauper, she (meaning the plaintiff's and defendant's said mother) is not justified in renting a cottage and paying rates and taxes. It is only done to keep a home for Miss Fray (meaning the plaintiff), who (meaning the plaintiff) has for years, without the slightest cause, systematically done everything she (meaning the plaintiff) can to annoy me (meaning the defendant): and I (meaning the defendant) am sorry to say my mother (meaning the said [604] mother of the plaintiff and the defendant) is only too glad to assist her (meaning the plaintiff). Some years ago, they (meaning the plaintiff's and the defendant's said mother and the plaintiff) dragged me (meaning the defendant) into Chancery, as well as Mr. Drew: and almost every term I (meaning the defendant) am obliged to appear by counsel before the Vice-Chancellor. They (meaning the plaintiff's and the defendant's said mother and the plaintiff) had no business to include me (meaning the defendant) in the bill, as I (meaning the defendant) make no claim to my (meaning the defendant's) late father's property: but, of course, it is a pleasure to my mother (meaning the plaintiff's and the defendant's said mother) and Miss Fray (meaning the plaintiff) to put me (meaning the defendant) to all the expense they (meaning the plaintiff's and defendant's said mother and the plaintiff) can. My (meaning the defendant's) solicitor has had notice to appear again in November. The cost I (meaning the defendant) have been put to is something considerable: and, how I (meaning the defendant) am to obtain the money to pay my (meaning the defendant's) solicitor, I (meaning the defendant) do not know. Doubting, as I (meaning the defendant) do, my mother's (meaning the plaintiff's and the defendant's said mother) extreme poverty, I (meaning the defendant) think the proper test of it is an order for the workhouse; the expense of which should be borne proportionately between all her children: and, as Miss Fray (meaning the plaintiff) is a lady of independence, and a single woman, and can find the money for carrying on all sorts of law proceedings, she (meaning the plaintiff) should not be exempted." Claim, 200l.

The defendant demurred to this declaration; the ground of demurrer stated in the margin being, "that [605] the words set forth in the declaration do not amount to a libel." Joinder.

Inderwick, in support of the demurrer, submitted that the letter declared upon was clearly not libellous, for that, to constitute a publication libellous, it must be such as is calculated to bring the party libelled into hatred and contempt with his fellow-subjects, or charges him with some offence for which if guilty he would be liable to be indicted, or the like: whereas, here, the gravamen of the charge is, that the plaintiff is a litigious person, without even suggesting that she is actuated by animosity against the writer, or by any improper motives. [Erle, C. J. That which may tend to lower the plaintiff in the estimation of others, we cannot withhold from a jury.] The question is whether this *can* be a libel. There should be at least some scintilla of injury. [Erle, C. J. The statute 32 G. 3, c. 60, is in terms applicable only to criminal cases: but it has always been adopted in practice in civil actions.] In *Baylis v. Lawrence*, 11 Ad. & E. 920, 3 P. & D. 526, Lord Denman says: "If the judge and jury think the publication libellous, still, if on the record it appears not to be so, judgment must be arrested."

Miss Fray appeared in person to support the declaration.

ERLE, C. J. We cannot take upon ourselves to hold that the letter in question can under no circumstances be libellous. The matter must go before a jury.

The rest of the court concurring,

Judgment for the plaintiff.

[606] EDDISON AND OTHERS, the Commissioners of the Nottingham Inclosure, *v.* THE REV. JOSHUA WILLIAM BROOKES, Vicar of St. Mary, Nottingham. Nov. 9th, 1864.

[S. C. 11 L. T. 378 ; 13 W. R. 98.]

By an act for inclosing lands in the town of Nottingham (8 & 9 Vict. c. vii.), the commissioners were to set out allotments for re-creation of the inhabitants, for a cemetery, to the lords of the manor for right of soil,—to the vicar, and Earl Manvers and certain charitable trustees, and other the persons entitled to corn-tithes, *vicarial tithes*, &c., and to the said vicar in respect of the glebe-lands and rights of common belonging to such vicar,—and to certain persons entitled to common rights; and by s. 66, after having made the before-mentioned allotments, they were to divide and allot the remainder of the lands to be inclosed unto and amongst the several owners and proprietors thereof and persons who should be entitled to any estate, right, or interest therein, in proportion to the value of their respective rights and interests. Section 69 enacted that the several allotments to be made in pursuance of the act (except the allotments to the mayor, &c., for places of recreation, &c., and the allotments to the said vicar and other persons in lieu of tithes), should be inclosed by the allottees: and by s. 70, it was provided that allotments in lieu of tithes were to be fenced at the general expense.—By s. 86, the commissioners were (before setting out any allotments to the persons entitled to rights of common, to the lord of the manor, persons entitled to tithes, and to the owners and proprietors of lands to be inclosed), to allot what they should judge sufficient to defray the expenses of and incident to the inclosure, and sell the same to defray such expenses. And by s. 89, in case the lands so set apart should be found insufficient to defray such expenses, the deficiency was to be made up and raised from time to time by a rate to be made and levied upon the several persons interested in the lands to be inclosed, *except the said vicar and persons entitled to tithes*, and the mayor, &c., in respect of allotments for recreation, &c.:—Held, that the vicar was not liable to be rated in respect of the lands allotted to him on account and in lieu of the lands claimed by him as *glebe-lands*, towards the general expenses of the Inclosure Act.

The following case was stated for the opinion of the court, under the Common Law Procedure Act, 1852:—

1. The writ herein was issued to recover 487l. 7s., the amount of two rates levied by the commissioners upon the vicar in respect of glebe-land, with interest thereon.

2. The public act is 41 G. 3, c. 109, intituled “An Act for consolidating in one act certain provisions usually inserted in Acts of Inclosure;” and the local act is the 8 & 9 Vict. c. vii., intituled “An act for inclosing lands in the parish of St. Mary, in the town and county of the town of Nottingham.”

3. By the public act, s. 6, it is enacted that all persons and bodies corporate and politic who shall have or claim any common or other right to or in any lands to be inclosed, shall deliver to the commissioners therein named, and in manner therein mentioned, an account or schedule in writing, signed by them or their agent, of such their respective rights or claims, and [607] therein describe the lands and grounds, and the respective messuages, lands, and hereditaments in respect whereof they shall respectively claim to be entitled to any and which of such rights in and upon the same, with the name of the person then in the actual possession thereof, and the particular computed quantities of the same respectively, and of what nature and extent such right is, and also in what right and for what estates and interests they claim the same respectively, distinguishing the freehold from the leasehold, &c.; and, in default of making such claim, shall be barred from any right, as therein mentioned.

4. By the local act, s. 36, all persons claiming any interest in any of the lands to be inclosed shall deliver their respective claims, in writing under their hands, to the commissioners, at the meetings to be held for that purpose, stating the several particulars in respect whereof such claims are made, and distinguishing freehold and leasehold from each other.

5. By the local act, s. 37, after the said claims are received, the commissioners are to examine and determine the same, and make such order as to them shall seem just; and which order shall be final

6. By the public act, s. 14, the several shares of and in the lands which shall upon division be allotted to the several persons entitled to the same, shall, when so allotted, be in full bar and satisfaction and compensation for their several and respective lands, grounds, rights of common, and all other rights and properties whatsoever which they respectively had or were entitled on and over the said lands and grounds immediately before the passing of the local act.

7. By the local act, s. 86, for defraying the costs of carrying the local act into execution, the commissioners shall, at such period as they think proper, before any allotments are set out to the parties entitled to [608] the rights of common, to the lord of the manor, persons entitled to tithes, and to the owners and proprietors of the lands to be inclosed, mark and allot for sale such portion of the lands as they shall judge sufficient in value to defray the expenses of obtaining and executing the powers of the act, and shall from time to time sell such lands as therein mentioned.

8. By the local act, s. 89, it is provided that, if at any time it shall appear to the commissioners, either before or after the execution of their award, that the money to arise by such sales shall not be sufficient to defray the expenses aforesaid, the deficiency shall be made up and raised from time to time by a rate to be made and levied upon the several persons interested in the lands to be inclosed (except the said vicar and persons entitled to tithes, and the mayor, aldermen, and burgesses in respect of the lands for places of public recreation, &c.), in such shares and proportions, within such time, and to be paid to such persons, as the commissioners shall from time to time direct.

9. By the local act, s. 90, it is enacted that, if any person shall refuse to pay his proportion of such expenses within the time and to such person as the commissioners shall appoint, it shall be lawful for the commissioners to recover the same, with interest, by action at law in their own names, in any of Her Majesty's courts of record at Westminster, or to be levied by distress, or to enter upon the premises allotted, and demise the same, and receive the rents until the rate and expenses shall be paid.

10. By the local act, s. 93, it is enacted that it shall be lawful for the proprietors of allotments being tenants for life, or any other estate of freehold, and also for certain other classes of persons therein mentioned representing persons under incapacity, to charge their allotments with any money not exceeding 5l. per acre [609] towards their proportion of the inclosure expenses, by mortgage as therein mentioned.

11. By the local act, s. 94, it is enacted that it should be lawful for the commissioners, on application made to them in writing by any of the proprietors of allotments to be made by virtue of the act, or by any of the husbands, guardians, trustees, committees, or attorneys of or for any of such proprietors, being under coverture, minors, idiots, lunatics, or beyond the seas, or under any other disability or incapacity, or by the persons acting as such guardians, trustees, committees, or attorneys, respectively, or by any of the said proprietors being tenants in tail, or for life or lives, or on any other contingency, or by any trustees or feoffees for charitable, parochial, or other uses, to sell any part of any such allotment, for raising a sum of money sufficient to defray the proportionable part of the expenses which should on such rates be charged upon such parties, and of the expenses of making and completing such sale: Provided always, that it should not be lawful for any proprietor of an allotment to raise by any such sale, or by mortgage and sale, any greater sum of money for the purposes aforesaid than such proprietor might have borrowed or charged upon his allotment for such purposes by virtue of the said first-recited act, 41 G. 3, c. 109, reckoning 5l. for each acre thereof: Provided further that, in all cases in which the money so raised by any such sale should not be equal to the money which might be borrowed or charged on such allotment as aforesaid, it should be lawful for the proprietor, part of whose allotment should be sold as aforesaid, to charge his allotment with any sum not exceeding the difference.

12. By the local act, it is recited in the preamble that Henry Smith, Samuel Fox, and other persons therein named, claimed to be owners or proprietors of [610] or otherwise interested in some of the lands to be inclosed, and other persons also claimed as therein mentioned. And then,—reciting that Earl Manvers was or claimed to be entitled to corn-tithes arising or accruing from the lands to be inclosed, and the Rev. J. W. Brookes, the now defendant, as the vicar of the parish of St. Mary, was or claimed to be entitled to the vicarial tithes arising or issuing out of such lands, or some parts

thereof; and that William Watson and others claimed, as devisees under the will of Micah Gedling, to be entitled to the tithes or tenths of hay arising or issuing out of certain parts of the lands to be inclosed; and the charitable trustees of the said town, as trustees of the Free Grammar School of the said town, were or claimed to be entitled to the tithes or tenths of hay arising or issuing out of certain other portions of the said lands,—it is enacted that the public act, 41 G. 3, c. 109, shall be executed as part of the local act, except in such cases wherein the same is repealed or varied or inapplicable to the purposes of the local act.

13. By the local act, the commissioners are to allot parts of the lands to be inclosed, as follows,—by s. 53, for the purposes of public recreation: by s. 54, for a public cemetery; and by s. 55, for the lord of the manor.

14. By the local act, s. 56, it is provided that the commissioners shall allot and award unto the vicar of the said parish of St. Mary, and unto the said Lord Manvers, William Watson and others, devisees in trust under the will of Micah Gedling, and the charitable trustees of the town of Nottingham, trustees of the Free Grammar School, or other the persons who may be entitled to corn-tithes, vicarial tithes, or tithes or tenths of hay, or other tithes, and to the said vicar in respect of glebe-lands and rights of common belonging to such vicar, such parcels of the lands to be inclosed [611] as in the judgment of the commissioners shall be a *full equivalent and compensation* to such persons severally and respectively for their several and respective claims, when substantiated to the satisfaction of the commissioners, in, over, and upon the lands to be inclosed.

15. By s. 57, the commissioners are to allot part of the lands to be inclosed to the freemen of Nottingham, and to the toftstead owners and inhabitant householders: and by s. 66, after the said several allotments have been made, the commissioners shall divide, allot, and award the remainder of the lands to be inclosed unto and amongst the several owners and proprietors thereof, and persons who shall be entitled to any estate, right, or interest therein, in such shares and proportions as the commissioners shall adjudge and determine to be proportionate to the value of their respective rights and interests therein.

16. By the local act, s. 69, it is enacted that the several allotments to be made in pursuance of this act (except the allotments to the mayor, aldermen, and burgesses for places of public recreation, &c., and the allotments to the said vicar and other persons in lieu of tithes) shall be inclosed, ditched, and fenced, at the expense of the respective persons to whom the same shall be allotted, in such manner and within such times as the commissioners shall by their award, or any writing under their hands, direct; and the fences so to be made shall for ever afterwards be repaired and maintained by such persons as the commissioners shall by their award direct.

17. By the local act, s. 70, the allotments to be made to the said vicar and *other* persons in lieu of tithes shall be well and sufficiently inclosed and fenced on all such parts and sides as shall not be directed to be fenced by any other proprietor, or as shall not adjoin any inclosed land or be bounded by any sufficient [612] watercourse or other sufficient fence: and the expense attending the inclosing and fencing the same shall be discharged out of the inclosure expenses fund: and all such inclosures and fences, when made, shall for ever thereafter be kept in repair by the said vicar or by the persons for the time being entitled in possession to the said allotments.

18. By s. 38 of the public act, it is provided that the rector or vicar for the time being, by indenture under his hand, with consent of the bishop and patron, may lease or demise all or any part of the allotments allotted to such rector or vicar by virtue of the local act, to any person for any term not exceeding twenty-one years, to commence within twelve months after the execution of the award; so that the rent shall be reserved to the rector or vicar for the time being by four quarterly payments; and so that the best rent be gotten, without taking any premium or consideration for granting the same, and otherwise as therein mentioned.

19. By the local act, s. 73, it is provided that the vicar for the time being of St. Mary, by indenture, with consent of the patron of the vicarage, and with consent of the bishop, may lease or demise all or any part of the allotment to be made to such vicar in right of his vicarage, to any person, for not exceeding twenty-one years, by quarterly payments, so that the best rent be obtained, without taking any fine or consideration for granting such lease: with provisions for cesser, and granting new leases, as therein mentioned.

20. The lands to be inclosed consisted of about 1200 acres. A small portion consisted of two pieces of waste land upon which it was alleged the inhabitant householders and freemen only had a right of pasturage. All the remainder of the lands consisted of [613] lands of freehold tenure belonging to different proprietors owners of the land in fee simple, but subject to a right of pasturage thereon for a limited number of cattle during certain periods of the year: and this right of pasturage existed only in the freemen and the occupiers of a few old houses called toftsteads. The owners of the lands had no right of common over the lands: but owned the land subject to the easement of pasturage as aforesaid: and, on the other hand, the persons entitled to the right of pasturage owned no portion of the lands to be inclosed.

21. The land-owners let the lands for beneficial rents; they being entitled to the land during the valuable part of the year, getting the crops; the commoners only getting the aftermath. The land owners were very numerous, and amongst them was the vicar of St. Mary, as the owner of glebe-lands. Such glebe-lands were in every respect under the same conditions as the lands of the other land-owners. Glebe-land paid rates, was let for beneficial rents, was subject to the freemen's and toftstead-owners' right of common: and, when the commonable period was over, the fences had to be repaired by the vicar or his tenants: and such glebe-land was utterly indistinguishable from the land of other land-owners.

22. Amongst the claims delivered to the commissioners were claims by numerous land owners, specifying the quantity and situation of the land claimed for, and the estate therein of the person making the claim. Earl Manvers made a claim for corn-tithes. William Watson and others, devisees of Micah Gedling, claimed for hay-tithes: and such devisees also made a claim for lands belonging to them as land-owners. The charitable trustees claimed for hay-tithes: and such charitable trustees also made a claim for lands belonging to them as land-owners. And all such claims, as [614] well for tithes as for land-owners, were duly substantiated to the satisfaction of the commissioners.

Amongst the claims was the following, made by the vicar of St. Mary:—

"I claim to be entitled, as vicar of the church of St. Mary, to the several pieces of land described in the annexed terrier, lying in the open and commonable fields of the parish of St. Mary, and to all rights and interests therein, subject nevertheless to certain common rights during part or parts of each year.

"I further claim, as such vicar, to be entitled to all tithes of milk, calves, lambs, wool, agistment, turnips, greens, peas, tares, and green crops of every description, potatoes, pigs, eggs, poultry, and all other tithes, excepting only the tithes of corn, grain, and hay, arising or accruing due as well upon the said open and commonable lands as upon all other the lands of the said parish, excepting only certain portions thereof which have already been exonerated from tithes.

"Terrier of the glebe-lands of the vicarage of the Blessed Virgin Mary, in Nottingham, lying in the open and commonable fields of Nottingham aforesaid:—

"*In the meadows,—*

"One piece of land in the Furlong, abutting on King's meadows, containing by admeasurement 1a. 3r. 37p., lately occupied by John Cooper, bounded north by land of E and A. Goodhead, south by land the property of the devisees of Gedling, deceased, west by the Earl's closes, east by other lands of the said devisees:

"One other piece of land on the Little Rye Hills, containing by admeasurement 2r. 35p., in the occupation of William Brighton, bounded east, west, north, and south as therein mentioned:

"One other piece of land on the Rye Hills, containing by admeasurement 2r. 5p., occupied by William [615] Brighton, and bounded as therein mentioned. [And so on, describing twenty-six pieces of land belonging to him as glebe-land of St. Mary's.]"

(Signed) "J. W. BROOKES."

At the hearing before the commissioners, Lord Manvers substantiated his claim for corn-tithes: William Watson and others, devisees of Gedling, deceased, and the charitable trustees of the Free Grammar School, severally substantiated their claims for hay tithes: and the vicar of St. Mary also substantiated his claim for tithes.

23. Allotments of land were severally made by the commissioners to Lord Manvers,

to Gedling's devisees, to the charitable trustees, and to the vicar of St. Mary, in lieu of such tithes, and to the full value thereof, as adjudged by the commissioners.

24. In addition to such allotments for tithes, distinct and separate allotments were also made to the said Gedling's devisees, and to the said charitable trustees, in respect of the lands claimed by them.

25. Distinct allotments, amounting to 18a. 3r. 37 $\frac{1}{2}$ p., were also made to the vicar of St. Mary, in respect of and in lieu of the lands claimed by him as glebe-lands; and such allotments were made according to the same conditions and upon identical terms so far as regards value, and in every other respect, as the lands of other land-owners.

26. Such allotment of 18a. 3r. 37 $\frac{1}{2}$ p. was in addition to the allotment made to the vicar in lieu of tithes.

27. The effect of the inclosure and of the allotments awarded by the commissioners was to convert the lands claimed from mere agricultural lands used chiefly for pasture, subject to common right as above, and capable of no other use, into freehold lands, free from restrictions and incumbrances, applicable as well for building as any other purpose, and raising their [616] value to a very large amount: and the land allotted to the vicar took these advantages in common with lands allotted to the different land-owners.

28. The commissioners have paid out of the inclosure funds the cost of fencing such allotments so made to Earl Manvers, Gedling's devisees, the charitable trustees, and the vicar of St. Mary, in lieu of tithes: but have not paid the cost of fencing the other allotments made to the said persons as land-owners, or the allotments made to the vicar in respect of the glebe-land.

29. In carrying the local act into execution, the commissioners marked and allotted for sale certain portions of lands, and sold the same, as directed by the statute, and applied the proceeds in carrying the act into execution: but the moneys arising from such sales not being sufficient to defray the expenses of executing the act, the commissioners have duly made certain rates under s. 89 of the local act upon the several persons interested in the lands to be inclosed; and in such rates the commissioners have rated the vicar in respect of his glebe-lands claimed by him, and have also rated Watson and others, Gedling's devisees, and the charitable trustees, in respect of the lands severally claimed by them: but the commissioners have not rated the Earl Manvers, Gedling's devisees, the charitable trustees, or the vicar of St. Mary, being the several persons entitled to tithes, in respect of the allotments made to them respectively in lieu of tithes.

30. The local act was to be referred to, if required, as part of the case.

31. The vicar of St. Mary contended that he was not liable to be rated in respect of the lands allotted to him in lieu of the glebe-lands claimed by him. The commissioners contended that he was liable to be rated in respect of his glebe-lands.

[617] 32. The question for the opinion of the court was,—whether the vicar was liable to be rated in respect of the lands allotted to him on account and in lieu of the lands claimed by him as glebe-lands.

If the court should be of opinion that the vicar was liable to be so rated, then judgment was to be entered for the plaintiffs for 487l. 7s., and costs of suit. If the court should be of a contrary opinion, judgment was to be entered for the defendant, with costs of suit.

Boden, Q. C. (with whom was Quain), for the plaintiffs (*a*). The vicar, it is submitted, is liable to be rated in respect of the lands allotted to him on account and in lieu of the lands claimed by him as glebe-lands. By the local inclosure act, the preamble of which recites the locality and the nature of the lands to be inclosed and the persons entitled as owners of land and of other rights (including the vicar), the commissioners are to set out allotments for recreation for the inhabitants of Nottingham (s. 53); for a cemetery (s. 54): to the lords of the manor for right of soil (s. 55): to the vicar of the parish of St. Mary, and to Earl Manvers, W. Watson, J. Fox, and T. Chouler, devisees in trust under the will of Micah Gedling, deceased, and the charitable trustees of Nottingham, trustees of the free grammar school, or *other* the

(*a*) The point marked for argument on the part of the plaintiffs was as follows:—

“That the exemption from rates contained in the 89th section of the local act, 8 & 9 Vict. c. vii., applies only to lands allotted to the defendant in lieu of tithes, and not to lands allotted to him in lieu of any other claim.”

persons who may be entitled to corn-tithes, vicarial tithes, or tithes or tenths of hay, or other tithes, and to the said vicar in respect of the glebe-lands and rights of common belonging to such vicar (s. 56); to the free-[618]-men of Nottingham and owners of antient toftsteads in the said town, and inhabitant householders of the town, and others (if any) entitled to rights of common (ss. 57-59), the 66th section enacts, "that, after the several allotments hereinbefore directed shall have been made, the commissioners shall divide, allot, and award all the remainder of the lands to be inclosed unto and amongst the several owners and proprietors thereof, and persons who shall be entitled to any estate, right, or interest therein, in such shares and proportions as the commissioners shall adjudge and determine to be proportionate to the value of their respective rights and interests therein." The 69th section enacts that "the several allotments to be made in pursuance of this act (except the allotments to the mayor, &c., for places of recreation, public walks, and baths, and the allotments to the said vicar and other persons in lieu of tithes) shall be inclosed, ditched, and fenced at the expense of the respective persons to whom the same shall be allotted, in such manner and within such times as the commissioners shall by their award or any writing under their hands direct, and the fences so to be made shall for ever afterwards be repaired and maintained by such persons as the commissioners shall by their award direct." By s. 70, allotments in lieu of tithes are to be fenced at the general expense. By s. 73, the vicar has power to lease the allotment made to him in right of his vicarage. By s. 86, the commissioners are empowered, for the purpose of raising money for defraying the expenses of the inclosure, "at such period as they think proper (before any allotments are set out to the persons entitled to rights of common, to the lord of the manor, persons entitled to tithes, and to the owners and proprietors of the lands to be inclosed), to mark and allot such parts of the lands to be inclosed as they shall judge sufficient in value to de-[619]-fray the expenses incurred preparatory to and in obtaining and in executing the powers of the act, and shall from time to time as they shall find expedient sell and dispose of the same, either by public auction or private contract; and the purchase moneys to arise by such sales shall be paid into the hands of the commissioners, and shall be by them applied in discharging the said expenses." Then comes the 89th section, which enacts, "that, if at any time it shall appear to the commissioners, either before or after the execution of their award, that the money to arise by such sales shall not be sufficient to defray the expenses aforesaid, the deficiency shall be made up and raised from time to time by a rate to be made and levied upon the several persons interested in the lands to be inclosed (*except the said vicar and persons entitled to tithes, and the mayor, aldermen, and burgesses in respect of the lands allotted for places of recreation, public walks, and baths*), in such shares, and proportions, within such time, and to be paid to such persons as the commissioners shall from time to time direct." The question turns upon this exception. That is to be construed with reference to the general powers of the act. The exception refers to the vicar as one of the tithe-owners, and not in his capacity of land-owner in respect of his glebe. It has reference to the class of persons whose allotments are under ss. 69, 70, to be fenced and inclosed at the general expense. [Byles, J. The expression in ss. 69, 70, is "the said vicar and *other* persons in lieu of tithes:" but, in the exception in s. 89, the word "*other*" is omitted.] The form of expression, no doubt, is somewhat inaccurate; but the intention is obvious enough, when the whole of the provisions are looked at together. The 69th section beyond question refers to the vicar only in his capacity of tithe-owner. There could be no reason why [620] the vicar, as land-owner, should be favoured at the expense of the other proprietors of land.

Mellish, Q. C. (with whom was A. Wills), contra (a). The 89th section of the local act in terms excepts "the said vicar and persons entitled to tithes, and the

(a) The points marked for argument on the part of the defendant were as follows:—

"1. That the power of the commissioners to make the rate in dispute is given by s. 89 of the local act, 8 & 9 Vict. c. vii.:

"2. That, by that section, the vicar is excepted from the persons on whom the rate is to be made:

"3. That there is no limitation, express or implied, of that exception; and that it applies to all allotments made to him as vicar."

mayor, aldermen, and burgesses in respect of the lands allotted for places of recreation, public walks, and baths," from liability to be rated to make up the deficiency in the fund raised under s. 86 for defraying the expenses of and incident to the inclosure. And there is good reason why these large expenses should not be charged upon one who has only a life-interest in his allotment, without the power of charging it, as others having limited interests may, by mortgage or sale of part under ss. 93 and 94 (b). It is under s. 56 that [621] the allotments to the vicar in respect of tithes and glebe-lands and rights of common are to be made, and not under s. 66, which relates only to the allotment of the residue of the lands to be inclosed among the other owners and proprietors. The persons named in s. 56, the vicar, and the tithe-owners, are to receive "such parcels of the lands to be inclosed as in the judgment of the commissioners shall be a *full equivalent and compensation* to such persons severally and respectively for their several and respective claims in, over, or upon the lands to be inclosed." Would the vicar receive a full equivalent and compensation for his claims, if his allotment in respect thereof was to be charged with the large sum now sought to be imposed upon it?

Boden, Q. C., in reply. The 93rd and 94th sections very much strengthen the argument on the part of the plaintiffs. The vicar is clearly a tenant for life within the meaning of those provisions. The 30th section of the General Inclosure Act, 41 G. 3, c. 109, contains an express exception in favour of rectors and vicars. The vicar here, in respect of his allotment for the glebe-land, is treated like any other land-owner. He takes a valuable benefit under the inclosure: there is therefore no reason why he should be relieved from the concomitant burthen. [Byles, J. The 89th section gives the commissioners power to enforce payment of the additional rate by action at law or by entry upon the whole of the land to be allotted. If the commissioners had under s. 84, set apart a sufficient quantity [622] of the land to defray the expenses, there would have been no need of a rate. They were bound to take care to reserve enough for that purpose.] The 89th section was inserted for the express purpose of remedying any failure in that respect. [Byles, J. If the vicar and the other persons exempted from contribution to the inclosure expenses by s. 69, are held liable to be assessed to the additional rate under s. 89, they will not get the full equivalent and compensation contemplated by s. 56.] The whole scope of the act shews that the vicar was to be dealt with in respect of his glebe-land in the character of an ordinary land-owner.

ERLE, C. J. I am of opinion that the vicar of St. Mary's is not liable to be rated in respect of the lands allotted to him on account and in lieu of the lands claimed by him as glebe-lands, towards the general expenses of the Inclosure Act. The act gives the commissioners power, under s. 86, before any allotments are set out to the persons entitled to rights of common, to the lord of the manor, persons entitled to tithes, and to the owners and proprietors of the lands to be inclosed, to mark and allot such parts of the lands to be inclosed as they shall judge sufficient in value to defray the expenses incurred preparatory to and in obtaining and in executing the powers of the act, and to sell the same, and apply the proceeds in discharging the said expenses. And, if the money to arise by such sales shall not be sufficient to defray such expenses, they are, by s. 89, to make up the deficiency by a rate to be made and levied upon the several persons interested in the lands to be inclosed,—except the said vicar and persons entitled to tithes, and the mayor, &c., in respect of the lands

(b) The 93rd section enacts that it shall be lawful for the respective proprietors of allotments to be made by virtue of the act, being tenants for life or in tail, or for any other estate of freehold or inheritance, and also for the husbands, guardians, trustees, committees, or attorneys of any of the proprietors being under coverture, infants, lunatics, idiots, or beyond seas, or otherwise incapacitated, and for the trustees or feoffees for charitable, parochial, or other uses, or a competent number of them, in respect of any lands held by them in trust for any charitable, parochial, or other uses (with the consent of the commissioners, testified in writing under their hands and seals), from time to time to charge their allotments with any money not exceeding 5l. per acre towards their respective proportions of the inclosure expenses, and, for securing the re-payment of such money, with interest, to *mortgage* the said allotments, &c. And s. 94 impowers such persons to *sell* a portion of any such allotment for the like purpose, under certain limitations.

allotted for places of recreation, &c. Mr. Boden has contended [623] that this exception only extends to the vicar in so far as he is interested in tithes: Mr. Mellish, on the other hand, contends that it applies to the vicar's rights in respect of the glebe-land also. I am of opinion that the latter construction is the true one, and that the vicar is exempted absolutely. The act names several classes of allottees, and amongst them the vicar, who by s. 56 is to have, in respect of the vicarial tithes, and of the glebe-lands and rights of common belonging to him, a full equivalent and compensation for his claims in, over, and upon the lands to be inclosed. Then, when all these have been provided for, the residue is (by s. 66) to be allotted amongst the land-owners. By s. 69, the several allotments (except those for places of recreation, &c., and to the vicar and other persons in lieu of tithes) are to be fenced at the expense of the allottees. Then comes s. 86, which provides for the appropriation of a certain portion of the lands to be sold for the purpose of defraying the general expenses of the inclosure. The vicar has no interest in the quantity to be set apart for defraying the expenses of the inclosure. He is to have an allotment which is to be a full equivalent and compensation for his tithes and glebe. The fund, therefore, out of which the expenses of the inclosure are to come, is to be irrespective of the allotments to the vicar. And by s. 89, in case the fund provided under s. 86 falls short of the amount required for that purpose, the deficiency is to be made up by a rate. It seems to me to stand to reason that the intention of the legislature was, that those who had not paid enough to defray the expenses of the inclosure which were cast upon them by the act were to be assessed for the purpose of making up the deficiency. If that be so, the liability to be assessed is not cast upon those who are to have allotments equivalent [624] in value to the interests they had. The 89th section may well be read in furtherance of that view. The vicar and the persons entitled to tithes are exempted absolutely, and the mayor, &c., in respect of the allotments for recreation, &c. The 69th and 70th sections make it clear that the allotments in respect of tithes are to be fenced at the general expense, and the allotment to the vicar in respect of the glebe at the vicar's expense. Upon the words, therefore, and upon the general scope of the act, it seems to me that the vicar is exempted from assessment to this rate.

BYLES, J. I am of the same opinion. I must confess that, at the commencement of the argument, I was inclined to think otherwise: but, upon full consideration, I now think that the literal construction of the act of parliament is the true one. As to the literal construction there can be no doubt. The vicar was to have a full equivalent and compensation both in respect of his tithes and his glebe. I cannot add anything to what has been pointed out by my Lord. If the vicar is to be subject to this charge, he might be called upon to pay during his time more than the amount of all the benefit he could derive from his allotment.

KEATING, J. I am entirely of the same opinion. Looking at the general scope and object of the statute, and at the way in which the 56th section deals with the vicar, it is clear that he was intended by s. 89 to be exempted from the rate with reference to the description in s. 56. In that section he is dealt with in two capacities, — as owner of the vicarial tithes, and as entitled to an allotment in respect of the glebe-lands. Mr. Boden says he has in respect of the glebe-[625]-lands been dealt with like the other land-owners. But, taking the 56th and 89th sections together, I think it is clear that the vicar was intended to be altogether exempted.

Judgment for the defendant.

THE VESTRY OF CHELSEA, *Appellants*; JAMES KING, *Respondent*. Nov. 14th, 1864.

[S. C. 34 L. J. M. C. 9; 11 L. T. 419; 10 Jur. N. S. 1150; 13 W. R. 157.]

The powers conferred upon the commissioners under the 68th section of Michael Angelo Taylor's Act, 57 G. 3, c. xxix., absolutely to prevent the keeping of swine in any house, building, yard, garden, &c., in or within forty yards of any street, or public place within the district comprised in that act, is not extended by the 73rd section of the Metropolis Local Management Acts Amendment Act, 25 & 26 Vict. c. 102, to the larger district comprised within such last-mentioned act.

The following case was stated for the opinion of this court:—

James King, the respondent, was summoned to appear before H. S. Selfe, Esq., one of the magistrates of the police-courts of the Metropolis, sitting at the Westminster

police-court, upon a complaint made by Charles Lahee, on behalf of the vestry of St. Luke's, Chelsea, the appellants, for unlawfully keeping swine in a yard within forty yards of a street called Symons Street, in the parish of Chelsea, within the Metropolis, contrary to the statutes 57 G. 3, c. xxix. (Michael Angelo Taylor's Act), and 25 & 26 Vict. c. 102 (the Metropolis Local Management Acts Amendment Act), s. 73.

It was proved that the respondent kept certain swine in a yard called Brook's Yard, within forty yards of Symons Street.

It was not proved that they were so kept as to be in any way a nuisance, or injurious to health.

[626] The statute 57 G. 3, c. xxix., does not apply to the parish of Chelsea, or to the place where the swine are kept, unless it applies to it by virtue of the statute 25 & 26 Vict. c. 102, s. 73.

The appellants contended that the whole of the 68th section of the statute 57 G. 3, c. xxix., was extended to the metropolis by the statute 25 & 26 Vict. c. 102, s. 73, that its provisions were imperative, and therefore that the magistrate was bound in point of law to convict the respondent.

The magistrate doubted whether, —the swine in question not being a nuisance, nor straying in the streets, —the case came within the 73rd section of the 25 & 26 Vict. c. 102, which extends to the Metropolis only so much of the 57 G. 3, c. xxix., as relates to the powers of improving and regulating the streets, and for the suppression of nuisances: see especially s. 67 of the last-mentioned act.

Having regard to the provisions of the Police Act, 2 & 3 Vict. c. 47, s. 60, clause 5, and to the Nuisances Removal Act, 18 & 19 Vict. c. 121, s. 8, the magistrate dismissed the complaint, on the ground that he was not bound in point of law to convict the respondent.

The appellants being dissatisfied with that decision, and conceiving it to be erroneous in point of law, the opinion of the court was requested whether the magistrate was bound in point of law to convict the respondent.

Keane, Q. C., for the appellants (a)¹. The question [627] turns mainly upon the construction to be put upon the 67th and 68th sections of Michael Angelo Taylor's Act, 57 G. 3, c. xxix. The 67th section enacts that, "in case any hog-stye, slaughter-house, horse-boiling establishment, or any other matter which in the judgment of the commissioners or trustees or other persons having the control of the pavements in any parochial or other district within the jurisdiction of this act (a)² is a nuisance to

(a)¹ The points marked for argument on the part of the appellants were as follows:—

"1. That the provisions of the 68th section of the 57 G. 3, c. xxix., are all of them powers of improving and regulating streets, and for the suppression of nuisances:

"2. That the 68th section was in force at the time of the passing of the 25 & 26 Vict. c. 102:

"3. That the 68th section is not inconsistent with the Metropolis Local Management Act, 18 & 19 Vict. c. 120, or with any of the metropolis Management Amendment Acts:

"4. That the 68th section applies to the metropolis as defined by the metropolis Management Acts, and therefore to the parish of Chelsea, by force of the 73rd section of the Metropolis Local Management Act, 1852:

"5. That the provisions of the 68th section relating to the keeping of swine, are powers for improving and regulating or for regulating streets:

"6. That the said provisions are powers for the suppression of nuisances in the streets of the metropolis, that is, in the words of the title of the 57 G. 3, c. xxix., for removing and preventing them:

"7. That the other provisions mentioned in the case do not apply to prevent the nuisance or effect the object contemplated by the 68th section of the 57 G. 3, c. xxix."

(a)² This extends (by s. 1) to "all streets and public places which are now paved, or which may be hereafter paved, within the cities of London and Westminster and borough of Southwark, and any other parts of the metropolis which are included within the weekly bills of mortality, and to all streets and public places which are now paved, or which may be hereafter paved, within the parishes of St. Pancras and St. Mary-le-bone, in the county of Middlesex."

the inhabitants of such parochial or other district, or any of them, at any time or times hereafter shall be in any of the streets, lanes, or public places in any parochial or other district within the jurisdiction of this act, it shall be lawful for the said commissioners, &c., upon complaint thereof to them made by any inhabitant, and, after due investigation of such com-[628]-plaint, by notice in writing under the hand or hands of any of their surveyor or surveyors, or of their clerk or clerks for the time being, to order that every or any such hog-stye, necessary-house, slaughter-house, or other matter, *being a nuisance*, shall be forthwith remedied or removed:" and it proceeds to impose a penalty for disobedience of the order. By s. 68, it is further enacted that "no person or persons whomsoever, at any time or times hereafter, shall breed, feed, or keep any kind or species of swine in any house, building, yard, garden, or other hereditaments, situate and being in or within forty yards of any street or public place in any parochial or other district within the jurisdiction of this act, nor shall suffer any kind or species of swine belonging to him or them to stay or go about in any street or public place in any parochial or other district within the jurisdiction of this act:" and it imposes a penalty of 40s. and forfeiture of the offending swine. The object of these provisions is the *prevention* not the suppression only of nuisances,—the keeping swine is the offence to be put down. To suppress is to overpower or subdue an existing evil (see Webster's Dictionary). To prevent is to hinder its perpetration. This is the evident meaning of the word in s. 73, which applies to the carrying of soap-lees, night soil, &c., through the streets. The 5th clause of s. 60 of the Metropolitan Police Act, 2 & 3 Vict. c. 47, which imposes a penalty on "every person who shall keep any pig-stye to the front of any street or road in any town within the said district, not being shut out from such street or road by a sufficient wall or fence, or who shall keep any swine in or near any street, or in any dwelling, so as to be a common nuisance," as well as the Nuisances Removal Act, 18 & 19 Vict. c. 121, s. 8,—which were referred to by the magistrate,—both relate to actual nuisances. For these [629] reasons, it is submitted, the magistrate ought to have convicted the defendant. [Byles, J. Is there any provision other than those in the 57 G. 3, c. xxix., to prevent the keeping of pigs within forty yards of a street or highway?] None. One main object of the legislature was, to prevent the risk of those evils which may result from the keeping of swine in a densely populated neighbourhood: and the law which applies to one district must apply to all those to which the prohibition is extended. [Erle, C. J. Where an act of parliament is susceptible of two constructions, one of which will have the effect of destroying the property of large numbers of the community, and the other will not, we must assume that the legislature intended the former to be applied to it. Michael Angelo Taylor's Act took in all the densely populated districts or places within or near the metropolis; and it gave extensive powers for removing and preventing nuisances and obstructions therein. The 73rd section of the 25 & 26 Vict. c. 102, extends to the larger area to which its enactments apply, not all the powers of the former act for removing and preventing, but only those for the suppression of nuisances. The act seems to me to be drawn in a workman-like manner.]

No one appeared on behalf of the respondent.

ERLE, C. J. In Michael Angelo Taylor's Act, 57 G. 3, c. xxix., s. 68, is contained a provision that "no person or persons whomsoever, at any time or times hereafter, should breed, feed, or keep any kind or species of swine in any house, building, yard, garden, or other hereditaments situate and being in or within forty yards of any street or public place in any parochial or other district within the jurisdiction of that act, nor should suffer any kind or species of swine be-[630]-longing to him or them to stray or go about in any street or public place in any parochial or other district within the jurisdiction of that act:" and a penalty of 40s. is imposed for every such offence, besides forfeiture of the swine. That act extended to all streets and public places within the weekly bills of mortality, embracing therefore many densely populated districts. The act contains a great number of provisions prior to the 68th section, for regulating the streets of the metropolis, and for removing and preventing nuisances and obstructions and things approximating to nuisances in various ways: and then the 68th section absolutely prohibits the keeping of swine, in whatsoever manner they may be kept, nuisance or no nuisance, in or within forty yards of any street or public place. So stood the law upon this subject under Michael Angelo Taylor's Act. Afterwards came the 25 & 26 Vict. c. 102, which extends over a much larger area, taking

in some rural districts, as well as several districts which are densely populated, from Fulham to Woolwich. The board, which was originally created by the 18 & 19 Vict. c. 120, has very extensive powers for the removal of actually existing nuisances. The question is whether they have the power to prevent the keeping of pigs in the manner described in this case. The power given to the commissioners under the 68th section of Michael Angelo Taylor's Act, which is a clause of a highly penal nature, is extended to the local board by the 73rd section of the Metropolis Local Management Acts Amendment Act, 25 & 26 Vict. c. 102. That section enacts that "the powers of improving and regulating streets, and for the suppression of nuisances, contained in the 57 G. 3, c. xxix., intituled 'An act for better paving, improving, and regulating the streets of the metropolis, and removing and preventing nuisances and obstructions therein,' shall, so far as the same is in force, and is not inconsistent with the provisions of the recited acts (a), and this act, extend and apply to the metropolis as defined in the firstly-recited act and in this act, including any unpaved streets, and notwithstanding any exceptions therein contained." Is the power contained in the 57 G. 3, c. xxix., of inflicting a penalty for keeping pigs in a manner which creates no nuisance, extended by the recent enactment, so as to compel the magistrate under the circumstances mentioned in this case to convict the party? I think not. The powers vested in the commissioners under the old act might have been conferred upon the new board in toto: nothing could have been easier for the draughtsman who drew the act than to say so if such had been the intention. He has, however, taken only part of the powers contained in the 57 G. 3, c. xxix. The act is "for better paving, improving, and regulating the streets of the Metropolis, and removing and preventing nuisances and obstructions therein:" the powers which are transferred to the new board are "the powers of improving and regulating streets, and for the suppression of nuisances." A great portion of Michael Angelo Taylor's Act relates to the paving of the streets of the metropolis. The legislature clearly did not intend by the 73rd section of the 25 & 26 Vict. c. 102, to transfer those powers, but only the power to suppress nuisances. Michael Angelo Taylor's Act contains many powers for removing and preventing nuisances, some actual, some inchoate. The keeping of pigs is prohibited, though no nuisance. I think the 73rd section of the 25 & 26 Vict. c. 102, transfers all the powers for the suppression of nuisances, not those for preventing them. Where the keeping of pigs becomes a nuisance, the neighbours may go to the board, and ask them to put in force their powers to suppress it. But pigs may well be kept in very many places within the extensive district defined in the Metropolis Local Management Acts, a very few yards from a public street, without annoying the most fastidious person. By the interpretation clause, s. 250 of the 18 & 19 Vict. c. 120, "street" would embrace the most secluded foot-path in a country district. It enacts that the word "street" shall apply to and include "any highway (except the carriage-way of any turnpike-road), and any road, bridge (not being a county bridge), lane, footway, square, court, alley, passage, whether a thoroughfare or not, and a part of any such highway, road, bridge, lane, footway, square, court, alley, or passage." The change of terms I think authorizes me to come to the conclusion that the magistrate was right in holding that he was not under the circumstances bound to convict the defendant. If the prohibition to keep pigs extends to Chelsea, it must equally extend to every place within the large district embraced by the Metropolis Local Management Acts. The magistrate may exercise his jurisdiction the moment the pig-stye becomes an annoyance to the neighbourhood. It is said that, all nuisances being brought under the jurisdiction of the local board, if the powers of the act are not extended to such things as are likely to become nuisances, the act will virtually have no operation. But every one of those powers may very well exist under Michael Angelo Taylor's Act within the weekly bills of mortality, without extending the prohibition against keeping pigs in the out districts. For these reasons, I am of opinion that the decision of the magistrate should be affirmed.

[633] BYLES, J. I am of the same opinion. Agreeing as I do in all that has fallen from my Lord, I will only add that I conceive the rule to be that, in the construction of every written instrument, the surrounding circumstances are to be

(a) The Metropolis Local Management Act, 1855, 18 & 19 Vict. c. 120, the Metropolis Local Management Act Amendment Act, 1856, 19 & 20 Vict. c. 112, and the Metropolis Local Management Act Amendment Act, 1858, 21 & 22 Vict. c. 104.

considered, and that that rule applies as well to acts of parliament as to deeds or wills. And, when it appears that this act is extended to a very large district, and that the provisions are very stringent, and may be put in force from motives of malice or extreme nicety and fastidiousness, it seems to me that we ought to see that the offence has really been committed, and at all events not to strain the words of the act beyond their fair natural sense. Michael Angelo Taylor's Act contains two sets of provisions,—the one, for the removal or suppression,—the other, for the prevention of nuisances. The 25 & 26 Vict. c. 102, s. 73, transfers to the local board, not in terms the power of *preventing* nuisances, but in terms the power of *suppressing* them. It means existing nuisances. The magistrate who has stated this case has evidently well considered the subject. For the reasons given by my Lord,—which I will not darken by repeating them,—I think the rational construction of the 73rd section of the 25 & 26 Vict. c. 102, is the true and literal construction.

KEATING, J. By the 68th section of Michael Angelo Taylor's Act, 57 G. 4, c. xxix., the keeping of swine in or within forty yards of any street or public place within the ambit affixed to that act is declared to be a nuisance, and prohibited. Various other nuisances and offences are to be dealt with under that act. The Metropolis Local Management Act of 1862 has transferred to the authorities created under the new system of local government all the powers contained in Michael Angelo Taylor's Act for the suppression of nui[634]-sances. That does not include the powers for preventing nuisances in the mode suggested by that act. Prior to the passing of the 25 & 26 Vict. c. 102, the local board had very large powers for the removal of existing nuisances; but they had not the power of preventing the possibility or probability of a nuisance arising, by punishing or preventing the keeping of swine within forty yards of any street, when not a nuisance. That being the state of things, the 73rd section of the 25 & 26 Vict. c. 102, provides that "the powers of improving and regulating streets, and for the suppression of nuisances, contained in the 57 G. 4, c. xxix., intituled 'An act for better paving, improving, and regulating the streets of the metropolis, and removing and preventing nuisances and obstructions therein,' shall, so far as the same is in force,"—some of the provisions having been affected by subsequent acts,—“and is not inconsistent with the 18 & 19 Vict. c. 120, 19 & 20 Vict. c. 112, and 21 & 22 Vict. c. 104, and this act, extend and apply to the metropolis as defined in the firstly-recited act and in this act, including any unpaved streets,” &c. I have during the argument entertained very great doubt whether the legislature did not intend to transfer the powers contained in the section referred to (57 G. 4, c. xxix., s. 68) to the keeping of swine within the extended district, even though not an actual nuisance. I cannot say that that doubt has been altogether removed. But I so far agree with my Lord and my Brother Byles that I am not prepared to dissent from the conclusion they have come to.

Decision affirmed.

[635] MILLS v. THE MAYOR, ALDERMEN, AND BURGESSES OF THE BOROUGH OF COLCHESTER. Nov. 14th, 1864.

[For subsequent proceedings see L. R. 2 C. P. 476; L. R. 3 C. P. 575.]

The corporation of Colchester having in 1740 become suspended by reason of certain proceedings on quo warranto in the court of King's Bench, an act of 31 G. 2, c. 71, was passed for amongst other things, preserving the Colne Fishery which had been by antient charters vested in them. By that act,—after reciting the charters and letters-patent of incorporation, “that the said mayor and commonalty, and their predecessors, had for time immemorial, as well by virtue of their prescriptive rights, as of the said letters-patent, granted licences to oyster-dredgers to dredge and take oysters in the said fishery,” and had held courts and made rules and orders for governing and preserving the fishery,—and that, by reason of the judgments of the court of King's Bench, there remained no mayor aldermen, or justices of peace, nor any person or persons to hold courts or make or enforce rules for the government and preservation of the fishery,—it was enacted that, from and after the passing of that act, it should be lawful to and for the justices residing within the borough or within the Colchester division of the county of Essex, and *they were thereby required*, to hold courts, appoint officers, “and grant licences to such oyster-

dredgemen as should apply for the same, *under the usual and accustomed payments and fees*, and in such manner as the said mayor and commonalty, or their predecessors, had theretofore used to grant such licences," &c. By s. 2, a penalty of 5*l.* was imposed upon non-licensed persons dredging in the fishery. By s. 4, the payments and fees for licences, and all fines, were to be paid to the justices, and, after the re-incorporation of the borough, to the chief magistrate thereof, &c., and be applied in the first place in payment of the necessary charges of obtaining the act, and then to the assignees of a mortgage on the estates of the late mayor and commonalty. And by s. 5, it was provided, enacted, and declared, that "the *powers and authorities* thereby given to the justices should continue and be in force only and until his Majesty, his heirs or successors, should please to re-incorporate the said borough; and that, from such incorporation, all the *powers and authorities* thereby vested in the said justices should cease to be in such justices, and should from thenceforth be and remain in such body corporate, for the uses aforesaid; and that all the other powers, matters, and things thereby enacted, should stand ratified and confirmed to such corporation."—In 1763, by charter of 3 G. 3 (*a*), the borough was re-incorporated. In an action against the new corporation for refusing to grant a dredging licence to the plaintiff, the declaration averred that the plaintiff, before and at the time of his applying for such licence, was, and thence hitherto had been and was, an oyster-dredgeman qualified and entitled to apply for, demand, and have a licence from the defendants *under the said act of parliament*, to dredge and take oysters in the said fishery under the usual and accustomed payments and fees; that he claimed at the proper court to be licensed; and that, although all conditions precedent to entitle him to such licence had been performed, &c., the defendants refused to license him:—Held, on demurrer, that, whatever the immemorial custom might be, there was nothing in the act of parliament which imposed upon the corporation the duty or obligation of granting licences for any accustomed payment or fee; and that consequently the declaration was bad.

This was an action against the mayor, aldermen, and burgesses of Colchester, for refusing to grant the plaintiff a dredger's licence pursuant to the Colne Fishery Act, 31 G. 2, c. 71.

[636] The first count of the declaration stated, that an act of parliament was passed in the 31st year of the reign of King George the 2nd, intituled "An act for regulating, governing, preserving, and improving the oyster-fishery in the river Colne and waters thereto belonging; that the several recitals in the said act contained were and are true in fact; and that, after the said act was passed, the late King George the 3rd, by his letters-patent, bearing date the 9th of September, in the third year of his reign,

(a) By this charter it was recited that it had been represented to the Crown that, by certain judgments of ouster "the said corporation is now dissolved, or at least incapable of enjoying and exercising their said liberties and franchises." It then proceeded to re-incorporate the borough, and by it the King did "ratify, confirm, and restore, as far as in us lies, to the aforesaid mayor and commonalty of the borough aforesaid,"—the new name of incorporation, which appeared also to be the old one,— "and their successors, all and singular so many, such like, and the same hamlets, &c., fisheries, fishings, waters, conservancy of waters, rivers, creeks, and banks, &c., authorities liberties, privileges, rights, jurisdictions, &c., which the men, free burgesses of the said borough, now or heretofore had, used and enjoyed, or as they or any of them, or their predecessors, burgesses of the said borough, by whatsoever name or names, or by whatsoever title of incorporation, they were known or incorporated, to them or their successors, by reason or virtue of any charters or letters-patent by any of our progenitors or ancestors, late Kings or Queens of England, heretofore made, granted, or confirmed, or by whatsoever other lawful manner, right, title, custom, prescription, or use heretofore lawfully used, had, or accustomed:" "To have, hold, and enjoy, &c., under the antient fee farm therefore accustomed to be rendered to us for the same."

By charter of 58 G. 3 (1818) it was recited that, since the last charter, by judgments on informations, &c., "the said corporation is now incapable of enjoying and exercising their said liberties and franchises:" and a new grant of the former rights was made.

re-incorporated the mayor and commonalty of the said borough of Colchester, by the name of "The Mayor and Commonalty of the Borough of Colchester," and granted to them perpetual succession, and a common seal, and did thereby ratify, confirm, and restore, as far as in him lay, to the said mayor and commonalty of the said borough and their successors the said fishery, with the authorities, liberties, privileges, rights, and jurisdictions which the free burgesses of the said borough then and theretofore had, used, and enjoyed, or which their predecessors, burgesses of the said borough, by whatsoever name or title of incorporation they were known or incorporated, had theretofore lawfully had and used: and the said mayor and commonalty of the said borough of Colchester duly accepted the said letters-patent; whereupon the said oyster fishery in the said river Colne, in the said act of parliament mentioned, became and was vested in the said re-incorporated mayor and commonalty of the said borough of Colchester, together with the said powers and authorities which by the said act were given to the justices of the peace residing within the said borough and the liberties thereof, and within the Colchester division of the said county, until the said re-incorporation; and the said fishery, with the said powers and authorities, and all other powers by the said act given, remained and continued vested in the [637] mayor and commonalty of the said borough of Colchester until and at the time of the passing of the act made in a session of parliament holden in the 5 & 6 W. 4, intituled "An act to provide for the regulation of municipal corporations in England and Wales," and until the said corporation, pursuant to the last-mentioned act, and after the first election of councillors under the same, took and had the name of "The Mayor, Aldermen, and Burgesses of the said Borough of Colchester," being the now defendants, in whom the said oyster-fishery, with the powers and authorities aforesaid given by the said act of the 31st year of King George the 2nd have been vested ever since the last-mentioned change of the name of the said corporation, and still are vested, for the uses in the said act mentioned: Averment, that, from the time of the said re-incorporation until the present time, the said corporation, by its name for the time being aforesaid, had been used and accustomed, in pursuance of the said act, once or oftener in every year, to keep and hold the said court commonly called the Admiralty court, in the said first-mentioned act of parliament mentioned, at such place as therein mentioned, and to appoint a water-serjeant or bailiff, and to grant licences to such oyster-dredgermen as have applied for the same, under the usual and accustomed payments and fees, and in such manner as the said mayor and commonalty of the said borough of Colchester in the said act mentioned, or their predecessors, had before the said act of parliament been used to grant such licences, to be paid in such manner as in the last-mentioned statute mentioned: that the plaintiff, before and at the time of his applying for such licence as thereafter mentioned, was, and thence hitherto had been and was, an oyster-dredgerman, qualified and entitled to apply for, demand, and have a licence from the defendants under [638] the said act of parliament, to dredge and take oysters in the said fishery, under the usual and accustomed payments and fees, and in such manner as aforesaid, to be paid as aforesaid, and the plaintiff then was and is personally interested therein: that the defendants, theretofore, to wit, on the 29th of February, 1864, pursuant to the said first-mentioned act, held the said court commonly called the Admiralty court, at a convenient place within the jurisdiction in the said act mentioned, for the purposes in the said act mentioned, and, amongst others, for the purpose of granting such licences as therein mentioned to such oyster-dredgermen as therein mentioned, and at such court did grant divers licences to dredge and take oysters in the said fishery to divers oyster-dredgermen who then and there applied for the same, under the usual and accustomed payments and fees, and in such manner as in the said act mentioned, to be paid as therein mentioned: and that, although the plaintiff, at the said court, duly applied to the defendants for and demanded of them a licence to the plaintiff to dredge and take oysters in the said fishery, under the usual and accustomed payments and fees, and in such manner as in the said act mentioned, to be paid as therein mentioned, and was then and there ready and willing, and tendered and offered the defendants, to pay them such usual and accustomed payments and fees, in manner as in the said act mentioned, and the plaintiff performed all conditions precedent, and all things happened, and all times elapsed which were necessary to entitle the plaintiff to have such licence granted to him by the defendants: yet the defendant did not nor would grant any such licence as aforesaid to the plaintiff, but made default therein, and had hitherto wholly refused so to do: whereby the plaintiff had been and was deprived of his right

to fish in the said [639] fishery, and of the gains and profits which he might and would have made thereby, and had become and was subject to the penalties in the said act mentioned if he fished in the said fishery, for the want of such licence as aforesaid: Claim, 500l.

And, for a second count, the plaintiff repeated all and every the recitals, statements, and matters in the said first count contained and further said that the defendants still wrongfully withheld such licence as aforesaid from the plaintiff, whereby the plaintiff still sustained and would sustain such damage as aforesaid; wherefore the plaintiff claimed a writ of mandamus to command the defendants to keep and hold such Admiralty court as aforesaid at some convenient place within their jurisdiction, pursuant to the said statute passed in the 31st year of the reign of King George the Second, and to grant a licence to the plaintiff, being such oyster-dredgerman as aforesaid, to dredge and take oysters in the said fishery, under the usual and accustomed payments and fees, and in such manner as in the said statute mentioned, to be paid as therein mentioned, pursuant to the said statute.

The defendants pleaded,—first, not guilty,—secondly, that they had not at any time been used or accustomed to grant licences to oyster-dredgermen to dredge for oysters in the said fishery, under usual or accustomed payments or fees, as in the first and second counts of the declaration in that behalf alleged,—thirdly, that, from time whereof the memory of man was not to the contrary, until the passing of the said act in the declaration mentioned, there were no usual or accustomed payments or fees under which the said burgesses in the said act mentioned granted licences to persons to dredge for oysters in the said fishery,—fourthly, that the plaintiff was not entitled to demand or have from the defendants a licence to dredge and [640] take oysters in the said fishery under a usual or accustomed payment or fee, nor was he personally interested therein,—fifthly, that the said mayor and commonalty did not accept the said letters-patent as was in the first and second counts respectively alleged.

The defendants demurred to each of these counts, the ground of demurrer stated in the margin being, “that the count does not shew any right in the plaintiff to a licence under any usual or accustomed fee.” Joinder.

The plaintiff also demurred to the third plea, the ground of demurrer stated in the margin being, “that the fees in question need not have been immemorial, in order to sustain the claim to a licence.” Joinder.

Lush, Q. C. (with whom were J. Brown and Philbrick), for the plaintiff (a). The first question arises upon the right set out in the first count of the declaration. That applies to the act of 31 G. 2, passed at the time the corporation of Colchester had ceased to exist. The title of the act is, “An act for regulating, governing, preserving, and improving the oyster-fishery in the river Colne and waters thereto belonging.” The pre-[641]-amble recites that “the oyster-fishery in the river Colne (describing it) hath from time immemorial belonged to and been under the jurisdiction of the burgesses of the borough of Colchester, which said fishery was by certain letters-patent under the great seal of England in the 1 Ric. 1, granted and confirmed to the burgesses of the said borough, and in the 1 Ric. 2 was confirmed to the bailiffs and burgesses of the said borough, and in the first year of the reign of Edward 4 was granted and confirmed to the bailiffs and commonalty of the said borough, and which said fishery was also by other letters-patent under the great seal of England in the 15 Car. 2 and in the 5 W. 3 further confirmed to the mayor and commonalty of the said borough, together with all their prescriptive rights; that the said mayor and commonalty, and their predecessors, have for time immemorial, as well by virtue of their prescriptive rights, as of the said letters-patents, granted licences to oyster-

(a) The points marked for argument on the part of the plaintiff were as follows:—

“1. That both counts shew that the plaintiff had a right under the act of 31 G. 2, to a licence to dredge and take oysters in the fishery in question, on payment of the usual and accustomed payments and fees mentioned in the act:

“2 That the said act of parliament estops and precludes the defendants from denying that there were such usual and accustomed payments and fees:

“3. That the fees and payments in question need not have been immemorial, in order to sustain the plaintiff's claim; and that it is enough that they were the usual and accustomed payments and fees at the time when the act passed:

“4. And that the third plea was therefore bad and the declaration good.”

dredgers to dredge and take oysters in the said fishery, and have held courts which have been commonly called Admiralty courts at, &c., and made rules and orders for governing and preserving the said fishery, and at such courts offenders and trespassers upon the said river and fishery have been, upon presentments, punished and fined; that the said mayor and commonalty and their predecessors have also from time to time appointed a water-serjeant or bailiff, who exercised a power and authority of entering and going on board the boats and vessels of the fishermen and dredgermen, and of viewing and measuring the oysters, and when any quantity of oysters more than was allowed by such rules and orders have been taken, or if the oysters were undersized, or any brood of oysters or spat was taken away with the culsh, such water-serjeant or bailiff has seized and put such oysters, brood, and [642] culsh back again into the said river and creeks: that, by several judgments lately obtained in Q. B., upon informations in the nature of quo warranto against several persons exercising the offices of mayor and aldermen within the said borough, and by virtue of their offices and charters claiming to be and exercising the office of justices of the peace within the same and the liberties thereof, such persons have been respectively ousted of the said several offices so that there now remains no mayor, aldermen, or justices of the peace, nor any person or persons to hold the said courts of Admiralty, or to make and establish any necessary rules and orders, or to enforce such as have been formerly made for the government and preservation of the said fishery: that many disorderly persons have, in contempt of the rules and orders made and established by the said mayor and commonalty and their predecessors, entered the said fishery before the times appointed for opening the same, and have caught great quantities of oysters more than their due, and taken the brood and undersizeable oysters at a time when they should be preserved, and have also taken and carried away the culsh upon which they cast their spat; and that, if such practices are not prevented, the said fishery will be ruined and destroyed." The 1st section then enacts that, "from and after the passing of this act, it shall and may be lawful to and for the justices of the peace for the time being for the said county of Essex residing within the said borough of Colchester or the liberties thereof, or within the Colchester division of the said county of Essex, or any three or more of them, and they were thereby authorized and required, once or oftener in every year, to keep and hold the said court commonly called the Admiralty court as aforesaid at the said Blockhouse or at some other convenient place within the aforesaid juris-[643]-diction, and from time to time to appoint a water-serjeant or bailiff and such other officers as they shall think necessary, and to grant licences to such oyster-dredgerman or oyster-dredgermen as shall apply for the same, under the usual and accustomed payments and fees, and in such manner as the said mayor and commonalty or their predecessors have heretofore used to grant such licences, to be paid in manner thereafter mentioned; and also from time to time to issue out summonses to the licensed dredgermen of the said fishery, at least eight days before the holding of such court, to attend at the same; and, in case any such dredgerman refuses or makes default to appear at any such court pursuant to such summons, not having a reasonable excuse, to be allowed by the said justices or the major part of them so assembled, it shall and may be lawful to and for the jury at the said courts, or the said justices, in default of the appearance of a sufficient and proper number whereout to impanel a jury, to impose upon any such dredgerman for non-appearance on [or] non-attendance at such court upon such summons the sum of 10s.; and the said justices assembled at such courts, or the major part of them so assembled, shall and may from time to time, at such courts, as often as shall be necessary, cause their water-serjeant or bailiff to impanel and return a jury, &c.; and such jury, so sworn, may and shall from time to time, as often as shall be necessary, at such courts, or any adjournment thereof, make, frame, and set down in writing and sign such rules and orders for limiting the times when the said fishery, or any part or parts thereof, within the limits aforesaid, shall or may be opened, and oysters taken therein," &c. &c. Section 2 enacts that, "if any person or persons not being licensed by the said court shall at any time enter the said fishery, and dredge for or take oysters [644] therein, every such person shall forfeit 5l. for every time he shall commit such offence." By the 4th section it is enacted "that all the payments and fees for granting licences, and also all fines, penalties, and forfeitures hereinbefore mentioned, and to be set and imposed by the said jury or justices at any of the said courts shall be paid, to the said justices, and, after a re-incorporation of the said

borough, to the chief magistrate thereof, or to such person or persons as such justices, or any three or more of them, assembled at such courts, or such chief magistrate, respectively, shall appoint to receive the same,—in trust that the same shall be applied in the first place in payment of the necessary charges of obtaining this act, and afterwards that such payments and fees for granting licences shall be paid upon demand to the assignees of the mortgagee of the estates of the late mayor and commonalty, or the lessee or lessees of such assignees for the time being, subject to redemption of such mortgaged estates," &c. And by the 5th section it is enacted and declared "that the powers and authorities hereby given to the justices of the peace residing within the said borough of Colchester and the liberties thereof, and within the Colchester division of the said county, shall continue and be in force only and until His Majesty, his heirs or successors, shall please to re-incorporate the said town and borough of Colchester; and that, from such incorporation, all the powers and authorities hereby vested in the said justices shall cease to be in such justices, and shall from thenceforth be and remain in such body corporate, for the uses aforesaid, by whatsoever name or style they shall be called; and all the other powers, matters, and things hereby enacted shall stand ratified and confirmed to such corporation." All the rights, powers, and duties which were by the act vested in the justices, by the [645] re-incorporation of the borough devolved upon the defendants. During the period that the corporation was suspended every dredgerman had a right to demand a licence on payment of the customary fees. The justices had no discretion: neither have the mayor, aldermen, and burgesses now. The duty cast upon them is, to regulate the fishery: the profits belong, and always have belonged, to the dredgermen. [Byles, J. Is there any limit to the number of dredgermen?] There is none contained in the act. It is admitted on the record that the old corporation had from time immemorial held the fishery and granted licences. The right to the licence is coeval with the rights of the corporation over the fishery. They by their re-incorporation take it from the Crown subject to the rights of the dredgermen. Their title is based upon the statute of 31 G. 2. Suppose they take it by their antient title,—the preamble of the statute shews what that was. Whether, therefore, we refer to their antient title or to the powers conferred upon them by anticipation by the act of parliament, we find that the dredgermen are the persons who have always enjoyed the substantial profits of the fishery. [Erle, C. J. Do you find any instance of an undefined body having rights like this, with no limitation either as to place or number?] The claim was as general in *Tyson v. Smith*, 9 Ad. & E. 406, 1 P. & D. 307 (a)¹. There, in trespass for making and entering the plaintiff's close, and erecting stalls, booths, &c., there, the defendant justified under a custom that, at fairs holden at certain times of the year on some part of the commons and wastes of the manor (the locus in quo being parcel of such commons and wastes, and named by the lord), *every liege subject exercising the trade of* [646] *a victualler might enter at the time of the fairs, and, for the more conveniently carrying on his said trade, erect a booth, &c., and continue the same for a reasonable time after the fairs, paying 2d. to the lord.* It was objected, in argument, that the right as claimed was too large,—in an undefined body,—whereas it should be confined to individuals of a particular class or description. But the court held that the custom was reasonable, and the plea a good justification in trespass brought by the owner of the soil. [Byles, J. In whom is the soil vested here?] It may be that, by the grant of the fishery, the soil passes (a)². [Byles, J. Is a right to fish a profit a prendre?] Yes. At all events, the right to make oyster-beds would be. The same question was raised in *Rogers v. Brenton*, 10 Q. B. 26. [Erle, C. J. There, the claim of the tin-borders was held to be too vague.] The court must, before they hold this custom bad, be satisfied that there is some rule of law which prevents it from being good. [Byles, J. The statute says (s. 1), that the justices are "to grant licences to such oyster-dredgermen as shall apply for the same, under the usual and accustomed payments and fees, and in such manner as the said mayor and commonalty or their predecessors have heretofore used to grant such licences." The question is, who are the parties who are to have licences?] There is no limitation in the act as to number: and, if there be any qualification by reason of birth, residence, or apprenticeship, the declaration sufficiently avers that the

(a)¹ See the case in the court below, 6 Ad. & E. 745, 1 N. & P. 784.

(a)² See *The Free Fishers of Whitstable v. Gann*, 11 C. B. (N. S.) 387; in error, 13 C. B. (N. S.) 853.

plaintiff is within it. It is enough to say that the general description is as much indicative of a specific calling as that of a victualler in *Tyson v. Smith*. [Byles, J. The right there was not claimed under an act of parliament.]

[647] Then, as to the third plea. That alleges that, from time whereof the memory of man was not to the contrary, until the passing of the act in the declaration mentioned, there were no usual or accustomed payments or fees under which the said burgesses in the act mentioned granted licences to persons to dredge for oysters in the said fishery. Clearly that affords no answer to the action. If there were no usual and accustomed fees, the corporation could only take a *reasonable* fee, or perhaps none at all. But the statute in the recital states that the mayor and commonalty have for time immemorial granted licences: and by the enacting part of s. 1, the justices are to grant licences "to such oyster-dredgers as shall apply for the same, *under the usual and accustomed payments and fees*:" and by s. 5, all the powers and authorities thereby given to the justices were to cease to be in such justices, and thenceforth be and remain in the corporation.

Petersdorff, Serjt. (with whom was R. E. Turner), for the defendants (a)¹. The rights of the corporation are [648] wholly unaffected by the act of parliament. Looking to its preamble and the nature of its enactments, it is plain that it was designed for a temporary purpose only, viz. to relieve parties from the difficulty they might be placed in by reason of the powers of the corporation being suspended. The act of parliament by its recital admits the immemorial rights of the corporation, antecedent even to the time of Richard 1, and confirmed by successive sovereigns down to William 3. It appears that in the year 1740, the officers of the corporation had been removed by quo warranto, and that there consequently remained no person to represent the corporation or protect the fishery. To provide for this emergency, and mainly to protect the rights of the assignees of a mortgage upon the property of the corporation, it became necessary to appoint some temporary governing body. Certain powers were accordingly given to the justices residing within the borough or within the Colchester division of the county of Essex. The powers and authorities given to the justices for this special and limited purpose ceased when on the revival of the corporation its original rights were restored. This question was virtually decided in *The Mayor, &c., of Colchester v. Brooke*, 7 Q. B. 339. There, the act of parliament and all the charters were fully considered, and the court of Queen's Bench decided that the fishery was in the corporation by virtue of its immemorial rights, and that those rights were not affected by the temporary abeyance, [649] but that the effect of the charter of re-incorporation of 1763 was to restore to them all the powers, rights, and privileges which they held before the suspension. Lord Denman, in delivering the judgment of the court, says, p. 382,—“The plaintiffs rely upon a distinction between the dissolution of a corporation and the suspension: and they cite the decision of this court in the case of this very corporation against Seaber, to be found in 3 Burrow and 1 Blackstone (a)². That was an action brought in 1766

(a)¹ The points marked for argument on the part of the defendants were as follows:—

“1. That the corporation, when re-incorporated by the charter of 3 G. 3, were not bound by the provisions of the 31 G. 2:

“2. That, when re-incorporated by the charter, the corporation resumed their antient and immemorial rights and jurisdiction over the fishery:

“3. That the first and second counts of the declaration are bad for not shewing that there was at the time the act of G. 2, was passed, any usual or accustomed payments for licences to dredge:

“4. That the right alleged in the declaration is unreasonable and too vaguely stated; that it is not stated who the dredgers are,—whether or not they are an incorporated body or the inhabitants of a particular district, or in any way limited in number or otherwise:

“5. That the right claimed in the declaration is bad in law, even if it had existed from time immemorial, which is not averred in the declaration:

“6. That the third plea is good in law; that the right claimed, even if a legal right in itself, is void for uncertainty, unless it has existed from time immemorial; and that no other meaning can be put upon the term ‘usual and accustomed.’”

(a)² *The Mayor, &c., of Colchester v. Seaber*, 3 Burr. 1866; *The Corporation of Colchester v. Seaber*, 1 Sir W. Bl. 591.

by the body corporate under the new charter, on a bond given to the body corporate under the old charters: and the court held that the action was maintainable, taking a distinction between total dissolution, as upon forfeiture after proceedings against the corporation itself, and mere inability to continue its existence upon the death of members, or proceedings against them ending in ouster. In the latter case, they treated the corporation as in abeyance, dormant or suspended, and held that a new charter incorporating by the same name, and giving the same constitution, did not create a new, but only revived or called again into activity the old body corporate. This case was very much considered in that of *Re v. Pasmore*, 3 T. R. 199, both in the very able argument at the Bar, and in the judgments delivered from the Bench. It may be collected from the language of the judges, perhaps, that they did not approve of all the expressions made use of by the court in it: but, taking the court to have admitted that *for some purposes at least* the corporation had been dissolved, they did not find fault with the decision itself. Whatever doubts, therefore, we might entertain as to the soundness of the distinctions relied on by Lord Mansfield, if this matter were now to be decided for the [650] first time, we do not feel ourselves at liberty to overrule this decision, and must therefore inquire whether it governs the present case. Lord Kenyon states the effect of the decision to be this. 'Lord Mansfield' (says he) 'did not say in that case that the corporation could act, or that it was not dissolved *to some purposes*: but only that the King might renovate it, and, when renovated, all the former rights would revive and attach on the new corporation, and amongst others the right of suing on the bond given to the old corporation.' Now, this judgment cannot stand on the supposition of the Crown having by the new charter incidently granted the chose in action which the corporation before its dissolution had: for, that chose in action never was in the Crown: the Crown never could have sued upon the bond. In the case of mere dissolution, as by the death of all the members, the real property of a corporation does not escheat to the Crown, but reverts to the donor or his heirs: Co. Litt. 13 b. In the case of liberties, in order to re-vest them in the Crown, there should be a judgment of seizure, or ouster at the least, against the corporation: *Re v. The Mayor of London*, 1 Show. 174, 180. Except by reverter or seizure, we do not see how the right could pass to the Crown: and there was no pretence for either in that case. Nor, if the right were actually extinct and gone, could the Crown have created it anew; for that would have been to affect third parties: it must, therefore, be taken to have continued in existence during the period of abeyance, so that the corporation, upon its revival, sued in virtue of its antient right, suspended, but never destroyed." It is clear, therefore, that, when the corporation was restored by the charter of 1763, it possessed all the rights and privileges which belonged to it under its antient charters. [Erle, C. J. Assuming that the re-incorporation operates a revival of all the powers of the old corporation, is not the allegation in the declaration, that the plaintiff was entitled to demand and have a licence to dredge and take oysters in the said fishery under the usual and accustomed payments and fees, admitted?] The claim is based upon the act of parliament. The dredgermen can only be entitled to licences *according to the immemorial custom*. The corporation is not bound by the act of parliament. The question is, whether there ever was any fixed and ascertained immemorial fee. The necessities of the fishery would manifestly call for a different fee at different times and under different circumstances. [Byles, J. Does Mr. Lush contend that the declaration would be good without the act of parliament? Lush. The plaintiff relies upon the recitals in the act.] Unless an immemorial right is alleged in the declaration, and proved at the trial, the third plea is a good answer to the action. [Erle, C. J. The corporation grant dredging licences. What is there to shew an obligation on them to grant them, because they have always *thought fit* to do so?] There is no obligation whatever upon them: at all events, not a fixed sum. [Byles, J. The difficulty I feel is, in seeing without the act of parliament, any obligation imposed upon the corporation. In the clause (s. 5) which deals with the transfer to the new corporation of the powers and authorities vested by the act in the justices, there is a total absence of words of requirement.] No fresh duty or obligation is cast upon the defendants by the act of parliament. [Erle, C. J. If the plaintiff's right fails under the act of parliament, the parties may settle an issue between themselves to raise the question of fact.] Assuming that there is no obligation on the defendants, except as arising out of the act of parliament, it is impossible

to say that the plaintiff can have a right [652] based solely on the act, because his claim has reference to the immemorial rights of the corporation. By the enacting part of s. 1, the justices were to grant licences to such oyster-dredgers as should apply for the same, "under the usual and accustomed fees, and in such manner as the said mayor and commonalty, or their predecessors, had theretofore used to grant such licences." So that the plaintiff's right cannot be separated from the obligations and duties of the corporation. If the granting of licences was discretionary in the corporation before the act, it is discretionary now. [Erle, C. J. The sole question is, whether the corporation, when reinstated, are by the act required to do that which the justices were required to do. Byles, J. There may be good reason why the carrying out the duties imposed upon them by the act should be made compulsory on the justices. If a discretion as to the imposition and levying of fines were left to them, they might decline to exercise it. The corporation would have an interest in the matter.] An act of parliament which contains only affirmative words cannot be construed so as to destroy antient customs.

Lush, Q. C., in reply. The statute casts upon the corporation the obligation of granting dredging-licences upon payment of the fee which was usually and customarily payable at the time the act passed. The object was, to preserve and restore a valuable fishery. It may be fairly collected from the preamble that the corporation were under an obligation to do what by the enacting part the justices were required to do for the purpose of carrying that object into effect. The justices are "authorized and required" to hold an Admiralty court, to appoint a water-serjeant or bailiff, and to grant licences "to such oyster-dredgers as shall apply for the same, under the usual and accus-[653]-tomed payments and fees, and in such manner as the said mayor and commonalty, or their predecessors, had theretofore used to grant such licences." They have no discretion to select, or to limit the number, or to vary the amount of the fee. The words "in such manner," &c., merely point to the *modus operandi*, and do not refer to the conditions under which the thing is to be done. Then, what meaning is to be given to the words of the proviso in s. 5,—“Provided always, and it is hereby further enacted and declared, that the powers and authorities hereby given to the justices shall continue and be in force only and until the re-incorporation of the said borough: and that, from such incorporation, all the powers and authorities hereby vested in the said justices shall cease to be in such justices, and shall from thenceforth be and remain in such body corporate?” [Erle, C. J. Under the act the justices had certain *powers and authorities* to exercise, and certain *duties* to perform. When the borough should be re-incorporated, all the *powers and authorities* vested by the act in the justices were to become vested in the new corporation.] The duty to grant licences is necessarily involved in the power and authority to do so. The state of things declared or created by the statute is to be continued by the new corporation. Certain powers are given to the corporation under the act which they did not possess before; for instance, the power to fine the dredgers for non-attendance when summoned on the jury, and to administer an oath to the jurymen. Suppose the payment had been uniform,—say, 10s. 6d. for each licence,—would it be competent to the corporation to say, “The fishery is ours; and, though our burgesses cannot fish, and none but a licensed dredgerman can fish, we will put such a price upon future licences as will virtually take the profits of the fishery out of those [654] for whose benefit it has been preserved, and vest them in the corporation?” In *The Mayor, &c., of Colchester v. Brooke*, 7 Q. B. 339, no mention was made of the statute at all.

ERLE, C. J. This is an action brought by a dredgerman of Colchester against the corporation of that borough, in order to enforce a supposed right to demand a licence to dredge for and take oysters in the Colne fishery, under the “usual and accustomed payments and fees.” It is perfectly clear from the preamble of the 31 G. 2 that the corporation of Colchester is one of very great antiquity, with very extensive rights, authorities, and duties; and that, in the year 1740, those rights, authorities, and duties became suspended in consequence of several of its members having been ousted by *quo warranto*,—not absolutely and for ever extinguished, but suspended as to the exercise of its municipal functions until it should please the Crown to revive and re-incorporate it by a new charter. I will take it, for the purposes of the day, that the new corporation revived by the charter of 1763 stand possessed of all the rights coming down to them from the old corporation. What

may have been the rights of the dredgers under the old corporation, I do not stop to consider. But, after the lapse of the old corporation, and before its reconstruction, the statute in question passed, putting the justices of the peace ad interim in the place of the suspended corporation, and imposing on them the obligation "to grant licences to such oyster-dredgers as should apply for the same, *under the usual and accustomed payments and fees*, and in such manner as the corporation, or their predecessors, had theretofore used to grant such licences." By a subsequent section, it was expressly enacted that, when it should please the Crown to [655] re-incorporate the borough, the *powers and authorities* thereby vested in the justices should cease, and should from thenceforth be and remain in such corporation. The justices were *required* by the statute to grant licences: the duty to do so was thereby cast upon them. The only question which my judgment goes to is, whether the effect of the statute is, to create a duty in the new corporation to grant licences in the manner the justices were required to do while acting ad interim. The case has been argued by Mr. Lush with his usual ability. But I cannot find that this statute has created any new liability in the corporation to grant licences which it was obligatory on the justices during the interval to grant. The statute recites the original grant of the fishery to the corporation, and various subsequent confirmations; that the corporation and their predecessors had for time immemorial, as well by virtue of their prescriptive rights as of the said letters-patent, granted licences to oyster-dredgers to dredge and take oysters in the said fishery, and held Admiralty courts, and made rules and orders for governing and preserving the said fishery, &c.: but nothing is said about the fees payable for such licences. It then goes on to recite that, by reason of proceedings in the court of King's Bench, there was no mayor, &c., nor any person to hold courts or make rules, and that certain mal-practices had ensued which if not prevented would ruin and destroy the fishery. The statute then proceeds to enact that it should be lawful for the justices residing within the borough, or within the Colchester division of Essex, and they were thereby authorized and *required*, to hold courts, to appoint a water-bailiff, &c., and "to grant licences to such oyster-dredgers as should apply for the same, *under the usual and accustomed payments and fees*, and in such manner as the said mayor, &c., or their pre-[656]-decessors, had theretofore used to grant such licences." It seems to me that the statute has purposely given authorities to and imposed obligations upon the justices during the time the corporation should remain in abeyance, and that its operation was to cease when the corporation should be revived. The words of the proviso contained in s. 5, are that the *powers and authorities* thereby given to the justices should continue and be in force only until His Majesty, his heirs or successors, should please to re-incorporate the borough, and that, from such incorporation, all the *powers and authorities* thereby vested in the justices should cease to be in them, and should thenceforth be and remain in the body corporate. When the borough comes to be re-incorporated, it is re-incorporated with all the rights, powers, and authorities, and all immemorial obligations it originally had and exercised; but the statute is silent as to transferring to them any statutable duties and obligations imposed upon the justices by the 1st section. In the mind of a lawyer, powers and authorities are clearly distinguished from duties and obligations. The former s. 5 intended to pass, the latter not. Then come the more general words, "and all other powers, matters, and things hereby enacted shall stand ratified and confirmed to such corporation." This, I think, means the same as "powers and authorities," and was not intended to impose upon the corporation any new obligation, but the legislature is treating them as in the nature of grantees. It is widely different from language imposing that which would be an immensely operative contract, limiting the corporation to the receipt of usual and accustomed fees. I cannot think the legislature had any such intention. If the corporation are bound to grant licences upon payment of any immemorial fee, be it so: but the statute does not establish anything of the kind.

[657] BYLES, J. I am entirely of accord with my Lord as to the construction of the statute. One can clearly see a right in the corporation (probably prescriptive) to grant licences. It is conceded, and properly conceded, that, however the fact may be, upon this record we can only deal with usual and accustomed payments and fees under the statute. The Lord Chief Justice has given his reasons why the statute does not help the plaintiff in this respect; and I will not repeat them. I was somewhat struck with the argument that "powers and authorities" implies "duties" to

be performed by those to whom are confided the powers and authorities. But the answer is that, reading those words in their literal sense in both parts of the statute, they clearly could not have been intended to impose upon the corporation obligations which did not exist under the old state of things. I cannot help feeling that this construction is the most reconcileable with the intention of the framers of the act, because of the extreme improbability of the legislature dealing in this indirect way with corporate rights. I therefore think that the defendants are entitled to judgment on this point.

KEATING, J. I am entirely of the same opinion. It is impossible to read the recitals and the various subsequent provisions of the act, without seeing that the legislature contemplated at the time of its passing the re-incorporation of the borough, which was then suspended, and merely intended to provide for what may be called the interregnum. The old corporation was not dissolved by the proceedings against some of its members in the court of Queen's Bench. Those operated merely as a temporary suspension of the corporate functions. The powers and duties necessary to provide for the preservation of the interests of the [658] borough and the fishery during the interval, must necessarily be conferred upon some acting body. This was all the act was passed for. There was no intention to interfere in any way with the rights or the obligations which were vested in or imposed upon the old corporation. No new statutory obligation is cast upon the new corporation by the act. The declaration, therefore, is bad, and there must be judgment thereon for the defendants.

Judgment for the defendants.

Lush asked leave to substitute a count founded upon the immemorial custom. To this the court assented.

Rule accordingly.

MITCALFE v. WESTAWAY. Nov. 26th, 1864.

[S. C. 34 L. J. C. P. 113; 11 L. T. 673; 10 Jur. N. S. 1202; 13 W. R. 181.]

A railway company, being possessed of a ship-yard in which was a "slip" for docking vessels, by indenture demised the yard to B., subject to the following reservation:—"Except and always reserved out of this demise the patent slip (as shewn on a plan), and the machinery and apparatus connected therewith, and the site thereof, and the dues and payments payable for the use thereof, and except and always reserved unto the said company, their successors and assigns, officers, servants, and workmen, free access at all times to and from the said slip, for the purpose of working and using or repairing the same, or otherwise:"—Held, that it was competent to the company to grant "licences" to persons to use the slip, on payment to them of certain dues; and that the right of access to and of using the slip was not limited to persons claiming to exercise it in the character of "assigns" of the company, in the strict sense.

This was an action of trespass. The declaration stated that the defendant, on divers days and times broke and entered certain land of the plaintiff's, which the plaintiff described as land on each side of a certain slip, and as abutting on the south side thereof on Lowestoft harbour, and placed on the said land of the plaintiff on each side of the said slip divers tools, utensils, and shipwrights' gear, pitch-pots, pieces of timber [659] and wood, and other goods and materials, and braziers and stoves, and kept the same there for long times, and therewith greatly incumbered the said land of the plaintiff, and with the feet of divers persons walked and trampled on the said land of the plaintiff on each side of the slip, and with the wheels of carts and feet of horses trespassed and trampled upon the said land of the plaintiff on each side of the said slip, and seized divers pieces of timber and wood and other goods of the plaintiff, and carried the same away, and threw the same about, and by so doing greatly incommoded the plaintiff, and prevented him from carrying on his business of a ship-builder and repairer of ships in so beneficial a manner as he otherwise would have been able to do, &c.

The defendant pleaded that, before the plaintiff was possessed of or had any title, estate, or interest in the said land, the then Eastern Counties Railway Company, now called the Great Eastern Railway Company, were and still are seised in their demesne

as of fee of and in the said land, and also of and in certain land and premises called and used and to be used as a slip; and, being so seised, they by a deed made between them of the one part, and William Stephen Andrews of the other part, demised and leased the said land in which, &c. to the said W. S. Andrews, To hold the same to him for a certain term therein mentioned and not yet expired; the said company excepting and reserving out of that demise the said slip shewn and distinguished by the letter A. in a map or plan drawn in the margin of the said deed, and the machinery and apparatus connected therewith, and the site thereof, unto the said company, their successors and assigns, officers, servants, and workmen, free access at all times to and from the said slip, for the purpose of working and using or repairing the same, or [660] otherwise; and which said deed was and is in the words and to the tenor following, that is to say, "This indenture, made the 25th day of March, 1856, between the Eastern Counties Railway Company of the one part, and William Stephen Andrews, of Lowestoft, in the county of Suffolk, of the other part, witnesseth that, in consideration of the rent hereinafter reserved, and of the covenants, stipulations, and agreements hereinafter contained on the part of the said W. S. Andrews, his executors, administrators, and assigns, to be observed and performed, the Eastern Counties Railway Company do hereby demise and lease unto the said W. S. Andrews, his executors, administrators, and assigns, all that piece or parcel of land situate, lying, and being at Lowestoft aforesaid, adjoining or near to the harbour there, now and for some time past used as a ship-yard, together with the buildings, workshops, sheds and other erections now standing and being thereon, as the same are particularly delineated and shewn in the map or plan in the margin of these presents, and thereon coloured pink, together also with all and singular the rights, members, easements, and appurtenances to the said piece of land, ship-yard, and premises belonging or in anywise appertaining, as the same are now in the occupation of the said W. S. Andrews, except and always reserved out of this demise the patent slip shewn and distinguished by the letter A. in the said map or plan, and the machinery and apparatus connected therewith, and the site thereof, *and the dues and payments payable for the use thereof, and except and always reserved unto the said company, their successors and assigns, officers, servants, and workmen, free access at all times to and from the said slip,* for the purpose of working and using or repairing the same, or otherwise, to have and to hold the said piece of land, yard, erections, buildings, and pre-[661]-mises hereinbefore demised, or expressed and intended so to be, unto the said W. S. Andrews, his executors, administrators, and assigns, henceforth for and during and unto the full end and term of twenty-one years, computed from the 25th day of March, 1856; yielding and paying," &c., &c. [Then followed a number of covenants not material to the present question]: Averment, that the said company, before and at the said times when, &c., gave and granted to the defendant their *licence and permission* to work and use the said slip, and he at the said times when, &c., worked and used the same under such *licence and permission*, and the trespasses complained of were a use and exercise by him of the said right and power so excepted, reserved, and given by the said deed: and, because the defendant could not have free access to and from the said slip for the purpose of working and using it, without entering and going on the said land on which, &c., and without placing on the said land on each side of the said slip the said tools, &c., and keeping the same there, and without the defendant and his servants in that behalf employed by him for working and using the said slip walking on the said land on each side of the said slip, and without going and passing on the said land with carts and horses on each side of the said slip, and without seizing and removing and carrying away to a small distance and a little throwing about the said timber, wood, and other goods of the plaintiff, the defendant did, for the purpose of having free access to and of working and using the said slip under the *said licence and permission*, and in the lawful exercise of his rights and powers in that behalf, enter and go on the said land on which, &c., and place thereon as aforesaid the said tools, &c., and keep the same there as aforesaid, and by himself and his said servants walk on the said land on each side of the said [662] slip, and go and pass on the said land with carts and horses on each side of the said slip, and with the wheels of the said carts and feet of the said horses trample on the said land on each side of the said slip, and seize the said pieces of timber and wood and other goods, and carry the same away to a small and convenient distance, and a little throw them about, and there leave them for the

plaintiff's use, as he lawfully might for the cause aforesaid, doing no more and nothing else but what he was entitled to do; and which are the trespasses complained of.

The plaintiff demurred to this plea; the ground of demurrer stated in the margin being, "that a licensee of the company cannot exercise the rights reserved on the plaintiff's land." Joinder.

Keane, Q. C. (with whom was Douglas Brown), in support of the demurrer (*a*). The exception out of the [663] demise to the plaintiff by the Great Eastern Railway Company operates as a re grant to the company of the slip, and a right for them and their successors and assigns, officers, servants, and workmen, of free access at all times to and from the slip for the purpose of working and using or repairing it. The plaintiff, as licensee, is not a successor, or assign, or an officer, servant, or workman of the company. The rights of a licensee are well defined in Com. Dig. *Common* (F. 2), where it is said that "he who has common appendant, or appurtenant for cattle levant and couchant, cannot use the common with the cattle of a stranger: nor can he license his tenants at will to put their cattle there: nor can he use the common with cattle which he agists, or which he has to sell." If the commoner could give a licence to a stranger, it would interfere with the enjoyment of the rights of others. So, if the company could grant a licence to anybody to use the slip, it would be using the plaintiff's land for a purpose which he could never have contemplated when he agreed to take the lease. If the reservation had been simply of the slip, a right of way of necessity might have passed with it. But here the way is granted in a limited manner, describing the persons by whom the right is to be exercised. If the licensee was a servant of the company, it should have been so alleged. Licences may be granted to an indefinite number of persons. [Erle, C. J. What difference can the form of the instrument make to the plaintiff. I presume there would be no objection to the company *assigning* the slip for the time requisite to repair one vessel, and then another.] If I have an assign, I know how to deal with him. A mere licence, whether by deed or [664] by parol, is revocable: see the judgment of Alderson, B., in *Wood v. Leadbitter*, 13 M. & W. 838, 844. In the notes to *Armory v. Delamirie*, (1 Stra. 505), in 1 Smith's Leading Cases, 5th edit. 304, it is said: "It may perhaps be laid down generally, that to rights lying in grant, and not susceptible of possession or seisin, there can be no title as against a wrong-doer where there is none against the party capable of granting such rights: excepting only where the right claimed is a natural incident of property which is in the possession of the claimant. Thus, as a mere licence confers no right at common law against the licensor, but only excuses that which, if not done under the licence, would have been a wrong to him (*Wood v. Leadbitter*), the licensee of that which might have been conferred as an easement or profit à prendre, cannot, it is apprehended, maintain an action against a wrong-doer for depriving him of the benefits which he might or would have enjoyed under the licence. This subject was discussed in *Whaley v. Laing*, 26 Law J., Exch. 327, 2 Hurlst. & N. 476."

(a) The points marked for argument on the part of the plaintiff were as follows:—

"1. That a mere licensee of the company has no right to enjoy the easement on the land demised to the plaintiff:

"2. That the exception of the slip by itself could confer no easement except a right of way of necessity; and this would not entitle the lessor to any onstand on the land demised for the purpose of using the slip:

"3. That, if anything more is claimed than a right of way of necessity, it must be under the so-called exception and reservation of free access for the purpose of working, using, or repairing the slip; and the class of persons to whom such free access is given does not include a licensee:

"4. That the right is only reserved, to be exercised by the company and their assigns (meaning by assigns those to whom the company assign an estate in the slip), and by the officers, servants, and workmen of the company and their assigns, that is to say, by those who are employed by the company or their assigns, and who act for them; and this a licensee does not do, as he acts on his own behalf, for himself:

"5. That the expression 'the company, their successors or assigns,' frequently occurs in the lease, and must receive the same construction throughout."

Bovill, Q. C. (with whom was O'Malley, Q. C.), *contra* (a). A licence is always an excuse for a trespass. [665] But the question here arises upon the construction of the lease under which the plaintiff holds. The subject-matter of the demise is a ship-yard. In it is a slip. The yard is demised to the plaintiff, the indenture containing an exception of the slip. If there had been nothing more, all things necessary for the free use of the slip would have remained vested in the lessors, not only for themselves, but also for every person who came there by their permission for the purpose of using the slip. The conveyancer, however, has added, for greater caution,—“and the machinery and apparatus connected therewith, and the site thereof, and the dues and payments payable for the use thereof, and except and always reserved to the said company, their successors and assigns, officers, servants, and workmen, free access at all times to and from the said slip for the purpose of working and using or repairing the same, or otherwise.” In Sheppard's Touchstone, 89, it is said: “When anything is granted, all the means to attain it, and all the fruits and effects of it, are granted also, and shall pass *inclusive*, together with the thing, by the grant of the thing itself, without the words cum pertinentiis, or any such like words. Cuiusque aliquid conceditur, conceditur etiam et id sine quo res ipsa non esse potuit. As, by the grant of consuance of pleas, is granted the ordinary process to bring causes to judgment. By the grant of a ground is granted a way to it [i.e. all usual ways: and, unless there be an usual way, then a way of necessity will pass: Shep. Abr. 4 part, 200: B. N. P. 74; F. N. B. 183: Com. Dig. *Chimin* (D. 2): *Horton v. Freeman*, 8 T. R. 50; *Surrey v. Piggot*, Latch, 153.] By the grant of trees is granted withal [unless the right of cutting be restrained, and it may be restrained so as to preserve them for ornament, &c.] power to cut them down and take them away. By the grant of mines is granted [666] the power to dig them: and by the grant of fish in a man's pond, is granted power to come upon the banks and fish for them.” The added words in this exception are words of extension, and not of limitation. The plea shews that, without committing the alleged trespasses, the slip could not be used. The judgment of Parke, B., in *Dand v. Kingscote*, 6 M. & W. 174, 197, is expressly in point. *Liford's case*, 11 Co. Rep. 46 b., also contains much learning on the subject. The reservation, if it were necessary to resort to that, of “the dues and payments payable for the use thereof,” removes all doubt: there could be no “dues” payable, unless for the use of the slip by others than the company, their officers or servants. See also the notes to *Pomfret v. Rivoirt*, 1 Wms. Saund. 323 (m).

Keane, Q. C., in reply. The exception is limited by the words used: and exceptions are to be construed strictly. This reservation of the slip is not a re-grant: it is rather in the nature of an easement,—*The Durham and Sunderland Railway Company v. Walker*, 2 Q. B. 940. There is no dispute about the authorities referred to on the other side. Where a thing is granted, of necessity the grant carries with it that without which the grant could operate nothing. There is a material difference, however, between a grant and a licence: *The King v. The Inhabitants of Mellor*, 2 East, 189; *The King v. The Inhabitants of Tardebigg*, 1 East, 528.

ERLE, C. J. I am of opinion that the defendant is entitled to judgment. This is an action of trespass for coming upon the land of the plaintiff: and the question turns upon the meaning of an exception out of the demise of the land under which the plaintiff holds. The demise is by the Eastern Counties Railway Com-[667]-pany (now the Great Eastern Railway Company) to the plaintiff of a piece of land described as a ship-yard, adjoining Lowestoft Harbour: and the exception is, —“Except and

(a) The points marked for argument on the part of the defendant were as follows:—

“1. That the defendant was under the licence and permission of the Great Eastern Railway Company entitled to use the rights in the exercise of which the alleged trespasses were committed:

“2. That the Great Eastern Railway Company were after the execution of the deed set out in the plea the absolute owners of the slip, and of all the rights necessary to the full enjoyment of the same; and that the defendant was entitled to use such rights, as their licensee:

“3. That such ownership and such rights were excepted or reserved by the deed set out in the plea: and that the defendant was entitled to use such rights as their licensee.”

always reserved out of this demise the patent slip (as shewn in a plan), and the machinery and apparatus connected therewith, and the site thereof, and the dues and payments payable for the use thereof, and except and always reserved unto the said company, their successors and assigns, officers, servants, and workmen, free access at all times to and from the said slip, for the purpose of working and using or repairing the same, or otherwise." I think the effect of the demise, taking it all together, was that the slip remained (the fee-simple) in the grantors, and consequently they were at liberty to make any use of it, and to exercise dominion over it, by themselves, or by their servants, or by assigns or licensees, in any way in which an owner in fee-simple can exercise acts of ownership over his property. I think we are bound to give effect to the intention of the parties; and that intention manifestly was, to reserve to the lessors the rights I have stated. The earlier words of the exception are plain to that effect; and the additional words, so far from restricting it, were inserted for the purpose of making it more clear that the company reserved the right to use the slip themselves, or to pass their interest therein for the whole or a part of their estate, and consequently the right to assign it or to license others to use it. It clearly was the intention of all parties that the company might make the slip available for earning dues for themselves, or in any other manner they might choose.

BYLES, J. I am of the same opinion. I think the construction of this exception would have been the same if the word "assigns" had not been found there. [668] All contracts are to be so construed as to give effect to the intention of the parties, even though in some cases this occasions a departure from the strict literal sense of the words used. The slip in question is upon the land demised to the plaintiff; and it is clear that the lessors were in the habit of allowing other persons to use it, and of receiving due therefor. The demise is, of the ship-yard, excepting the slip, and reserving to the grantors "their successors and assigns, officers, servants, and workmen, free access at all times to and from the said slip, for the purpose of using and working or repairing the same, or otherwise." It may be conceded that "officers, servants, and workmen," exclude licensees: but those words would I think be satisfied if the persons using the slip were the officers, servants, and workmen of a licensee. It is plain that, if the slip were let by the company for a week, the tenant would be an assign for this purpose, and his servants and workmen would be the servants and workmen of the company and their assigns. If the word "assigns" had not been there, the other words would imply this: but that word is there. Are we, then, to give "assigns" the strict literal construction, and hold it to be satisfied only by the grant of such an interest in the slip as would enable the party to maintain trespass? or are we to construe it so as to comprehend an assignee of the right to use the slip for a valuable consideration, by leave of the company, for a given time? I think the latter is the true construction.

KEATING, J. I am of the same opinion. Looking at the subject-matter of this exception, I think it is impossible that the word "assigns" can have the limited meaning which Mr. Keane seeks to put upon it, viz. an estate in the slip granted to a person by deed. The sub-[669]-ject matter of the exception is not simply the slip, but "the dues and payments payable for the use thereof." That plainly contemplates a user of the slip by others than the company, their successors and assigns, officers, servants, and workmen, viz. by persons who would render to the company dues and payments for the use thereof. The construction sought to be put by the plaintiff on the word "assigns" would preclude the company from enjoying what they had reserved to themselves as necessary to the full and free enjoyment of the slip, viz. access thereto, not only by persons having some estate therein, but also by persons using it by their licence and permission.

Judgment for the defendants.

DOGGETT v. CATTERNS. Nov. 24th, 1864.

[Reversed in Exchequer Chamber, 19 C. B. N. S. 765.]

Held, that the habitual use of a spot in a public park for the receiving of deposits, to return a larger sum on the contingency of a particular horse winning a race, is the using of a "place" for such purpose, within the prohibition of the 16 & 17 Vict.

e. 119, and consequently that the money so deposited might be recovered back by virtue of s. 5 of that act.

This was an action for money had and received by the defendant for the use of the plaintiff, and for moneys found to be due and owing from the defendant to the plaintiff on an account stated between them: Claim, 20l.

The defendant pleaded,—first, never indebted, —secondly, a set-off for work and labour, money paid, and money due on accounts stated,—thirdly, that the money alleged to have been had and received by the defendant for the use of the plaintiff was money deposited by the plaintiff with the defendant under a con-[670]-tract or agreement by way of wagering and gaming and illegally betting on horses running at races, and the account stated alleged in the declaration was made and stated of and concerning the said money deposited as therein alleged, and not otherwise. Issue thereon.

The cause was tried before the undersheriff of Middlesex on the 30th of June, 1864. The only witness called was the plaintiff himself. In his examination in chief, he stated that, on the 20th of October last, he was in Hyde Park under a clump of trees; that there were a hundred and fifty or two hundred persons present; that he there saw the defendant, who was betting on races: that he was shewing a list and betting the odds on cards printed [one of which was produced and identified]: that he (plaintiff) made a wager with him, backing "Fly-trap" for the Witham Handicap at Lincoln, for the 20th of October, at $\frac{1}{2}$ past 12: that he (plaintiff) was to receive 6l. to 1l.: that he deposited 5l. 10s., and was to receive 38l. 10s. if Fly-trap won: that he had seen the defendant there before: that he (defendant) was there daily betting on horse-racing: that twenty or thirty others were there doing the same: that Fly-trap did not win: that two days afterwards he told the defendant that the horse was scratched four hours before he made the bet: and that he (defendant) refused to return the money, saying that he "betted all in on the day of the race."

On cross-examination, the plaintiff said he was at the place in question backing horses, and knew as much about betting as the defendant: that he examined the card, and would not swear that the words "all bets stand on the day of the race, scratched or not," were not there: and that he did not know that the defendant knew that the horse was scratched.

The card referred to had printed on it in large letters "all bets stand on the day of the race, scratched or not."

[671] On behalf of the defendant, it was submitted that the plaintiff was not entitled to recover back the 5l. 10s., the money having been paid by him upon a contract of gaming and wagering within the meaning of the 8 & 9 Vict. c. 108. For the plaintiff, reliance was placed upon the 16 & 17 Vict. c. 119, which, it was submitted, entitled the plaintiff to recover back his deposit.

The undersheriff directed the jury to find for the defendant, reserving leave to the plaintiff to move to enter a verdict for him for 5l. 10s., if the court should be of opinion that the 16 & 17 Vict. c. 119 entitled the plaintiff to recover.

Yeatman, accordingly, on a former day in this term, obtained a rule nisi to enter a verdict for the plaintiff for 5l. 10s., on the grounds,—first, that there was no risk, the horse being struck out,—secondly, that the Betting House Act, 16 & 17 Vict. c. 119, entitled the plaintiff to recover as for money had and received to his use.

Talfourd Salter now shewed cause. The plaintiff is not entitled to recover. The 18th section of the 8 & 9 Vict. c. 109 enacts "that all contracts or agreements, whether by parole or in writing, by way of gaming or wagering, shall be null and void: and that no suit shall be brought or maintained in any court of law or equity for recovering any sum of money or valuable thing alleged to be won upon any wager, or which shall have been deposited in the hands of any person to abide the event on which any wager shall have been made." Here the event did come off, viz. when the horse was scratched. The 16 & 17 Vict. c. 119 has no application. It was passed for a totally different purpose. The title of the act is, "An Act for the sup-[672]-pression of betting-houses." It recites that "a kind of gaming has of late sprung up, tending to the injury and demoralization of improvident persons by the opening of *places called betting houses or offices*, and the receiving of money in advance by *the owners or occupiers of such houses or offices*, or by other persons acting on their behalf, on their promises to pay money on events of horse-races and the like contingencies:" and, "for the

suppression thereof," it proceeds in s. 1 to enact, that "no house, office, room, or other place shall be opened, kept, or used for the purpose of the owner, occupier, or keeper thereof, or any person using the same, or any person procured or employed by or acting for or on behalf of such owner, occupier or keeper, or person using the same, or of any person having the care or management or in any manner conducting the business thereof, betting with persons resorting thereto; or for the purpose of any money or valuable thing being received by or on behalf of such owner, occupier, keeper, or person as aforesaid, as or for the consideration for any assurance, undertaking, promise, or agreement, express or implied, to pay or give thereafter any money or valuable thing on any event or contingency of or relating to any horse-race, or other race, fight, game, sport, or exercise, or as or for the consideration for securing the paying or giving by some other person of any money or valuable thing on any such event or contingency as aforesaid; and every house, office, room, or other place, opened, kept, or used for the purposes aforesaid, or any of them, is hereby declared to be a common nuisance, and contrary to law." By s. 2 betting-houses are declared to be "common gaming houses" within the 8 & 9 Vict. c. 108. The 3rd section imposes a penalty not exceeding 100l. on any person who, being the owner or occupier of any house, office, room, or other place, or a person using the [673] same, shall open, keep, or use the same for the purposes thereinbefore mentioned, or either of them, &c. The 4th section imposes a penalty not exceeding 50l. upon "any person, being the owner or occupier of any house, office, room, or place opened, kept, or used for the purposes aforesaid, or either of them, or any person acting for or on behalf of any such owner or occupier, or any person having the care or management or in any manner assisting or conducting the business thereof, who shall receive, directly or indirectly, any money or valuable thing as a deposit on any bet on condition of paying any sum of money or other valuable thing on the happening of any event or contingency of or relating to a horse-race, &c., or as or for the consideration for any assurance, undertaking, promise, or agreement, express or implied, to pay or give thereafter any money or valuable thing on any such event or contingency, and any person giving any acknowledgment, note, security, or draft, on the receipt of any money or valuable thing so paid or given as aforesaid, purporting or intended to entitle the bearer or any other person to receive any money or valuable thing on the happening of any such event or contingency as aforesaid." And s. 5 enacts that "any money or valuable thing received by such person aforesaid as a deposit on any bet, or as or for the consideration for any such assurance, undertaking, promise, or agreement as aforesaid, shall be deemed to have been received to or for the use of the person from whom the same was received, and such money or valuable thing, or the value thereof, may be recovered accordingly, with full costs of suit, in any court of competent jurisdiction." [Erle, C. J. "No house, office, room, or other place, shall be opened, kept, or used for the purpose," &c. You say that those words do not extend to a tree in the park habitually resorted to for betting [674] purposes?"] "Other place" in the statute means a place ejusdem generis with those enumerated: it must be a place of which some person may be the owner, and a place devoted to the purposes of betting. [Erle, C. J. What is a "public place," or a "place of public resort," has frequently been the subject of discussion, and also of some difference of opinion (a). According to your argument, open-air transactions must go free. Here, it seems, the defendant does habitually in Hyde Park that which done in a room would render him liable to the penalty imposed by the statute. Is the place where this is done without the line of prohibition? What is done here, is constantly done at Epsom without objection, and also at Tattersall's, though, as to the latter place, it may be observed that it is a place bonâ fide established and used for another purpose. The preamble clearly shews to what this statute was intended to apply. If it had meant to declare all betting illegal, and the money deposited recoverable, the legislature would have so enacted in terms.

Yeatman, in support of his rule, was stopped by the court.

Erle, C. J. I am of opinion that this rule should be made absolute. The evidence was that the defendant was in the habit of betting generally with the persons who chose to resort to the place which he used for the purpose of carrying on that business,

(a) See *Ex parte Brown*, 21 Law J., M. C. 113; *Ex parte Jones*, 21 Law J., M. C. 116; *Ex parte Davis*, 26 Law J., M. C. 178; *Darys, App.*, *Douglas, Resp.*, 28 Law J., M. C. 193; *Sewell, App.*, *Taylor, Resp.*, 7 C. B. (N. S.) 160.

viz. a tree in Hyde Park. I dwell upon the evidence of the plaintiff, that he had seen the defendant there daily making bets with a number of persons. The plaintiff [675] there deposited with him the sum of 5l. 10s. upon an agreement to restore him 38l. 10s. upon the contingency of a certain horse named "Fly-trap" winning a certain race. Was that a deposit upon a contingency within the prohibition of the 16 & 17 Vict. c. 119? The 5th section of the statute enacts that "any money or valuable thing received by any such person aforesaid as a deposit on any bet, or as or for the consideration for any such assurance, undertaking, promise, or agreement as aforesaid, shall be deemed to have been received to or for the use of the person from whom the same was received, and such money or valuable thing, or the value thereof, may be recovered accordingly, with full costs of suit, in any court of competent jurisdiction." The 1st section has, I think, words wide enough to embrace a case of this sort,—*"No house, office, room, or other place, shall be opened, kept, or used for the purpose of the owner, occupier, or keeper thereof, or any person using the same, or any person procured or employed by or acting for or on behalf of such owner, occupier, or keeper, or person using the same, or of any person having the care or management or in any manner conducting the business thereof, betting with persons resorting thereto; or for the purpose of any money or valuable thing being received by or on behalf of such owner, occupier, keeper, or person as aforesaid, as or for the consideration for any assurance, undertaking, promise, or agreement, express or implied, to pay or give thereafter any money or valuable thing on any event or contingency of or relating to any horse-race, &c., or as or for the consideration for securing the paying or giving by some other person of any money or valuable thing on any such event or contingency as aforesaid."* This person used the tree in Hyde Park as a place for carrying on these illegal transactions; having there a betting-book, cards, and [676] all the other accessories of his calling. I think he is clearly brought within the words of the act. The words "other place" following the words "house, office, room," Mr. Salter has contended that "place" there must mean something in the nature of a structure of which there may be an owner or occupier. To hold those words to include a "booth" would hardly be thought too wide an extension of them. The mischief is to my mind precisely the same, whether the party stands under the shelter of an oak tree or of a roof or a covering of canvas: and I think the words are large enough to embrace it. Mr. Salter relies upon the preamble, which he says recites a mischief narrower than the construction which I place upon the enacting words. Beyond all doubt, the mischief which the statute intended to remedy was that which was then known to exist, viz. the injury resulting to improvident persons by the opening of betting-houses or offices: but I think it was intended to go further, and to prohibit the trade of betting, where-soever it might be carried on. If the prohibition had stopped at "houses, offices, and rooms," forsooth persons minded to carry on this traffic would resort to trees in the park, and the legislature may well have thought that a practice which should be placed under control, and for that purpose inserted the general words. Mr. Salter also contends that this construction will have the effect of bringing within the penalties of this act such bets upon horse-races as are in a measure recognized by the statute of 8 & 9 Vict. c. 108. But I think the mischief which the act was pointed at was the habit of using a particular place by persons skilled in gambling and betting, for the purpose of luring the ignorant and imprudent to the ruinous courses to which the vice of gambling too frequently leads. It was intended to present every possible obstacle to the professed game-[677]-ster using a place for exercising his vocation, and for this purpose to prohibit the keeping or using of any known place for the receipt of deposits on the contingency of a particular horse running and winning at a horse-race; and I can come to no other conclusion than that a particular spot used for that purpose in a public park is a "place" within the spirit and intention of the act of parliament.

KEATING, J. I am of the same opinion, though at first I entertained some doubt whether the words of the statute were large enough to reach the case. I am now, however, satisfied that they are. The act was intended to prohibit the keeping or using of any house, room, or place for the deposit of moneys on the contingency of horse-races,—that is, to prevent the keeping or using of any known place of resort for such purpose. Mr. Salter admits that that which took place here would have been within the prohibition, if it had taken place in any house, office, or room, or even in a booth erected in Hyde Park. I think that the use of a tree in the park as a place of resort for the same purpose is equally within the mischief of the act. I agree with

my Lord that our decision will not affect the question as to the legality of isolated transactions of betting, whether at Tattersall's, or in the park, or in a public street: and, if this had been a mere casual transaction of betting, Mr. Salter's argument might have been well founded. But the evidence is of an habitual and constant resort to the place in question for the express purpose of carrying on there the prohibited trade.

Rule absolute.

[678] HARRISON v. BLACKBURN. Nov. 21st, 1864.

[34 L. J. C. P. 109; 11 L. T. 453; 13 W. R. 135; 10 Jur. N. S. 1131. Distinguished, *Debenham v. Dyball*, 1873, 21 L. T. 171. Referred to, *Wallis v. Hands*, [1893] 2 Ch. 86; *Harcke v. Dunn*, [1897] 1 Q. B. 586.]

1. Entry is not necessary to the vesting of a term of years in the lessee: but, for the purpose of maintaining an action of trespass, the lessee must enter, since that action is founded on the actual possession.—2. By a deed, reciting that A. was indebted to B. in the sum of 60l. for goods supplied, A. assigned to B. “all and every the household goods and furniture, stock in trade, and other household effects whatsoever, and all other goods, chattels, and effects now being, or which shall hereafter be, in, upon, or about the messuage or dwelling-house and premises occupied by A., known as the Bull’s Head, situate, &c., and all other the personal estate whatsoever of or to which the said A. is now and from time to time and at all times hereafter (so long as any money shall remain due to B.), and all the estate of A. in, to, or upon the premises hereby assigned or intended so to be,” absolutely. Then followed a power to B. to sell and dispose of “the same premises,” and out of the proceeds to pay the 60l. and expenses, and to render the surplus to A.:—Held that, notwithstanding the general words, the deed (which was registered under the Bills of Sale Act, 17 & 18 Vict. c. 36), did not pass to B. the term which A. had in the Bull’s Head.

This was an action brought in the Common Pleas at Lancaster, to recover damages for breaking and entering a certain messuage, dwelling-houses, and premises of the plaintiff called the Bull’s Head, situate in Bedford, in the southern division of the county of Lancaster, and there staying and continuing, making a great noise and disturbance therein, and then and there seizing, pulling, and tearing down and taking possession of divers trade and other fixtures of the plaintiff’s affixed to the said premises, and then taking and carrying away and converting to his own use the said several fixtures of the plaintiff’s, and also divers goods and chattels of the plaintiff’s, and ejecting and expelling the plaintiff from the use and possession of the said dwelling-house and fixtures: and thereby the said premises and goodwill of and belonging to the plaintiff of the business of a public-house and inn there carried on became and were greatly deteriorated and depreciated in value, and the plaintiff was by reason of the premises otherwise greatly damaged and aggrieved.

The defendant pleaded, —first, not guilty,—secondly, that the dwelling-house and premises, trade, and other fixtures, goods and chattels, goodwill and business in the declaration respectively mentioned, were not the plaintiff’s, as alleged,—thirdly, that the defendant did what was complained of by the plaintiff’s leave. Issue thereon.

The cause came on to be tried before Williams, J., [679] at the Liverpool Winter Assizes, 1863, when a verdict was found for the plaintiff for 500l. damages, subject to the opinion of this court upon the following case:—Prior to the month of July, 1863, John Battersby was tenant of the Bull’s Head Inn, in the declaration mentioned. In the month of December, 1861, the said John Battersby was indebted to the plaintiff; and, on the 20th of the same month, Battersby executed a bill of sale to the plaintiff, which was duly filed on the 3rd of January, 1862. The said John Battersby was tenant from year to year of the Bull’s Head Inn, under the trustees of the will of the late Duke of Bridgewater, who were the owners of the Bull’s Head Inn; his tenancy commencing in the month of November many years ago. On the 21st of July, 1863, the trustees distrained for two years’ rent in arrear of the Bull’s Head Inn, viz. for the sum of 54l. 11s. 4d. On the 27th of July, 1863, a sale took place at the Bull’s Head Inn under the said distress, at which sale the whole of the moveables, including furniture, stock-in-trade, and tenant’s fixtures, were sold and

disposed of. The goodwill, if any, was not put up for sale, and was not nor was it professed to be dealt with at the said sale. The sale did not realize sufficient to satisfy the arrears of rent and expenses. On the same day, viz. the 27th of July, 1863, Battersby signed the following memorandum, and gave up possession of the Bull's Head Inn and premises to his landlords, the said trustees of the late Duke of Bridgewater :—

“Bull's Head Inn, township of Bedford, in the county of Lancaster.

“I, James Battersby, occupier of the house known by the sign of the Bull's Head, in Bedford, and all premises, buildings, stabling, and bowling green connected therewith, in my occupation as tenant to the trustees of the late Duke of Bridgewater. This [680] agreement made this day witnesseth that I do hereby give up peaceable possession of all the aforesaid house and premises this day into the hands of Mr. Richard Higgins, the agent of the aforesaid premises for the trustees of the late Duke of Bridgewater. As witness my hand, this 27th of July, 1863.

“Witness,—Ellen Billington.

“JAMES BATTERSBY, his X mark.

“Witnesses (William Wilson.
(Richard F.”

On the same day, the 27th of July, 1863, the said trustees let the said Bull's Head Inn and premises, at a rent of 20l. per annum, to the defendant who entered into possession on the same day, and still remains in possession. His tenancy commenced on and from the 12th of May, 1863 : but the payment of rent commenced from the 27th of July, 1863. The plaintiff by himself and by his agent has demanded of the defendant possession of the said Bull's Head Inn and premises, and has requested him to withdraw from the same : but the defendant has refused so to do. The goodwill of the said Bull's Head Inn and premises is of no value whatever.

The bill of sale is in the words and figures following :—

“This indenture, made the 20th of December, 1861, between James Battersby, of Bedford, in the county of Lancaster, innkeeper, of the one part, and John Harrison, of Horwich, in the said county of Lancaster, common brewer, of the other part : Whereas, the said James Battersby is now indebted to the said John Harrison in the sum of 60l. for ale supplied by the said John Harrison to the said James Battersby between the 1st of January, 1858, up to the date of these presents ; and the said James Battersby has agreed to secure the re-payment thereof in manner hereinafter mentioned : Now, this indenture witnesseth that, in [681] pursuance of the said agreement in this behalf, and also in consideration of 5s. to the said James Battersby now paid by the said John Harrison, the receipt whereof is hereby acknowledged, he the said James Battersby doth by these presents grant, bargain, sell, and assign unto the said John Harrison, his executors, administrators, and assigns, all and every the household goods and furniture, stock in-trade, and other household effects whatsoever, and all other goods, chattels, and effects now being or which shall hereafter be in, upon, or about the messuage or dwelling-house and premises occupied by the said James Battersby, and known as the Bull's Head, situate in Bedford aforesaid ; and all other the personal estate whatsoever of or to which the said James Battersby is now and from time to time and at all times hereafter (so long as any money shall remain due and payable to the said John Harrison, his executors, administrators, and assigns, by virtue of these presents)* : and all the estate, right, title, interest, claim, and demand of the said James Battersby of, in, to, or upon the said several premises hereby assigned, or intended so to be : Together with full power, and authority which the said James Battersby doth hereby give and grant unto the said John Harrison, his executors, administrators, and assigns, at the costs and charges of the said James Battersby, his executors or administrators, to use the name or names and act as the attorney or attorneys of the said James Battersby, his executors or administrators, in or about recovering, receiving, obtaining, and giving effectual receipts and discharges for the same ; To have, hold, take, receive, and enjoy the said premises hereby assigned unto the said John Harrison, his executors, administrators, and assigns, absolutely : Provided, nevertheless that, in case the said James Battersby, his heirs,

* Sic.

executors, or administrators, shall, [682] on demand made thereof in writing by the said John Harrison, his executors, administrators, or assigns, well and truly pay or cause to be paid unto the said John Harrison, his executors, administrators, or assigns, the said sum of 60l., the said payment to be made without any deduction, then these presents shall be absolutely void, anything hereinbefore contained to the contrary notwithstanding: And the said James Battersby doth hereby, for himself, his heirs, executors, administrators, and assigns, covenant with the said John Harrison, his executors, administrators, and assigns, that he the said James Battersby, his heirs, executors, or administrators, shall and will on demand made thereof as aforesaid pay or cause to be paid unto the said John Harrison, his executors, administrators, or assigns, the said sum of 60l. in manner aforesaid, without any deduction, and without fraud or further delay: But it is hereby expressly declared and agreed that, after default shall be made by the said James Battersby, his executors, administrators, or assigns, in payment of the said sum of 60l., contrary to the tenor and effect of the before-mentioned proviso, then and in such case it shall be lawful for the said John Harrison, his executors, administrators, or assigns, to sell and dispose of the same premises, and every or any part thereof, for such price or prices as can be reasonably had or gotten for the same, and to receive and take the moneys to arise from such sale or sales thereof, and to stand possessed of such moneys upon the trusts following, that is to say, upon trust in the first place to retain, satisfy, and discharge all costs, charges, and expenses incidental to these presents, and in the next place to satisfy, pay, deduct, or retain unto the said John Harrison, his executors, administrators, or assigns, the said principal sum of 60l.; and, from and after full payment and satisfaction of such costs, charges, and [683] expenses, and principal sum of 60l., to render to and account for the surplus (if any) of the money arising from such sale or sales aforesaid to the said James Battersby, his executors, administrators, or assigns: And it is hereby lastly declared and agreed by and between both the said parties to these presents, that the receipt or receipts of the said John Harrison for any money payable to him under these presents shall be a good and sufficient receipt and discharge to any purchaser or purchasers. In witness, &c.

his mark
 "JAMES BATTERSBY 
 and seal.
 "JOHN HARRISON."

The question for the opinion of the court was whether, upon the true construction of the said bill of sale, and on the state of facts above appearing, any right or interest in the Bull's Head Inn and premises, and the goodwill thereof, passed to the plaintiff, sufficient to sustain the declaration against the defendant.

In case the court should be of opinion that a right or interest sufficient to sustain the declaration passed to the plaintiff, the damages sustained by the plaintiff in respect of the matters in the declaration mentioned were assessed at one farthing.

Edward James, Q. C. (with whom was Baylis), for the plaintiff. The question is whether any interest in the Bull's Head Inn passed to the plaintiff by the bill of sale of the 20th of December, 1861. It professes to be a conveyance by Battersby of all he had, including the term he had in the public-house. It clearly operated to vest the term in Harrison. *Ringer v. Cunn*, 3 M. & W. 343, is precisely in point. There Vince, the lessee of a mill and premises at a rack-rent, being in insolvent circumstances, executed an assign-[684]-ment, whereby, after reciting his insolvency, and that he had agreed to assign "all his debts, personal estate, and effects of every description, to C. and B., in trust for the benefit of his creditors," he conveyed and assigned to the said C. and B. all and singular the stock-in-trade, implements, and utensils in trade, corn, grain, hay, horses, carts, and carriages, *crops of every kind, as well served as not*, and personal estate whatsoever, of him Vince, in, upon, or about the said mill and premises now in his use or occupation, or elsewhere, &c. (except the wearing apparel of himself and family); and also all debts, securities, writings, &c., and all other the personal estate and effects of him the said Vince, whatsoever or wheresoever, or in or to which he is in anywise interested or entitled; habendum, in trust out of the proceeds, first, to pay the costs of the assignment, &c., secondly, to pay the rent due and in arrear for the said mill and premises, or accruing due until and at and up to the 6th of April then next, and thirdly, to distribute the residue for the benefit of his creditors: and it was held that

the words of the assignment were large enough to comprehend the lease of the mill, and, the jury having found that the assignees had accepted the lease, that it passed to them under the assignment. The only difference between that case and the present, is, that there there was a recital in the deed that Vince was the lessee of the premises ; but the object of both was the same. It was there contended that the words, though general, were not sufficient to pass the lease ; and *Payler v. Homersham*, 4 M. & Selw. 423, *Doe d. Meyrick v. Meyrick*, 2 Cr. & J. 223, *Roberts v. Kuffin*, 2 Atk. 112, and *Rawlings v. Jennings*, 13 Ves. 39, were cited. But Lord Abinger, C. B., said : " I think the distinction in all these cases is, whether the object of the parties was to pass a limited interest or not : if it was, then the rule is that we are not to [685] construe general words so as to enlarge that limited interest. I believe in every case that has been mentioned the object was to pass a particular estate : but such is not the object here. The object of the conveying party here was, to make a general assignment of his property over to trustees, in order to pay his creditors. Can it be doubted, if this lease was of any value, that the object was to pass the whole ? And here are words which are large enough to pass everything. We must suppose the object the parties had in view was, to pass every thing of value, capable of being turned to account in the hands of the assignees ; and I cannot see why the words, which are sufficiently comprehensive to include everything he had, should not be held to pass the leasehold estate." [Erle, C. J. The assignment there was for the benefit of all the creditors : here, it was to secure a debt of 60l. to a single creditor. Byles, J. Suppose the rent of the premises had been double the annual value, would you say that the term passed ?] Whether valuable or burthensome, can make no difference.

Manisty, Q. C., contra. The plaintiff had no estate or interest in the Bull's Head Inn sufficient to enable him to maintain this action, regard being had to the state of facts found by the case. One test is, could the Duke's trustees have sued him for the rent if he had taken possession under the deed in question ? In July, 1863, the trustees, having distrained for two years' rent, sold all Battersby's property, and took from him a surrender of the premises, and immediately let them to the defendant, and gave him possession. The question is, whether, upon this state of facts, the plaintiff had such a possession as to entitle him to sue in trespass. The authorities clearly negative that proposition. Actual entry is necessary : a mere de-[686]-mand of possession is not enough. [Erle, C. J. If the term is vested in him, the plaintiff in law is in : see *Cooper v. Willmott*, 1 C. B. 672.] In *Turner v. Cameron's Coalbrook Steam Coal Company*, 5 Exch. 932, it was held that trespass will not lie against the occupier of land, at the suit of the mortgagee, who has never been in actual possession or been seised of the land, and has not obtained a judgment in ejectment, either by default or by verdict : and therefore he cannot in such case waive the tort, and maintain an action of use and occupation. Parke, B., in delivering judgment, said : " We are all clearly of opinion that the plaintiff was not in a condition to bring an action of trespass, inasmuch as he was mortgagee out of possession : he never had entered upon the property at the time of the trespass committed, and never was in actual possession. He could only have maintained one in case he had brought an ejectment and laid the demise at an antecedent period, and the defendants had either suffered judgment by default as tenants in possession, or there had been a verdict at the trial, and then the defendants would have been in the condition of admitting the lease, and therefore the plaintiff would have been in possession, by the fiction in ejectment, from the time of the demise." So, in *Litchfield v. Ready*, 5 Exch. 939, it was held that a mortgagee out of possession, who gives notice of the mortgage to the tenant who has occupied since the mortgage, cannot maintain trespass for mesne profits against the tenant for the rents accrued due since the date of the mortgage, by mere entry upon the land after the notice. " If," said Parke, B., " the plaintiff seeks to recover mesne profits antecedently to the day of the demise in the declaration in ejectment, he must go further, and is bound to prove such a title, accompanied by possession, as would enable him to maintain [687] an ordinary action of trespass." [Erle, C. J., referred to *Williams v. Bosanquet*, 1 Brod. & B. 238, 3 J. B. Moore, 500, where it was held that, when a party takes an assignment of a lease by way of mortgage, as a security for money lent, the whole interest passes to him, and he becomes liable on the covenant for payment of rent, though he has never occupied or become possessed in fact.] That was to make him liable to the covenants. Patteson, J., in delivering the judgment of the court in

Ryan v. Clark, 14 Q. B. 65, says: "It is distinctly laid down in *Williams v. Bosanquet*, that entry is not necessary to the vesting of a term of years in the lessee; the interest and the legal right of possession, where the term is to commence immediately, and not in future, vests in the lessee before entry: and, of course, the right of possession in the lessor is gone, though, for the purpose of maintaining an action of trespass, the lessee must enter, since that action is founded on the actual possession" (a). The result of the authorities is thus summed up in *Roscoe on Evidence*, 10th edit. 608,—To entitle a party to maintain an action for a trespass to land, "it must appear that the plaintiff was in the actual and immediate possession of the locus in quo where the trespass was committed. Therefore, an heir before entry, who has only [688] a seisin in law, cannot maintain trespass: *Com. Dig. Trespass* (B. 3). Nor a bargainee before entry. *Ib.*: *Barker v. Keal*, 2 Mod. 251; *Geary v. Bavercoft*, Carter, 66. Therefore, a mortgagee by demise for years cannot bring trespass against a stranger, before entry: *Wheeler v. Montefiore*, 2 Q. B. 133; *Turner v. Cameron's Coalbrook Steam Coal Company*, 5 Exch. 932; nor a parson before induction,—*Hare v. Bickley*, Plowd. 526." Further, it is submitted that the deed of the 20th of December, 1862, did not assign the term. There is nothing upon the face of the instrument to shew an intention to convey more than the chattels. It was registered as a bill of sale under the 17 & 18 Vict. c. 36. And nothing can be more loose than the general words. In the case relied on of *Ringer v. Cann*, 3 M. & W. 343, the deed was super visum a conveyance of all the property.

James, in reply. In *Ringer v. Cann*, 3 M. & W. 343, there was a trust for sale, and a power to pay the rent. Here there is no provision as to the rent: for, as the term was intended to pass, the assignee would necessarily become liable for rent, and therefore there was no occasion to make a special provision for it. The mortgagee may maintain an action of ejectment against the mortgagor: and he has an equal right as against a stranger. If he may maintain ejectment, why not trespass? In the passage cited from *Roscoe*, p. 609, it is said that a mortgagee by demise for years cannot bring trespass against a stranger before entry. But this defendant is no stranger. He comes in under *Battersby*. The landlord came in under the surrender made by *Battersby* in July, 1863. He could have no better title than *Battersby* had: neither could his tenant, the now defendant. If a demand and refusal be sufficient to maintain trover for a lease, why should [689] not a demand and refusal be sufficient to maintain trespass in respect of the chattel interest? The only question intended to be raised here was whether, upon the construction of the bill of sale, and the facts found, any right or interest in the premises, that is, the Bull's Head Inn, passed to the plaintiff. It never was intended to raise the question whether actual bodily possession was necessary to entitle the plaintiff to maintain trespass.

ERLE, C. J. I am of opinion that the verdict ought to be entered for the defendant. This is an action of trespass for breaking and entering certain premises known as the Bull's Head Inn, Bedford, the interest in which the plaintiff claimed to have been assigned to him by one *Battersby* in December, 1861: and the question is whether or not the term was conveyed by the deed of that date. By that deed, after reciting that he was indebted to the now plaintiff, *Harrison*, in the sum of 60l. for ale supplied, *Battersby* assigns to *Harrison*, his executors, &c., "all and every the household goods and furniture, stock-in-trade, and other household effects whatsoever, and all other goods, chattels, and effects now being or which shall hereafter be in, upon, or about the messuage or dwelling-house and premises occupied by the said *James Battersby*, and known as the Bull's Head, situate in Bedford aforesaid." Having thus assigned to the plaintiff all his household goods, chattels, and effects in and about the messuage occupied by him, the assignor goes on to assign "all other the personal estate whatsoever of or to which the said *James Battersby* is now and from time to time and

(a) And see per Lord Denman in *Doe d. Parsley v. Day*, 2 Q. B. 147, 156, 2 Gale & D. 757, *Wheeler v. Montefiore*, 2 Q. B. 133, 1 Gale & D. 493: and see *Blatchford, App., Cole, Resp.*, 5 C. B. (N. S.) 514, where it was held that the remedy for double value given by the 4 G. 2, c. 28, s. 1, against a tenant unlawfully holding over after the determination of the term, and after demand and notice in writing, is given only to the lessor or landlord or the person entitled to the reversion, and not to one to whom the landlord has granted a fresh lease, to commence from the expiration of the former term,—such new lessee having no estate, but a mere *interesse termini*.

at all times hereafter (so long as any money shall remain due and payable to the said John Harrison, his executors, &c., by virtue of these presents): and all the estate, right, title, interest, claim, [690] and demand of the said James Battersby of, in, to, or upon the said several premises hereby assigned or intended so to be," absolutely. The deed then gave a power to Harrison "to sell and dispose of the same premises and every or any part thereof," and out of the proceeds to pay the 60l. and expenses, rendering the surplus (if any) to Battersby. I think the context leads irresistibly to the conclusion that the parties to this deed merely contemplated the assignment of the chattels personal, and did not contemplate passing the chattel real, the lease of the premises. General words following specific words are ordinarily construed as limited to things *ejusdem generis* with those before enumerated (*a*)¹. Here the two first classes of things assigned are confined to chattels strictly so called. It seems to me to be very unlikely that a creditor who was taking an assignment of chattels as a security for a debt of 60l. would burthen himself with a lease which would impose upon him a liability for an uncertain amount of rent. If he had intended to take to the term, I think we should have found words in the deed more expressly and clearly intimating such intention. The instrument provides that the plaintiff is to continue in possession until his debt of 60l. is satisfied, and that, in case of default, he is to be at liberty to sell the premises, that is, the things assigned, in trust to retain the expenses and his debt, and to return the surplus, if any, to Battersby. Not a word is said about paying the rent or any arrears of rent, which would have been provided for if it had been intended that the plaintiff should become assignee of the term. The case of *Ringer v. Cunn*, 3 M. & W. 343, is in terms very much like this case: but there are two very important distinctions between them. There, the assignment was for the benefit of all the creditors of the [691] assignor, and would therefore naturally be an assignment of all the debtor possessed: and, further, it was there provided that the rent should be paid out of the proceeds of the sale. Upon the best construction, therefore, that I can put upon this instrument, I think the term was not intended to pass. I also am of opinion with Mr. Manisty, —assuming that the term did pass by this deed, —that the assignee of a term cannot maintain trespass in respect of the premises unless he has actually entered into possession of them. This is clear from the elaborate judgment of Patteson, J., in *Ryan v. Clarke*, 14 Q. B. 73. It is there laid down, and to the same effect are all the text-books that, to entitle a party to maintain trespass, actual entry is necessary. To render him liable upon the covenants, an assignment in law is sufficient: but to maintain trespass, there must have been an actual entry.

BYLES, J. I am of the same opinion upon both points. Nobody doubts that a gift of all a man's "personal estate" would include a term for years. But, as a general rule, all written documents are to be construed according to the intention of the parties as it is to be collected from the language which they have used. In *Parker v. Hammersham*, 4 M. & Selw. 423, a deed of release containing very general words releasing the debtor from all claims and demands which the several creditors had against him, or thereafter could, should, or might have, was held to be confined in its operation to the respective debts referred to in the recital. So, in *Rawlings v. Jennings*, 13 Ves. 39, where the testator gave to his wife certain Bank stock, together with all his "household furniture and effects, of what nature or kind soever," that he might be possessed of at the time of his decease, and then be-[692]-queathed certain stock and money legacies to other persons, Sir W. Grant, M. R., held that the bequest to the wife was confined to articles of the nature of those specified, and did not comprise the general residue (*a*)². There, the court restrained

(a)¹ See *Doggett v. Catterns*, ante, p. 669.

(a)² Observing that, part of the property being given to her afterwards, the word "effects" must receive a more limited construction. Mr. Jarman (1 Jarman on Wills, 2nd edit. 645, n. *g*), remarking upon this case, says,—“But, according to the statement of the will in the report, the only other bequest to the wife is of the Bank stock, which is *anterior*. See *Parker v. Marchant*, 1 Y. & C., C. C. 394, where Vice-Chancellor Knight Bruce observed upon this case, that perhaps the word 'household' belonged to the word 'effects,' as much as to the word 'furniture.'”

And see *Campbell v. Prescott*, 15 Ves. 503, where a testator gave to his sons A. and J. all his sugar-house, cupola, and merchandize stocks, with jewels, plate, household

the operation of the word "effects" by preceding words, and held it to mean things ejusdem generis. The only difficulty I have felt has arisen from the case of *Ringer v. Cann*, 3 M. & W. 343: but my Lord has effectually distinguished it. Here, too, the instrument contains qualifying words, though imperfectly expressed, which shew plainly enough what the parties intended should pass thereby. In *Ringer v. Cann*, Parke, B., lays great stress on the application of the proceeds of the sale. "With respect," he says, "to the clause as to payment of the rent, it is not confined to the future, but applies to the by-gone rent as well, in respect of the mill and premises; not only to that which had become due, but to that also which was on the eve of becoming due on the 6th of April following; and the provision enables the trus-[693]-tees to pay it, whether they take possession of the property or not. The other words used do not appear to me to be sufficient to control these general words." If it had been intended here to pass the term, the first thing the assignee would do would be to pay the rent. But there is an express stipulation that he shall apply the proceeds otherwise. I may advert to another distinction between that case and the present. In *Ringer v. Cann* there was an assignment of growing crops, and no distinct provision that I can see relative to the taking of them: and this makes it the more reasonable that the term should be assigned. Looking, therefore, at that case carefully, it seems to me to be rather an authority against than for the plaintiff. As to the other point, I at first overlooked the distinction between ejectment and trespass. But my Brother Keating pointed out the distinction: in ejectment, the want of actual possession was supplied, under the old course of proceeding, by the rule to confess lease, entry, and ouster. For these reasons, I am of opinion that the defendant is entitled to judgment,—a conclusion which is equally in conformity with the justice as with the law of the case.

KEATING, J. As I did not hear the whole of the argument, I will only say that, so far as I have heard, I entirely concur with the rest of the court upon both points.

Judgment for the defendant.

[694] JOSHUA WILSON AND OTHERS, *Appellants*; THE CHURCHWARDENS OF THE PARISH OF SUNDERLAND NEAR THE SEA, *Respondents*. Nov. 9th, 1864.

[S. C. 34 L. J. M. C. 90; 11 L. T. 342; 10 Jur. N. S. 1105; 13 W. R. 342. See *Davey v. Hinch*, [1901] P. 110; [1903] P. 221.]

By a local act (of 1719) creating the township of Sunderland a distinct parish, twenty-four "substantial and creditable *inhabitants*" of the parish were to be elected vestrymen: and it was enacted that the rector and thirteen or more of the vestrymen in vestry assembled, or the major part of them, might make a rate for, amongst other things, keeping the church in repair,—with a power to four or more justices, in case of default in payment of the rate, to grant and issue their warrant to levy the same by distress and sale of the offender's goods: and a power of appeal to the sessions was given to any person who should find himself aggrieved by any assessment, or by any distress to be made for the same, within three months after such distress made:—Held, that the justices had no jurisdiction to inquire into the validity of the rate, the remedy, if it were invalid, being by appeal to the sessions: and that, if they had such jurisdiction, the fact of some of the vestrymen not *residing* and *sleeping* within the parish did not disqualify them.

This was a case stated by justices of the peace in and for the county of Durham, under the statute 20 & 21 Vict. c. 43, for the purpose of obtaining the opinion of the court on questions of law which arose before them as hereinafter stated.

At a petty sessions holden at Sunderland, in the county of Durham, on the 28th of May, 1864, an application was made to the justices by the churchwardens of the parish of Sunderland near the Sea, hereinafter called "the respondents," to grant and issue out their warrant to cause to be levied by distress and sale of the goods of

goods, furniture, and *all effects whatsoever*, and appointed them executors: Sir W. Grant, M. R., held that the whole personalty passed under this clause, remarking that there was no case for the restrictive sense attempted to be put upon the words "all my effects whatsoever."

Joshua Wilson, Henry Wilson, Caleb Wilson, and Charles Wilson, hereinafter called "the appellants," the sum of 7l. 0s. 7½d., being the amount of a rate assessed upon them the appellants on the 9th of July, 1863, by the rector and thirteen of the vestrymen of the parish of Sunderland near the Sea, in vestry assembled, at a meeting duly convened pursuant to, and acting under and by virtue of the powers, authorities, and provisions of, an act of parliament passed in the fifth year of George the 4th (18th April, 1719), intituled "An Act for making the town and township of Sunderland a distinct parish from the parish of Bishopwearmouth, in the county of Durham."

The appellants having been duly summoned, the ap-[695]plication was heard, the said parties respectively being then present; and the justices determined to issue their warrant to levy the said sum of 7l. 0s. 7½d.

The appellants being dissatisfied with this determination, as being erroneous in point of law, duly applied to the justices, in writing, to state and sign a case setting forth the facts and the grounds of such their determination, for the opinion of this court. The justices thereupon stated the following facts:—

Upon the hearing of the application, the rate or assessment was produced and proved before the justices. It was intituled and signed, and, as far as concerns the said appellants, is as follows:—"An assessment upon the yearly value of all houses, lands, tenements, hereditaments, and estates whatever, and upon the value of stock-in-trade and personal estates, within the parish of Sunderland near the Sea, in the county of Durham, for keeping in repair the church of the said parish, defraying the yearly expenses of the churchwardens respecting the same, for paying the rector his stipend, the parish clerk's salary, and for other the purposes mentioned in the act of parliament passed in or about the year 1719, intituled," &c.

"Made and assessed this ninth day of July, 1863, being a rate of 3d. in the pound under and by virtue of the powers of the said act or any other power or authority enabling in this behalf."

(Signed) "H. PETERS, rector, chairman.

"THO. REED.

"WILLIAM THOMPSON, jun.

"MATTHEW FORSTER.

"J. G. HILL.

"JNO. POTTS.

"MARK DOUGLAS.

"GEORGE REED.

"THOS. RISEBOROUGH.

"JOSEPH HUMPHREY.

"JOHN FERGUSON.

"R. B. PORRETT.

"WM. ST. JOHN."

"THOS. DIXON.

[Then followed, in columns, the numbers, the names [696] of the occupiers and owners, the description of the property rated, the name or situation of the property, the rateable value, and the amount of the rate to be paid.]

At the foot of the rate were these words: "At a meeting of the undersigned, the rector and gentlemen of the ancient vestry for the parish of Sunderland near the Sea, in the county of Durham, held this day, legal notice being first given, it was resolved that the foregoing assessment be collected for the year commencing at the visitation, of the several inhabitants and persons therein named, the same being an equal rate or assessment to the best of our judgment. Given under our hands this 9th of July, 1863." [Signed as before.]

Then follows the following memorandum of allowance of the said rate:—"Durham, to wit. We, the undersigned, being four of Her Majesty's justices of the peace in and for the county of Durham (and of the quorum) do so far as we can and lawfully may, make, consent unto, and allow the foregoing rate or assessment. Dated this 18th of July, 1863." [Signed by the four justices.]

It was also proved before the justices that the appellants are quakers: that they were the occupiers of the houses, warehouses, and hereditaments in the said parish mentioned in the said rate and set opposite their names therein, where they carried on their trade and business, and were possessed of the stock-in-trade therein.

It was also proved that the parties making and signing the said rate were the rector and thirteen of the twenty-four vestrymen, and were members of the vestry chosen and acting under the local act, and were the whole of the members of such vestry present at a meeting duly convened: that the rate had been demanded of the appellants; and that they had made default in payment thereof

[697] It was also proved, on the cross-examination of the collector, that, at the time of their election, and thenceforth up to the making of the said rate, nine out

of the thirteen vestrymen who signed the rate, although rate-payers occupying houses and shops in the parish, and carrying on their trades and businesses there, resided and slept in their private dwelling-houses in the adjoining township of Bishopwearmouth.

It also appeared by the rate that stock-in-trade was rated therein, but that ships (many of the persons assessed being ship owners) were not expressed as rated therein; and also that the occupiers of 836 properties occupied in small tenements under the yearly value of 6l. each, and for which the landlords thereof, under the Small Tenements Act, 13 & 14 Vict. c. 99, were rated to the poor-rate of the parish instead of the occupiers thereof, were not included in the rate produced before the justices, nor were the landlords or occupiers thereof assessed for the same therein: and, as to these, it was proved by the collector of the said rate that the occupiers of these tenements were many of them paupers receiving parish relief, and that very few if any of them in his opinion were able to pay the said rate, and that it had not been customary to include the said tenements in the said rate.

The parish of Sunderland is one of the parishes comprised within the boundaries of the borough of Sunderland, the mayor, aldermen, and burgesses of which form the local board of health: and it was admitted that, since the passing of the Municipal Corporation Act, 5 & 6 W. 4, c. 76, no scavenger had been appointed for the said parish of Sunderland under the local act of 1719.

On the case being called on, and previous to any evidence being taken, it was alleged by the professional adviser of the appellants that they disputed the validity of the rate.

[698] It was contended on behalf of the appellants, that the said Sunderland Local Act, 1719, had, so far as it applied to the recovery of the rate, been repealed by the 5 & 6 W. 4, c. 74; and that the justices had therefore no power to issue their warrant of distress.

It was also contended on the part of the appellants, that the rate was invalid, because nine of the thirteen persons who had made and signed the same were not properly elected vestrymen under the local act of 1719, inasmuch as they were not nor was any of them resident and sleeping within the said parish.

It was also contended on behalf of the appellants, that the rate was invalid, because of the omission of the said small tenements therefrom, and by reason that "ships," as forming stock-in-trade, were not included in the said rate under the designation "ships."

It was contended on the part of the respondents,—first, that the Sunderland Local Act, 1719, was not repealed by the 5 & 6 W. 4, c. 74, as alleged by the appellants,—secondly, that the justices had no jurisdiction, on this application, to inquire into or decide on the legal constitution of the vestry or the qualification of the vestrymen, nor on the validity of the rate,—thirdly, that, if even the justices had jurisdiction to decide on the legal constitution of the vestry or the qualification of the vestrymen, that, by the Sunderland Local Act of 1719, it was not required that the vestrymen should be *resident* and *sleep* within the parish, but only that they should be *inhabitants* of the said parish, occupying rateable hereditaments therein, and paying rates; and that therefore the said nine persons so acting as vestrymen were duly qualified to act as such,—fourthly, that, if even the justices had jurisdiction to inquire into and decide on the validity of the rate, the objections of the appellants were untenable and not sufficient to justify them in refusing to grant their warrant.

[699] The justices, being of opinion that their jurisdiction was not ousted by the appellants disputing the validity of the rate, and that the Sunderland Local Act of 1719, and the powers therein authorizing them to issue their warrant of distress, were not repealed or affected by the 5 & 6 W. 4, c. 74, but were and are still in force,—that they had no jurisdiction to inquire into or to decide on the constitution of the vestry or the qualification of the members thereof, nor into the validity of the rate,—and that the objections made by the appellants to the rate were not sufficient to justify them in refusing to grant their warrant,—gave their determination against the appellants, and signed their warrant, but suspended the issuing and levying thereof on the goods of the appellants until the opinion of the court should be obtained.

The questions of law for the opinion of the court, were,—first, whether, the appellants having stated that they disputed the validity of the rate, the jurisdiction of the justices to hear the case and grant their warrant was or was not ousted,—

secondly, whether the Sunderland Local Act of 1719, or the power thereby given to the justices to issue their warrant for levying the rate, had been repealed by the 5 & 6 W. 4, c. 74,—thirdly, if not, whether the justices, on the hearing of the application for the said warrant, were bound to inquire into, and had jurisdiction to decide on, the legality of the constitution of the vestry or the qualifications of the members of each vestry,—fourthly, if they had such jurisdiction, whether it was required by the said Sunderland Local Act that the vestrymen chosen thereunder should be inhabitants *residing and sleeping* in the said parish.

And the court was solicited to remit the case to the justices with their opinion hereon, or to make such other order as the court might deem fit.

[700] A. Wills, for the appellants. The first question is, whether the justices have jurisdiction at all in the case of quakers, whether the validity of the rate is disputed; the second, whether they were bound to go into any matter affecting the validity of the rate; and the third, whether, assuming that the justices had jurisdiction, they were entitled to issue their warrant. By the local act of 1719, s. 5, it was enacted that, within three months next after the 1st of May, 1719, the rector or minister of the church of Sunderland for the time being, on some Sunday, in the forenoon, immediately after Divine Service, should in the said church give public notice to the said parishioners to meet in the vestry-room there at a day and hour which he should then name for that purpose, to choose vestrymen; and that the major part of the inhabitants paying scot and lot then and there to be assembled pursuant to such notice should choose twenty-four substantial and creditable *inhabitants* of the said parish of Sunderland, each of which should have a freehold estate or other estate of inheritance of the yearly value of 10l., to be vestrymen for the parish for the space of three years from the day of such election: and provision was made for successive elections. By s. 9 the rector and *thirteen* of the vestrymen in vestry assembled, or the major part of them, were empowered, amongst other things, to appoint a scavenger for the town, and also “from time to time equally to rate, tax, and assess all tenants, occupiers, and farmers of all houses, keys, lands, tenements and hereditaments, and estates whatsoever in the said parish of Sunderland, and also stock-in-trade and personal estates, with such sum or sums of money as they or the major part of them then and there assembled shall think just and reasonable (having a due regard to the yearly rents or values of such houses, keys, lands, tenements [701] or hereditaments, and other estates, and to the true value of such stock-in-trade and personal estates) for defraying the charges and expenses of procuring and obtaining the act, and for and towards buying of bells for the church, and for the doing, finishing, and perfecting what should be thought fit and convenient to be further done in or about the said new church, and for keeping the same in repair, defraying the yearly expenses of the churchwardens concerning the same,” and for raising a yearly stipend for the rector, and for the salary of the clerk and scavenger. By s. 17 it was enacted that, in case default should be made in payment of the sums so to be taxed or assessed, by the persons upon whom the same should be so rated and taxed, it should be lawful for any four or more justices of the peace within the county of Durham, and they were thereby authorized and empowered to grant and issue out their warrant or warrants under their hands and seals, for the intent and purpose to cause the same to be levied by distress and sale of the offender's goods wheresoever the same should be found.” By s. 18 it was enacted that, “if any person should find himself or herself aggrieved by any assessments to be made by virtue of the act, or *by any distress or seizure to be made for the same*, or for the money so to be collected, in such case he or she might appeal to the justices of the peace to be assembled at any general quarter sessions of the peace to be held for the said county of Durham, *within three months after such distress made*, who were thereby empowered to hear and finally determine the same, and to award and give costs to the party and parties appealing or defending, as to them should seem meet; and the determination of the said justices should be final, and no appeal to be had or made from the same.”

Where an appeal to the sessions is given, generally [702] speaking that is the only remedy,—*The Queen v. The Justices of Kingston*, Ellis, B. & E. 256; *Ex parte May*, 2 Best & Smith, 426. But, here, the appeal given by the 18th section of the local act, is perfectly illusory,—after a distress has been made. [Byles, J. Not so. The appeal may be before as well as after distress: the only limit is three months.] Then, by the 5 & 6 W. 4, c. 74, it is provided that “no suit or other proceeding shall be had or instituted for or in respect of any great or small tithes, &c., rates, or other

ecclesiastical dues or demands whatsoever of or under the value of 50l., withheld by any quaker; but that all complaints touching the same shall be heard and determined only under the powers and provisions contained in the recited acts,"—7 & 8 W. 3, c. 6, and 53 G. 3, c. 127. This is principally a rate for ecclesiastical purposes. [Erle, C. J. This is purely a temporal demand.] The rate was clearly bad: and the justices had jurisdiction to inquire into its validity. To make a rate valid, there must be a majority of the number named in the appointment of vestrymen present: *Blackett v. Blizard*, 9 B. & C. 851. Here, nine of the thirteen persons who signed the rate were not qualified to act as vestrymen, not residing within the parish: and there was no other way of trying the validity of their appointment than by objecting to the rate. To entitle a party to act as a vestryman under the local act, it is not enough that he is a rated parishioner: he must also be an "inhabitant." In Stephens's Laws of the Clergy, vol. 2, p. 1327, outdwellers are contrasted with inhabitants; and so in 1 Burn's Ecclesiastical Law, 415 k. In Sturges Bourne's Act, 58 G. 3, c. 69, the word "inhabitant" is used throughout to denote those who were entitled to vote in vestry; and it was thought necessary to amend that in the next session (59 G. 3, c. 85, s. 1), to make it include persons not *resident* within [703] the parish. The word has received a similarly restricted interpretation under the Reform Act, 2 W. 4, c. 45 (a).

Lush, Q. C. (with whom was Prideaux), *contra*. The only questions which remain to be considered are,—first, whether the magistrates were bound to inquire into the validity of the rate,—secondly, if so, whether the persons who made this rate were duly qualified to act as vestrymen. The jurisdiction given to the magistrates by the local act is purely ministerial; and a right of appeal is given to the quarter sessions; not, as is suggested, a right to appeal after distress, but a right unlimited as to time where there has been no distress, and limited to three months where there has been a distress. It is enough that the rate is made by persons acting as vestrymen *de facto*. Then, as to the meaning of the word "inhabitant." To determine that, regard must be had to the object of the statute. The occupier of a house in the parish is bound to serve the office of churchwarden, although not residing there (b). In the Statute of Bridges, 22 H. 8, c. 5, "inhabitants" are held to include all holding lands in the county whether *resident* there or not. In *The King v. Barwick*, 7 T. R. 33, where several persons held in partnership, some of whom actually resided on and occupied the property and others resided at a distance, in another parish, the latter as well as the former were held to be bound to take parish apprentices, if in other respects fit persons to take them. Lord Kenyon there said: "It has been taken for granted in the argument of this case that the appellant is not an inhabitant: but the contrary is most clear, according to the con-[704]-struction put on the statute 22 H. 8, c. 5, which makes the 'inhabitants' of counties liable to the repair of bridges. Lord Coke (2 Inst. 702) in his comment on that statute says that persons having lands in their own possession, though dwelling in a foreign county, are inhabitants; and that doctrine has never been doubted from that time to the present." So, in *The King v. Hull*, 1 B. & C. 123, 136, 2 D. & R. 241, Abbott, C. J., says: "The meaning of particular words in an act of parliament, as well as other instruments, is to be found not so much in a strict etymological propriety of language, nor even in popular use, as in the subject or occasion on which they are used, and the object that is intended to be attained. The meaning of the word 'inhabitants,' in the Statute of Bridges, which was referred to at the Bar, affords an illustration of this proposition very applicable to the present case. The inhabitants of any county, city, or other place, taking that word either in its strict or in its popular sense, are those persons only who have their dwelling therein; and all persons who have their dwelling therein are inhabitants thereof. But, the object of the statute being to raise a fund for the repair of bridges by the taxation of persons to a reasonable aid and sum of money for that purpose, and to enforce the payment of the tax, in case of refusal, by distress on the lands, goods, and chattels of the persons taxed, the word 'inhabitant' has been held, on the one hand, to include all the occupiers of lands in the county, &c., although actually living and dwelling not in that county, but in some other, and, on the other hand, not to include servants, lodgers, or inmates, although actually dwelling and abiding

(a) Section 27. See *Withorn, App., Thomas, Resp.*, 8 Scott, N. R. 783, 7 M. & G. 1, 1 Lutw. Reg. Cas. 125.

(b) *The King v. Poynder*, 1 B. & C. 178, 2 D. & R. 258

the county." The word "inhabitants" is used in the same general sense in the 3 Eliz. c. 2. It is plain, therefore, that these vestrymen were "in-[705]-habitants" within the meaning of the local act of 1719 (a).

Wills was heard in reply.

ERLE, C. J. I am of opinion that our judgment in this case ought to be for the respondents. Our opinion is requested by the justices, as to whether under the circumstances stated they had jurisdiction to hear the case and grant their warrant,—whether, in the hearing, they had jurisdiction to decide on the legality of the constitution of the vestry or the qualifications of the members thereof,—and, if so, whether it was required by the Sunderland local act that the vestrymen chosen thereunder should be inhabitants *residing and sleeping* in the said parish. The appellants disputed the jurisdiction of the justices under the local act to enforce the rate in question, because, they (the appellants) being quakers, the jurisdiction of the justices over them in respect of church-rates was taken away by the statute 5 & 6 W. 4, c. 74. It has already been pointed out that that general law has no application to the present case. If this had been the ordinary case of a church-rate, the rate being objected to, the parties seeking to enforce it would be remitted to the Ecclesiastical Court. But here the rate originates in the local act, and is altogether of a temporal character: and in respect of any objection thereto an appeal is by the act given to the justices in quarter sessions, and that right of appeal still continues. The justices being asked to enforce the rate by warrant, it was objected on the part of the appellants that the [706] local act, so far as it is applied to the recovery of the rate, was repealed by the 5 & 6 W. 4, c. 74. That objection is disposed of. It was then objected that the rate was invalid because the major part of the vestrymen who made and signed the rate were not duly elected under the local act, inasmuch as they were not *resident and sleeping* within the parish of Sunderland. If that were a valid objection to the rate, I am of opinion that it might be raised by appeal to the quarter sessions, whether before or after a distress levied. This seems to me to be the reasonable construction of the 18th section of the local act. I also think it was not competent to the justices to inquire whether or not the vestry was properly constituted.] If they could, I should have little hesitation in holding that "inhabitants" in s. 5 of the local act, do not necessarily mean persons *residing and sleeping* within the parish. From the time of H. 8 to the present time that word has in all statutes relating to rates been construed to mean "rateable occupiers:" I know of no case where it has been held that they must reside and sleep within the parish. In respect of a residence for the acquisition of a settlement, it is different. In answer to the fourth question put to us, therefore, I should be strongly inclined, if it were necessary to decide upon the meaning of the word "inhabitants," to hold that it was not competent to the justices to inquire where the parties resided and slept, but that it was enough if they were rateable occupiers. It is not, however, essential that we should on this occasion express any opinion upon that point.

BYTES, J. I also am of opinion that our answers to the questions put to us by the justices must be in favour of the respondents. I do not give any opinion upon the point; but I do not dissent from the view of [707] my Lord as to the meaning of the word "inhabitant." It is a very elastic word. Where an act of parliament gives an appeal against a rate, the justices are not at liberty to enter into questions of this nature. By the 18th section of this act, a double appeal is given,—first, against the assessment,—next, if any party shall find himself aggrieved by any distress or seizure. As to the limit, probably both are limited to three months. It clearly was not competent to the justices to entertain the objections. If it were, it would practically become impossible to levy the rate at all.

KEATING, J. I am also clearly of opinion that it was not competent to the justices to enter into an inquiry as to the qualification of the vestrymen by whom the rate was made. By the local act, an appeal is given to the quarter sessions. If there were anything in the objection, it might properly be raised by an appeal to that tribunal. That being so, it is unnecessary for us upon the present occasion to decide whether "inhabitants" in s. 5 of the Sunderland local act means "residents" or persons who

(a) See the definition of "inhabitants" given by Bayley, J., in *Donne v. Martyn*, 8 B. & C. 69, 2 M. & R. 98, and by Littledale, J., in *The King v. Mashiter*, 6 Ad. & E. 153, 1 Nev. & P. 314.

sleep within the parish. Although, therefore, I am by no means disposed to dissent from the opinion thrown out by the Lord Chief Justice, I do not wish to be understood as deciding it.

Appeal dismissed, with costs.

[708] EICHHOLZ v. BANNISTER. Nov. 17th, 1864.

[S. C. 34 L. J. C. P. 105; 12 L. T. 76; 11 Jur. N. S. 15; 13 W. R. 96. See *Baqueley v. Hawley*, 1867, L. R. 2 C. P. 628; *Dorab Ally Khan v. Abdool Ayeer*, 1878, L. R. 5 Ind. App. 126. Referred to, *Wood v. Barter*, 1883, 49 L. T. 47; *Raphael v. Bart*, 1884, Cab. 2 E. 328; *R. v. Sampson*, 1885, 52 L. T. 774.]

In the case of goods sold in an open shop or warehouse, there is an implied warranty on the part of the seller that he is the owner of the goods: and, if it turns out otherwise,—as, where the goods are claimed by the true owner, from whom they have been stolen,—the buyer may recover back the price as money paid upon a consideration which has failed.

This was an action for money payable by the defendant to the plaintiff for money received by the defendant for the use of the plaintiff, for money paid by the plaintiff for the defendant at his request, and for money found to be due from the defendant to the plaintiff on accounts stated: Claim, 19l. Plea, never indebted, whereupon issue was joined.

The cause was tried in the court of record for the trial of civil actions within the city of Manchester, before the deputy recorder, when the facts which appeared in evidence were as follows:—The plaintiff was a commission-agent at Manchester. The defendant was a job-warehouseman in the same place. On the 18th of April last, the plaintiff went to the defendant's warehouse, and there saw, amongst other goods which the defendant had just purchased, 17 pieces of prints, which he offered to buy of him at 5½d. a yard. After some discussion, the defendant agreed to sell them, and gave the plaintiff an invoice in the following form, the whole of which was printed, with the exception of the parts in italics:—

“21 Chorlton Street, Portland Street, Manchester,

“Mr. Eichholz.

“April 18th, 1864.

“Bought of R. Bannister, Job-warehouseman.

“Prints, fents, grey fustians, &c. Job and perfect yarns in hanks, cops, and bundles.

17 pieces of prints, 52 yds. at 5½d.	£19	0	0
1½ per cent. for cash	0	6	0

“£18 4 0”

[709] The plaintiff paid for the goods before he left the warehouse, and the defendant sent them by a porter to the plaintiff's place of business. The plaintiff sold the lot a few days afterwards for 19l. 15s. net. The goods were subsequently returned to the plaintiff; they having been recognized as goods which had been stolen from the premises of one Krauss. The goods were taken possession of by the police, and the thief, one Aspinall, was tried at the general quarter sessions of the peace holden in and for the city of Manchester on the 9th of May last, and convicted, and sentenced to penal servitude for four years.

On the part of the defendant, it was objected that there was no case to go to the jury, inasmuch as there is no implied warranty of title on the sale of goods.

For the plaintiff it was insisted that he was entitled to recover, the money having been paid upon a consideration which had wholly failed.

The learned judge directed a verdict to be entered for the plaintiff for the amount claimed, reserving leave to the defendant to move to set aside the verdict and enter a nonsuit or a verdict for the defendant, if the court should be of opinion that the plaintiff was not entitled to recover.

Holker, on a former day in this term, obtained a rule nisi accordingly. He referred

Crosse v. Gardner, Carthew, 90, *Pasley v. Freeman*, 3 T. R. 51, *Morley v. Attenborough*, Exch. 500, and *Hall v. Conder*, 2 C. B. (N. S.) 22, 40.

C. Pollock now shewed cause. The question is, whether there is any implied warranty of title upon a sale of goods. That there is such warranty according to the Roman (Cod. lib. 8, tit. 45. Dig. lib. 21, tit. 2), the French (Code Civil, art. 1626. Troplong, ch. 4, De la Vente), the American [710]-can (a), the Scotch, and almost every law of the continent of Europe, is clear: and there are not wanting authorities to shew that it is so in the law of this country. "By the Civil law," says Blackstone (2 Bl. Com. 451), "an implied warranty was annexed to every sale, in respect of the title of the vendor: and so, too, in our law, a purchaser of goods and chattels may have a satisfaction from the seller, if he sells them as his own, and the title proves deficient, without any express warranty for that purpose." In *Crosse v. Gardner*, Carth. 90, the plaintiff declared quod cum (on such a day) colloquium fuit between the plaintiff and the defendant concerning the buying and selling two oxen, which the defendant then had in his possession, and he (the defendant) adtunc et ibidem falso et malitiose affirmabat that those oxen were his (the defendant's) proper goods, to which the plaintiff giving credit bought the said oxen of the defendant for so much money, when in truth the said oxen then were the proper goods of T. S., and that he the said T. S. poster, &c., lawfully recovered the said oxen from the plaintiff, and licet (the defendant) sapius requisit. fuit, yet he refused to give the plaintiff satisfaction for the same. Upon motion in arrest of judgment, it was contended that the declaration was ill, because the plaintiff had not alleged that the defendant (sciens that these were the oxen of T. S.) did affirm them to be his oxen, nor allege this to be done deceptive, nor set forth any warranty, but generally that the defendant did affirm these to be his (the defendant's) oxen, which was not sufficient to maintain the action, because a man may be mistaken in his property and right to a thing, without any fraud or ill intent. But the court held that [711] the action would lie upon a bare affirmation, ut supra,—"referring to *Harvey v. Young*, Yelv. 20, *Bosden v. Thinne*, Yelv. 40, *Furnis v. Leicester*, Cro. Jac. 474, 1 Rol. Abr. 91, *Leakins v. Clissel*, 1 Siderfin, 146, and *Elkins v. Tresham*, 1 Lev. 102. In *Melina v. Stoughton*, 1 Ld. Raym. 593, Salk. 210, it was held that an action lies against the seller of goods for affirming them at the time of the sale to be his own, when they were not, if he was in possession of them at the time of the sale; and that it is no answer that he bought them bona fide, and believed them to be his. Offering to sell generally is sufficient evidence of offering to sell as owner: per Lee, C. J., in *Ryall v. Rowles*, 1 Ves. sen. 348, 351. And see the judgment of Buller, J., in *Pasley v. Freeman*, 3 T. R. 56, 57. In *Morley v. Attenborough*, 3 Exch. 500, although the conclusion arrived at by the court is, that there is no implied warranty of title in the contract of sale of a personal chattel, yet many of the authorities referred to in the judgment delivered by Parke, B., sustain the present argument: and the decision may well be warranted by the circumstance of the vendor being a pawnbroker and the subject of sale an unredeemed pledge. "With respect to *executory* contracts of purchase and sale," says that learned judge, "where the subject is unascertained, and is afterwards to be conveyed, it would probably be implied that both parties meant that a good title to that subject should be transferred, in the same manner as it would be implied, under similar circumstances, that a merchantable article was to be supplied. Unless goods which the party could enjoy as his own, and make full use of, were delivered, the contract would not be performed. The purchaser could not be bound to accept if he discovered the defect of title before delivery: and, if he did, and the goods were recovered from him, he would not be bound to pay, or, having [712] paid, he would be entitled to recover back the price, as on a consideration which had failed. But, when there is a bargain and sale of a specific ascertained chattel, which operates to transmit the property, and nothing is said about title, what is the legal effect of that contract? Does the contract necessarily import, unless the contrary be expressed, that the vendor has a good title? or, has it merely the effect of transmitting such title as the vendor has? According to the Roman law (vide Domat. book 1, tit. 2, s. 2, art. 3), and in France (Code Civil, chap. 4, sect. 1, art. 1603) and Scotland, and partially in America (*Defreeze v. Trumper*, 1 Johns. U. S. R. 274, Broom's Maxims, 628, where this subject is well discussed), there is always an implied contract that the

(a) *Armstrong v. Pery*, 5 Wend. 535; *Blasdale v. Babcock*, 1 J. R. 517; Sedgwick on Damages, 2nd edit. 293; 2 Kent's Commentaries, 478.

vendor has the right to dispose of the subject which he sells (Bell on Sale, 94): but the result of the older authorities is, that there is by the law of England no warranty of title in the actual contract of sale, any more than there is of quality. The rule of caveat emptor applies to both: but, if the vendor knew that he had no title, and concealed that fact, he was always held responsible to the purchaser as for a fraud, in the same way that he is if he knew of the defective quality. This rule will be found in Co. Litt. 102 a., 3 Rep. 22 a., Noy's Maxims, 42, Fitz. Nat. Brev. 94 C. in *Sprigwell v. Co.* Litt. 102 a., 3 Rep. 22 a., Noy's Maxims, 42, Fitz. Nat. Brev. 94 C. in *Sprigwell v. Allen*, Aleyn, 91, cited by Littledale, J., in *Early v. Garrett*, 9 B. & C. 932, 4 M. & R. 687, and in *Williamson v. Allison*, 2 East, 469, referred to in the argument. Lord Hale says, 'Though the words *assign, set over, and transfer*, do not amount to a covenant against an eign title, yet as against the covenantor himself, it will amount to a covenant against all claiming under him.'—*Deering v. Farrington*, 3 Keble, 304. It may be that, as in the earlier times the chief transactions of purchase and sale were in markets and fairs, where the bonâ fide purchaser [713] without notice obtained a good title as against all except the Crown (and afterwards a prosecutor to whom restitution is ordered, by the 21 H. 8, c. 11), the common law did not annex a warranty to any contract of sale. Be that as it may, the older authorities are strong to shew that there is no such warranty implied by law from the mere sale. In recent times a different notion appears to have been gaining ground (see note of the learned editor to 3 Rep. 22 a.): and Mr. Justice Blackstone says, 'In contracts for sale it is constantly understood that the seller undertakes that the commodity he sells is his own;' and Mr. Wooddeson, in his Lectures, vol. 2, p. 415, goes so far as to assert that the rule of caveat emptor is exploded altogether, which no authority warrants. At all times, however, the vendor was liable if there was a warranty *in fact*: and, at an early period, the affirming those goods to be his own by a vendor in possession, appears to have been deemed equivalent to a warranty. Lord Holt, in *Medina v. Stoughton*, 1 Salk. 210, Ld. Raym. 593, says that, 'where one in possession of a personal chattel sells it, the bare affirming it to be his own amounts to a warranty:' and Mr. Justice Buller, in *Pasley v. Freeman*, 3 T. R. 57, disclaims any distinction between the effect of an affirmation, when the vendor is in possession or not, treating it as equivalent to a warranty in both cases. Some of the text-writers drop the expression of 'warranty' or 'affirmation,' and lay down in general terms that, if a man sells goods *as his own*, and the title is deficient, he is liable to make good the loss: 2 Bl Com. 451: the commentator cites for that position *Furnis v. Leicester*, Cro. Jac. 474, and 1 Roll. Abr. 70, in both which cases there was an allegation that the vendor *affirmed* that he had a title, and therefore it would seem that the learned author treated the expression 'selling as his own' as equivalent to an [714] affirmation or warranty. So, Chancellor Kent, in 2 Comm. 478, says that, 'in every sale of a chattel, if the possession be in another, and there be no covenant or warranty of title, the rule of caveat emptor applies, and the party buys at his peril: but, if the seller has possession of the article, *and he sells it as his own*, and for a fair price, he is understood to warrant the title.' From the authorities in our law, to which may be added the opinion of the late Lord Chief Justice Tindal, in *Ormerod v. Huth*, 14 M. & W. 664, it would seem that there is no implied warranty of title on the sale of goods, and that, if there be no fraud, a vendor is not liable for a bad title, unless there is an express warranty, or an equivalent to it, by declarations or conduct; and the question in each case, where there is no warranty in express terms, will be, whether there are such circumstances as to be equivalent to such a warranty. Usage of trade, if proved as a matter of fact, would, of course, be sufficient to raise an inference of such an engagement; and, without proof of such usage, the very nature of the trade may be enough to lead to the conclusion that the person carrying it on must be understood to engage that the purchaser shall enjoy that which he buys, as against all persons. It is, perhaps, with reference to such sales, or to executory contracts, that Blackstone makes the statement above referred to. We do not suppose that there would be any doubt, if the articles were bought in a shop professedly carried on for the sale of goods, that the shopkeeper must be considered as warranting that those who purchase will have a good title to keep the goods purchased. In such a case, the vendor sells 'as his own,' and that is what is equivalent to a warranty of title. But, in the case now under consideration, the defendant can be made responsible only as *on a sale of a forfeited pledge, co nomine*. The vendor must be [715] considered as selling merely the right to the pledge which he himself had."

There is nothing in that judgment to militate against the claim of the plaintiff here. The circumstances of a tradesman selling goods in a public shop is a representation to all the world that that which he is selling is his own property. In *Chapman v. Speller*, 14 Q. B. 621, the defendant at a sheriff's sale bought goods from the sheriff for 18l.: the plaintiff, who was also at the sale, bought *the defendant's bargain* of him for 5l., and paid him the 23l.: the defendant paid the sheriff the 18l., and the sheriff began to deliver the goods to the plaintiff, but they were then claimed as not being the property of the execution-debtor, and were recovered by the true owner: and, in an action upon an alleged warranty that the vendor (the defendant) had title to sell, it was held that there was no implied warranty by the defendant that he had title, nor any failure of consideration,—the plaintiff having paid the 23l. to the defendant, not for the goods, but for the right which the defendant had acquired by his purchase, and this consideration not having failed. But, in delivering judgment, Patteson, J., says: "In deciding for the defendant under these circumstances, we wish to guard against being supposed to doubt the right to recover back money paid upon an ordinary purchase of a chattel, where the purchaser does not have that for which he paid." In *Sims v. Murregat*, 17 Q. B. 281, 290, Lord Campbell, in delivering judgment, says, obiter,—“I do not think it necessary to inquire what the law would be in the absence of an express warranty. On that point the law is not in a satisfactory state. The decision in *Morley v. Attenborough*, 3 Exch. 500, was that a pawnbroker, selling an unredeemed pledge as such, did not warrant the title of the pawnor. Of that decision I approve: but a great many questions, beyond [716] the mere decision, arise on the very able judgment of the learned Baron in that case, which I fear must remain open to controversy. It may be that the learned Baron is correct in saying that, on a sale of personal property, the maxim of caveat emptor does by the law of England apply: but, if so, there are many exceptions stated in the judgment which well nigh eat up the rule. Executory contracts are said to be excepted: so are sales in retail shops, or where there is a usage of trade: so that there may be difficulty in finding cases to which the rule would practically apply.” [Erle, C. J., referred to Noy's Maxims, c. 42, p. 89 (Bythewood's edit. 209), where it is said, “If I take the horse of another man, and sell him, and the owner take him again, I may have an action of debt for the money; for, the bargain was perfect by the delivery of the horse: and caveat emptor.”] That can hardly be considered law at this day.

Holker, in support of his rule. The real question is, whether there is a warranty of title to goods sold in a shop or warehouse: or, in other words, whether the money which the buyer has paid for them, can, if the vendor turns out to have no title, be recovered back as upon a failure of consideration. As a general rule there is by the law of England, whatever may be the law of other commercial countries, no implied warranty of title on the sale of a chattel. The law is the same with respect to warranty of title to land as of title to goods. [Byles, J. Chancellor Kent, in his Commentaries, vol. 2, p. 478, states the contrary to be the law of England as well as that of America.] The English authorities he refers to (a), with the exception of the [717] passage in Blackstone, do not bear him out. The rule is clearly laid down by Tindal, C. J., in *Ormerod v. Huth*, 14 M. & W. 651, 664,—“The rule which is to be derived from all the cases appears to us to be that, where upon the sale of goods the purchaser is satisfied without requiring a warranty (which is a matter for his own consideration), he cannot recover upon a mere representation of the quality by the seller, unless he can shew that the representation was bottomed in fraud. If indeed, the representation was false to the knowledge of the party making it, this would in general be conclusive of fraud: but, if the representation was honestly made, and believed at the time to be true by the party making it, though not true in point of fact, we think this does not amount to fraud in law, but that the rule of caveat emptor applies, and the representation itself does not furnish a ground of action. And, although the cases may, in appearance, raise some difference as to the effect of a false assertion or representation of title in the seller, it will be found, on examination that in each of those cases there was either an assertion of title embodied in the contract, or a representation of title which was false to the knowledge of the seller.” That, it is submitted, is a correct exposition of the law upon the subject: and it has never

(a) 2 Bl. Com. 451, Bacon's Abridgment, *Actions on the Case* (E.), Comyn on Contracts, part 3, ch. 8, *Stuart v. Wilkins*, Dougl. 18, and *Parkinson v. Lee*, 2 East, 314.

been questioned. Almost all the authorities are referred to and commented upon in *Morley v. Attenborough*; and the result arrived at is that, by the common law of England, there is no implied warranty of title from the mere contract of sale of a chattel. The doctrine is still further carried out in *Hall v. Corder*, 2 C. B. (N. S.) 22, 40, where Williams, J., in delivering the judgment of the court, says: "With regard to the sale of ascertained chattels, it has been held that *there is not any implied warranty of either title or quality*, unless there are some circumstances [718] beyond the mere fact of a sale from which it may be implied. The law on this subject was very fully explained by Parke, B., in giving the judgment of the court of Exchequer in *Morley v. Attenborough*." [Erle, C. J. In both those cases, the dicta you rely on were extra judicial, not necessary to the determination of the question in issue.] They are, at all events, strong expressions of opinion. [Erle, C. J. Very.] In a note to *Williamson v. Allison*, 2 East, 448, the following MS. note of *Sprigge v. Allen*, (Ayleyn, 91) by Burnet, J., is given,— "In an action on the case for selling a horse as the defendant's own, when in truth it was the horse of A. B., upon not guilty pleaded, it appeared that the defendant bought the horse in Smithfield, but did not take care to have him legally tolled; yet, as the plaintiff could not prove that the defendant knew it to be the horse of A. B., the plaintiff was nonsuited; for, the *scienter* or *fraud* is the gist of the action *where there is no warranty*; for, there the party takes upon himself the knowledge of the title to the horse and of his qualities." The note goes on,— "See also *Chandler v. Lopus*, in the Exchequer Chamber, Cro. Jac. 4, to the same purpose. The same MS. also refers to another case: 'So, if a man sell six blank lottery tickets, and afterwards another, as owner of these tickets, recover them of the vendee, unless the vendor *knew* them to be the property of another, or warranted them, neither this action (under the title Case of torts in nature of deceit and other wrongs) nor assumpsit for money had and received to the vendee's use will lie. Per Holt, C. J., *Paget v. Wilkinson*, Tr. 8 W. 3, Guildhall.' And see *Denison v. Ralphson*, 1 Ventr. 366, where an opinion is given on the very point in question; for, on the second count, which stated a *warranty* that the goods sold were good and merchantable, and averred that the defendant delivered them [719] bad and not merchantable, *knowing* them to be naught, the court observe that, though the declaration be '*knowing* them to be naught,' *yet the knowledge need not be proved in evidence*.'" [Erle, C. J. If I sell an article as *my* article, is not that a contract that the article is mine? Has any court decided that, under such circumstances, the money paid is not recoverable back, if it turn out that the seller has no title?] In *Walker's case*, 3 Co. Rep. 22 a., it is laid down that, "if a man sell goods for money to be paid at several days, in such case, although the goods be taken by one who hath right before the day, yet the seller shall have an action of debt in respect of the contract" To which is added in the note, "And, unless the seller knew the goods to be the property of another, or warranted them, the buyer must bear the loss; for the rule is caveat emptor,—citing 1 Inst. 102 a., 2 Inst. 247. [Erle, C. J. That is merely talking, not adjudging.] In *Early v. Garrett*, 9 B. & C. 928, 4 M. & R. 687. Little Dale, J., says: "It has been held that, where a man sells a horse as his own, when in truth it is the horse of another, the purchaser cannot maintain an action against the seller, unless he can shew that the seller knew it to be the horse of the other at the time of the sale,—the *scienter* or *fraud* being the gist of the action *where there is no warranty*, for there the party takes upon himself the knowledge of the title to the horse, and of his qualities." [Erle, C. J., referred to *Brown v. Edgington*, 2 M. & G. 279, 2 Scott, N. R. 496.] In Broom's Legal Maxims, 4th edit. 768, the result of the authorities, antient and modern, is thus summed up,— "Upon the whole, we may safely conclude that, with regard to the sale of ascertained chattels, there is not any implied warranty of either *title or quality*, unless there are some circumstances beyond the mere fact of a sale, from which it may be implied." The mere [720] fact of the sale taking place in a shop surely cannot make any difference. As to the failure of consideration, that raises very nearly the same question. "It may be," says Parke, B., in *Morley v. Attenborough*, 3 Exch. 514, "that, though there is no implied warranty of title, so that the vendor would not be liable for a breach of it to unliquidated damages, yet the purchaser may recover back the purchase-money, as on a consideration that failed, if it could be shewn that it was the understanding of both parties that the bargain should be put an end to if the purchaser should not have a good title. But, if there is no implied warranty of title, some circumstances must be

shewn to enable the plaintiff to recover for money had and received." In the present case, the defendant sold in the usual and ordinary course of business, without any warranty or representation of any sort, and without any knowledge that he had not the full right openly to sell that which he had as openly bought. To hold that any implication of warranty of title arises under such circumstances will be to establish a doctrine, not only new to the law of England, but fraught with inconveniences the extent of which cannot well be foreseen (a)¹.

ERLE, C. J. I am of opinion that this rule should be discharged. The plaintiff brings his action to recover back money which he paid for goods bought by him in the shop of the defendant, which were afterwards lawfully claimed from him by a third person, the true owner, from whom they had been stolen. The plaintiff now claims to recover back the money as having been paid by him upon a consideration which has failed. The jury at the trial found a verdict for the plaintiff, under the direction of the learned judge who presided, and a rule has been obtained on behalf of [721] the defendant to set aside that verdict and to enter a nonsuit, on the ground that it is part of the common law of England that the vendor of goods by the mere contract of sale does not warrant his title to the goods he sells, that the buyer takes them at his peril, and that the rule caveat emptor applies. The case has been remarkably well argued on both sides; and the court are much indebted to the learned counsel for the able assistance they have rendered to them. The result I have arrived at is, that the plaintiff is entitled to retain his verdict. I consider it to be clear upon the antient authorities that, if the vendor of a chattel by word or conduct gives the purchaser to understand that he is the owner, that tacit representation forms part of the contract, and that, if he is not the owner, his contract is broken. So is the law laid down in the very elaborate judgment of Parke, B., in *Morley v. Attenborough*, 3 Exch. 500, 513, where that learned judge puts the case upon which I ground my judgment. A difference is taken in some of the cases between a warranty and a condition (a)²: but that is foreign to the present inquiry. In *Morley v. Attenborough*, 3 Exch. 513, Parke, B., says: "We do not suppose that there would be any doubt, if the articles are bought in a shop professedly carried on for the sale of goods, that the shop-keeper must be considered as warranting that those who purchase will have a good title to keep the goods purchased. In such a case the vendor sells 'as his own,' and that is what is equivalent to a warranty of title." No doubt, if a shopkeeper in words or by his conduct affirms at the time of the sale that he is the owner of the goods, such affirmation becomes part of the contract, and, if it turns out that he is not the owner, so that the goods are lost to the buyer, the price which he has received may be recovered back. [722] I ventured to throw out some remarks in the course of the argument upon the doctrine relied on by Mr. Holker, which he answered by assertion after assertion coming no doubt from judges of great authority in the law, to the effect that upon a sale of goods there is no implied warranty of title. The passage cited from Noy certainly puts the proposition in a manner that must shock the understanding of any ordinary person. But I take the principle intended to be illustrated to be this, —I am in possession of a horse or other chattel: I neither affirm or deny that I am the owner: if you choose to take it as it is, without more, caveat emptor: you have no remedy, though it should turn out that I have no title. Where that is the whole of the transaction, it may be that there is no warranty of title. Such seems to have been the principle on which *Morley v. Attenborough* was decided. The pawnbroker, when he sells an unredeemed pledge, virtually says, —I have under the provisions of the statute (39 & 40 G. 3, c. 99, s. 17) a right to sell. If you choose to buy the article, it is at your own peril. So, in the case of the sale by the sheriff of goods seized under a fi. fa., —*Chapman v. Speller*, 14 Q. B. 621. The fact of the sale taking place under such circumstances is notice to buyers that the sheriff has no knowledge of the title to the goods: and the buyers consequently buy at their own peril. Many contracts of sale tacitly express the same sort of disclaimer of warranty. In this sense it is that I understand the decision of this court in *Hall v. Coulter*, 2 C. B. (N. S.) 22. There, the plaintiff merely professed to sell the patent-right such as he had it, and the court held that the contract might still be enforced, though the patent was ultimately defeated on the ground of want of

(a)¹ *Lee v. Bayes*, 18 C. B. 599.

(a)² See *Bannerman v. White*, 10 C. B. (N. S.) 844.

novelty. The thing which was the subject of the contract there was not matter, it was [723] rather in the nature of mind. These are some of the cases where the conduct of the seller expresses at the time of the contract that he merely contracts to sell such a title as he himself has in the thing. But, in almost all the transactions of sale in common life, the seller by the very act of selling holds out to the buyer that he is the owner of the article he offers for sale. The sale of a chattel is the strongest act of dominion that is incidental to ownership. A purchaser under ordinary circumstances would naturally be led to the conclusion that, by offering an article for sale, the seller affirms that he has title to sell, and that the buyer may enjoy that for which he parts with his money. Such a case falls within the doctrine stated by Blackstone, and is so recognized by Littleale, J., in *Earle v. Garrett*, 9 B. & C. 928, 4 M. & R. 687, and by Parke, B., in *Morley v. Attenborough*, 3 Exch. 513. I think justice and sound sense require us to limit the doctrine so often repeated, that there is no implied warranty of title on the sale of a chattel. I cannot but take notice that, after all the research of two very learned counsel, the only semblance of authority for this doctrine from the time of Noy and Lord Coke consists of mere dicta. These dicta, it is true, appear to have been adopted by several learned judges, amongst others by my excellent Brother Williams, whose words are almost obligatory on me: but I cannot find a single instance in which it has been more than a repetition of barren sounds, never resulting in the fruit of a judgment. This very much tends to shew the wisdom of Lord Campbell's remark in *Sims v. Murrell*, 17 Q. B. 291, that the rule is beset with so many exceptions that they well nigh eat it up. It is to be hoped that the notion which has so long prevailed will now pass away, and that no further impediment will be placed in the way of a buyer recovering back [724] money which he has parted with upon a consideration which has failed.

BYLES, J. I also am of opinion that this rule should be discharged. It has been said over and over again that there is no implied warranty of title on the mere sale of a chattel. But it is certainly, as my Lord has observed, barren ground: not a single judgment has been given upon it. In every case, there has been, subject to one single exception, either declaration or conduct. Chancellor Kent, 2 Com. 478, says: "In every sale of a chattel, if the possession be at the time in another, and there be no covenant or warranty of title, the rule of caveat emptor applies, and the party buys at his peril:" for which he cites the dicta of Lord Holt in *Medina v. Staughton*, 1 Salk. 210, 1 Ld. Raym. 523, and of Buller, J., in *Paslev v. Freeman*, 3 T. R. 57, 58. "But," he goes on, "if the seller has possession of the article, and he sells it as his own, and not as agent for another, and for a fair price, he is understood to warrant the title." Thus the law stands that, if there be declaration or conduct or warranty whereby the buyer is induced to believe that the seller has title to the goods he professes to sell, an action lies for a breach. There can seldom be a sale of goods where one of these circumstances is not present. I think Lord Campbell was right when he observed that the exceptions had well nigh eaten up the rule.

KEATINGE, J. I am of the same opinion. Whether it be an exception to the rule or a part of the general rule, I think we do not controvert any decided case or dictum when we assert that, under circumstances like those of the present case, the seller of goods warrants that he has title. These goods were bought in the defendant's shop in the ordinary course of business. He [725] gives an invoice with them, which represents that he is selling them as vendor in the ordinary course. I think the case falls within that put by Parke, B., in *Morley v. Attenborough*, 3 Exch. 513, of a sale in a shop, which he treats as a circumstance which beyond all doubt gives rise to a warranty of ownership. I was somewhat pressed by Mr. Holker's question whether there is more affirmation of title in the case of a sale in a shop than in a sale elsewhere. It may be that the distinction is very fine in certain cases. If a man professes to sell without any qualification out of a shop, it is not easy to see why that should not have the same operation as a sale in the shop. It is not necessary, however, to decide that question now. Here, the sale took place in a public shop, in the ordinary way of business, and every circumstance concurs to bring the case within the distinction put by Parke, B., in *Morley v. Attenborough*.

Rule discharged.

PODMORE v. SCHMIDT. Nov. 19th, 1864.

The judge having at the trial substituted for the defendant on the record the name of the person really intended to be sued, and directed a verdict to be entered for the plaintiff against that person "sued as, &c.," the court refused to order a verdict to be entered for the defendant named originally on the record, for the purpose of enabling him to get costs,—there being suspicion of collusion.

This was an action by the plaintiff, a stock-jobber, to recover from the defendant, who carried on the business of a print dealer, in Crown Street, Finsbury, the sum of 32l. 10s., the amount of loss sustained on a sale of Greek stock, which the plaintiff had bought for a person who came to him with Schmidt's card. The [726] writ of summons was left with a shopman at the defendant's place of business in Crown Street, and was by him handed to the defendant. The defendant took it to his attorney, who gave an undertaking to appear, and afterwards pleaded to the action.

The cause came on for trial before Willes, J., at the first sitting in London in this term. Upon the defendant being called, the plaintiff was asked if he was the party with whom he had been dealing and whom he intended to sue. He replied that he was not; and he identified another person in court (one Louis Rochefort, who managed the defendant's business,) as the person who had employed him, presenting the defendant's card. The defendant swore that he never had had any transaction in buying or selling stock, nor had he authorized Rochefort to do so in his name. Rochefort was then called, when he admitted that he had employed the plaintiff to buy and sell the stock in question, and that he did so on his own account, having no authority from Schmidt to use his name in the transaction.

The learned judge thereupon directed the jury to find a verdict for the plaintiff for the sum claimed, against Louis Rochefort "sued as Philipp Schmidt."

Pearce now moved to enter a verdict for Schmidt. The motion was founded upon an affidavit of Schmidt detailing the above facts, and stating that "he never informed Rochefort what steps had been taken in this cause before the 8th of November instant, and that he (Rochefort) was not aware from any information which he (Schmidt) had given him, either directly or indirectly, that a plea had been delivered in this cause." The managing clerk of Schmidt's attorney also swore that, on the 8th of November, he ascertained for the first time that Rochefort was the person who had been dealing with the plaintiff, whereupon he immediately [727] caused notice of that fact to be given to the plaintiff's attorneys; that he had no instructions to appear for Rochefort; that judgment had been signed, and the costs taxed; and that he had been informed by the plaintiff's attorney that, if he could find Schmidt, he would take him in execution on the judgment. [Erle, C. J. Upon the verdict as entered, Schmidt can be in no jeopardy. What is the real object of the motion? That Schmidt may have his costs.

ERLE, C. J. I do not think we ought to interfere, under the circumstances. The whole transaction is replete with suspicion.

The rest of the court concurring,

Pearce took nothing.

IN RE SPARKS. Nov. 2nd, 1864.

The court will not strike an attorney off the rolls, where he has become bankrupt having moneys of a client in his hands which ought to have been paid over, unless a clear case of fraudulent misappropriation be made out against him.

Garth, in Trinity Term last, instructed by the Incorporated Law Society, obtained a rule calling upon Mr. Sparks to shew cause why his name should not be struck off the roll of attorneys of this court, on the ground that he had improperly appropriated to his own use moneys which had come to his hands in his character of attorney.

The motion was founded upon an affidavit of one Lockington, the client, and also an affidavit verifying the proceedings in bankruptcy under a petition filed by Sparks under the Bankruptcy Act, 1861. Lockington in his affidavit stated that in May, 1862, he employed Sparks to recover a debt of 65l. 2s. due to him [728] from Messrs. T. & C.; that he afterwards called on Sparks to inquire what he had done in the matter, when he told him he had received certain bills, but was pressing for security;

that he called again several times at Sparks's office, but received evasive answers, and was unable to see him: that, in January, 1863, he saw Sparks, and, in answer to inquiries, was informed by him that a part of the money had been paid, but that there still remained 31l. unpaid, which he expected to get in about a fortnight, when he would pay it all together; that he subsequently made applications for the money or for information respecting it, without being able to obtain any: that he was informed and believed that Sparks did receive as his attorney the sum of 51l. 9s. 6d. in or previously to the month of August, 1862: and that Sparks never informed him that he had received that sum.

In his examination before the commissioner, Sparks, admitted having on the 14th of May, 1862, received from Messrs. T & C. two bills of exchange amounting together to 51l. 9s. 6d., which he discounted with his bankers, applying the proceeds to his own use. He further stated that the bills were dishonoured at maturity, that he repaid the amount to his bankers, and afterwards, in August, 1862, received from the parties to the bills the amount thereof in cash, and applied it to his own use.

By the proceedings in bankruptcy it appeared that, upon Sparks coming up for his discharge, "it was adjudged by the court that the said bankrupt could not have had at the time when Mr. Lockington's debt was contracted any reasonable or probable ground or expectation of being able to pay the same, and that the bankrupt's insolvency was attributable greatly to unjustifiable extravagance in living: and that the order of discharge be suspended for nine months from this [729] date (16th December, 1863), with protection for one month from this day: but, after the expiration of such month, no further protection is to be granted until the bankrupt has been without protection for six months."

Morgan Lloyd and Butler Rigby now shewed cause. They produced the affidavit of Sparks, in which he stated that his discharge by the bankruptcy court had been opposed by Lockington on the same ground as that upon which it was now sought to strike him off the roll: and he attributed his bankruptcy to a severe attack of illness which had for some time succeeding Christmas, 1862, incapacitated him from attending to business: and also the affidavits of five respectable individuals (to one of whom, a relative, he was indebted at the time of his bankruptcy in the sum of 2000l. and upwards, and to another in the sum of 280l.), who deposed that they had severally employed Sparks as their attorney for periods varying from ten to twenty years, that he had always transacted their business to their entire satisfaction, and that they were willing to employ him again as their attorney.

The court will not lend its aid in this stringent course of proceeding to compel an attorney to pay a debt which is barred by his certificate, nor will they punish him for an offence for which he has already under the order of the court of bankruptcy been punished by six months' suspension from practice. In *Ex parte Culliford*, 8 B. & C. 220, the court of Queen's Bench refused to compel an attorney to pay a sum of money which he had received in his character of attorney: he having, as here, after the receipt of the money, become bankrupt and obtained his certificate.—Bayley, J. saying: "If an action were brought against Warren for money had and received, the certificate [730] might be pleaded in bar" (a). Besides, here, the affidavit of Mr. Lockington falls very far short of shewing that any wilful deceit with reference to the receipt of the money in question had been practised upon him.

Kay (with whom was Garth) submitted that the bankrupt's own admissions in his examination before the commissioner established a clear case of fraud and misrepresentation by him, and a wilful misappropriation of his client's money, which rendered it inexpedient that he should be permitted to remain upon the roll of attorneys.

ERLE, C. J. I have listened attentively to the affidavits and to the arguments which have been urged by counsel: and, though the case is one of grave suspicion, I cannot say that I find any specific misappropriation of the client's money which would warrant me in taking the extreme course of removing this gentleman from the roll of attorneys. I therefore think the rule must be discharged: but, under the circumstances, I think it should be discharged without costs.

The rest of the court concurring,
Rule discharged, without costs.

(a) And see *Baron v. Martell*, 9 D. & R. 390, *The King v. Edwards*, 9 B. & C. 652, *In re Bonner*, 1 Nev. & M. 555, 4 B. & Ad. 811.

[731] SAUNDERS v. BEST. Nov. 24th, 1864.

[S. C. 11 L. T. 421; 10 Jur. N. S. 1204; 13 W. R. 160.]

The 154th section of the Bankruptcy Act, 1861, discharges the bankrupt from liability to a surety in respect of payments of premiums on a policy of insurance becoming due subsequently to the date of the adjudication.

The defendant in the year 1853 assigned to one Hardwick a policy of insurance upon his life, the plaintiff joining him as surety, and covenanting to pay the premiums which should from time to time become due. In April, 1862, the defendant became bankrupt, and obtained his order of discharge on the 30th of June, 1862. In December, 1863, the plaintiff paid the premium due upon the policy, amounting to 10l. 19s. 2d., and brought this action. The defendant pleaded, amongst other pleas, his bankruptcy and certificate.

The cause was tried before the undersheriff of Worcestershire on the 9th of August last, when a verdict was found for the plaintiff for the sum claimed; leave being reserved to the defendant to move to enter a verdict for him, or a nonsuit, if the court should be of opinion that the 154th section of the Bankruptcy Act, 1861, 24 & 25 Vict. c. 134, made the subsequently accruing premiums a debt provable under the defendant's bankruptcy.

T. S. Pritchard, on a former day in this term, obtained a rule nisi accordingly. He referred to the cases of *Waring v. Tule*, 5 Ellis & B. 384 (affirmed on error, Ellis B. & E. 914), and *Young v. Watts*, 16 C. B. 401, decided upon the 178th section of the Bankrupt Law Consolidation Act, 1849, 12 & 13 Vict. c. 106, and to the 154th section of the Bankruptcy Act, 1861, 24 & 25 Vict. c. 134, which was expressly introduced for the purpose of meeting the difficulty presented by that class of cases, and which provides that, "if any bankrupt shall at the time of adjudication be liable by reason of any contract or [732] promise to pay premiums upon any policy of insurance, or any other sum of money, whether yearly or otherwise, or to repay to or indemnify any person against any such payments, the person entitled to the benefit of such contract or promise may, at his election, apply to the court to set a value upon his interest under such contract or promise, and the court is hereby required to ascertain the value thereof, and to admit such person to prove the amount so ascertained, and to receive dividends thereon."

Griffiths, who was instructed to shew cause, submitted that the 154th section of the Bankruptcy Act, 1861, merely gave the surety in a case like this permission to call upon the court of bankruptcy, if he thought fit, to set a value upon his interest in the contract, leaving him to the option of resorting to any other remedy he might have against the bankrupt.

Digby Seymour, Q. C., and Pritchard, were not required to support the rule.

ERLE, C. J. By the 161st section of the Bankruptcy Act, 1861, the order of discharge frees the bankrupt from "all debts, claims, or demands provable under his bankruptcy." A debt which the creditor has the option of proving is a debt provable. The rule must be absolute to enter a nonsuit.

The rest of the court concurring,

Rule absolute.

[733] INCHBALD v. THE WESTERN NEECHERRY COFFEE, TEA, AND CINCHONA PLANTATION COMPANY (LIMITED). Nov. 10th, 1864.

[S. C. 24 L. J. C. P. 15; 11 L. T. 345; 10 Jur. N. S. 1128; 13 W. R. 95. Referred to, *Ordens, Limited v. Nelson*, [1903] 2 K. B. 296; [1904] 2 K. B. 410; [1905] A. C. 109. Adopted, *Burcheil v. Gurne and Blackhouse Cakes Company, Limited*, [1910] A. C. 626.]

The plaintiff was retained, by resolution of the directors of a public company, as broker, to dispose of the shares therein, upon the terms that he was to receive

(a) See Doria & Macrae's Law of Bankruptcy, vol. 1, 741, and Shelford's Law of Bankruptcy, 3rd edit. 478, 543.

100l. down, and 400l. more *when all the shares should have been allotted*. By the act of the directors, without any default on the part of the plaintiff, the company was wound up before the whole of the shares had been disposed of:—Held, that the plaintiff was entitled to recover, as damages for the breach of contract, such sum as a jury (or the court substituted for a jury) should think reasonable.

This was an action for the breach of a contract by the company to employ the plaintiff as their broker to dispose of shares.

The special count of the declaration stated that it was agreed between the plaintiff and the defendants that the plaintiff should become stock broker to the defendants in and about the selling and disposing of shares in the said company, for reward to the plaintiff in that behalf to be paid by the defendants, that is to say, 100l. to be paid down, and 400l. in addition on the allotment of the whole of the shares of the said company; that thereupon, in consideration of the premises, and that the plaintiff then promised the defendants to fulfil the said agreement on his part, the defendants then promised the plaintiff to permit and suffer him to act as such broker, and to sell and dispose of the said shares for the defendants as aforesaid: General averment of performance of all conditions precedent, &c.: Breach, that the defendants, without any reasonable cause or pretence, wrongfully refused to permit the plaintiff to act as such broker, or to sell and dispose of the said shares for the defendants as aforesaid, whereby the plaintiff was prevented from earning the said sum of 400l. so to be paid to him in addition as aforesaid.

There was also a count for work and labour and commission as a broker.

The defendants pleaded to the special count, a denial of the promise, and a traverse of the breach as alleged, and, to the common count, never indebted, and payment. Issue thereon.

The cause was tried before Williams, J., at the sit-[734]-tings in London after Easter Term last, when the following facts appeared in evidence:—The Western Neilgherry Coffee, Tea, and Cinchona Plantation Company (Limited), was alleged by the prospectus to be incorporated under the Companies Act, 1862 (25 & 26 Viet. c. 89), whose capital was to consist of 50,000l., in 10,000 shares of 5l. each: and it was stated that the company was formed for the purpose of purchasing and cultivating coffee, tea, and cinchona upon certain freehold and leasehold estates in the Madras presidency, the purchase-money for which was to be 30,000l., one third of which was to be taken in shares by the vendor. The prospectus further stated that “the directors had entered into an arrangement with the vendor (a gentleman for the last twenty years a resident on the Neilgherry Hills, during which time he had made the cultivation of coffee his chief occupation), whereby he agreed to accept the superintendence of the property, and to guarantee an average minimum profit of 8 per cent. per annum on all paid up capital for five years, and to double the present crop within the same period; and, as security for the fulfilment of this guarantee, he was to leave 5000l. and the 2000 shares, parts of the purchase-money, and the interests and dividends thereof respectively, in the hands of the company;” that “it was not intended to call for more than 30,000l. of the proposed capital of 50,000l. during the first three years’ operation of the company;” that “2260 shares had been already subscribed for;” and that “applications for the remaining shares must be addressed to the bankers or broker, or to the secretary.”

It being of importance to the efficient starting of the company that a broker conversant with that sort of business, and having a large and influential connection among capitalists, should be employed to dispose of the shares, the secretary communicated with [735] the plaintiff, who was a member of the Stock-Exchange, and in December, 1862, the directors passed a resolution appointing the plaintiff to be the stock-broker of the company, on the terms that he was to receive 100l. down, and 400l. more on the allotment of the whole of the shares in the company.

The 100l. was accordingly paid to the plaintiff, and he proceeded to get subscribers for shares. On the 21st of January, 1863, at a meeting of the directors, at which the plaintiff was present, some dissatisfaction was expressed at the small progress made, and it was proposed that the remaining shares should be taken up amongst the directors themselves. But, in May following, in consequence of the agent with whom the company had been in treaty for the purchase of the estates turning out not to have authority from the owner (Mr. Lascelles) to sell on the terms proposed, and the

latter refusing to ratify the contract, the directors found themselves unable to form a company, and accordingly they sent circulars to the holders of shares, informing them that they found it expedient to wind up the concern, and that the deposits would be returned,—which they subsequently were, with 8 per cent. interest. The directors were aware as early as February, 1863, of the difficulty as to the purchase, but no communication was made by them to the plaintiff on the subject.

The plaintiff, on learning that the company was wound up, demanded the stipulated 400l., which the directors refused to pay, on the ground that the whole number of shares had not been allotted. Whereupon this action was brought.

The defence above suggested being relied on at the trial, it was contended on the part of the plaintiff, on the authority of *Planché v. Colburn*, 8 Bingh. 14, 1 M. & Scott, 51, that, inasmuch as he had been prevented by [736] the act of the defendants from disposing of the remaining shares, he was entitled to recover the whole stipulated reward, just as if he had performed the work.

A verdict was taken, by consent, for the plaintiff, for 400l., the right of the plaintiff to recover, and the amount of damages he was entitled to, being left for the decision of the court.

E. James, Q. C., in Trinity Term last, obtained a rule nisi accordingly. He sought to distinguish the case from *Planché v. Colburn*, on the ground that there it was the voluntary act of Colburn which prevented Planché from fulfilling the engagement; whereas, here, the non-fulfillment arose from a circumstance over which the directors had no control. He also referred to the authorities collected in the notes to *Cutter v. Powell*, 2 Smith's Leading Cases, 5th edit. p. 1.

Karslake, Q. C., and H. James, now shewed cause. The plaintiff being ready to perform the services for which he was retained, and the company having by winding up put it out of their power to permit the plaintiff to go on placing the shares, however discreetly the directors may have acted, they are clearly liable to pay him the stipulated remuneration under the special contract, or at all events a reasonable remuneration under the common counts. *Planché v. Colburn*, 8 Bingh. 14, 1 M. & Scott, 51, is precisely in point. There, the defendants engaged the plaintiff to write a treatise for a periodical publication. The plaintiff commenced the treatise, but, before he had completed it, the defendants abandoned the publication: and it was held that the plaintiff might sue for compensation, without delivering or tendering the treatise. To the same effect is *Prickett v. Badger*, 1 C. B. (N. S.) 296, where it was held that, where an [737] agent employed for an agreed commission to sell land at a given price, succeeds in finding a purchaser at the stipulated price, but the principal, from whatever cause, declines to sell, and rescinds the agent's authority, the latter is entitled to sue for a reasonable remuneration for his work and labour, and is not bound to resort to a special action for the wrongful withdrawal of the authority. "The defendant having declined," said Crowder, J., "from whatever cause, to sell the land after the plaintiff had succeeded in procuring a purchaser willing to take it at the price proposed, and the plaintiff having thus done all he could to entitle him to the stipulated commission, the Lord Chief Baron ruled that, although the plaintiff could not maintain an action upon the special contract, he was nevertheless entitled to recover upon the common count a reasonable remuneration for his work and labour. In this I am of opinion he was quite right. His ruling is perfectly consistent with the law as laid down in the notes to the case of *Cutter v. Powell* (6 T. R. 320), in 2 Smith's Leading Cases, 1. At p. 16 [5th edit. 17], the learned editors say, 'It is an invariably true proposition that, wherever one of the parties to a special contract not under seal has, in an unqualified manner, refused to perform his side of the contract, or has disabled himself from performing it by his own act, the other party has thereupon a right to elect to rescind it, and may, on doing so, immediately sue on a quantum meruit for anything which he had done under it previously to the rescission: this, it is apprehended, is established by *Withers v. Reynolds*, 2 B. & Ad. 882, *Planché v. Colburn*, 8 Bingh. 14, 1 M. & Scott, 51, *Franklin v. Miller*, 4 Ad. & E. 599, *Prickett v. Badger*, 1 C. B. (N. S.) 296, and other cases.'" [Williams, J., referred to *Moffatt v. Laurie*, 15 C. B. 583.] That was a very peculiar case, and has no application to the circumstances of this [738] case. If the directors here had a valid contract with the proposed vendor of the estates, they should have enforced it. If they had not, they should not have acted so precipitately.

Prentice, in support of the rule. It may be that the directors would be liable in

a special action upon an implied contract that they would not do anything to prevent the plaintiff from earning the stipulated remuneration. But the question here is, whether the plaintiff is in a position to maintain an action upon a quantum meruit. The defendants have been guilty of no wilful default: it is solely by the wrongful act of a third party that they are prevented from perfecting the contemplated arrangements. The case, therefore, differs materially from *Planché v. Colburn*, where the defendant by his own act made it impossible that the contract should be carried out. In the notes to *Cutter v. Powell*, 2 Smith's Leading Cases, 32, it is said: "The next exception to the general rule that no action of indebitatus assumpsit will lie while the special contract remains unperformed, is to be found in a class of cases which establish the proposition that, when one party has absolutely refused to perform, or has incapacitated himself from performing, his side of the contract, the other party may rescind the contract, and sue for what he has already done under it, upon a quantum meruit. That he may rescind it upon an *absolute* refusal by the other party to perform his part, is proved by *Withers v. Reynolds*, 2 B. & Ad. 882. There, the plaintiff having refused to pay for the loads on delivery, pursuant to his contract, the defendant was held entitled to rescind it. 'If the plaintiff,' said Patteson, J., 'had merely failed to pay for any particular load, that of itself might not have been an excuse to the defendant for delivering no more straw: but the [739] plaintiff here expressly *refuses* to pay for the loads as delivered: the defendant is therefore not liable for ceasing to perform his part of the contract.' This case was commented on in *Franklin v. Miller*, 4 Ad. & E. 599, and the same doctrine laid down. 'The rule is,' said Coleridge, J., 'that, in rescinding, as in making a contract, both parties must concur.' In *Withers v. Reynolds*, each load of straw was to be paid for on delivery. When the plaintiff said he would not pay for his loads on delivery, that was a *total* failure, and the defendant was no longer bound to deliver. In such a case it may be taken that the party refusing has abandoned the contract. The refusal which is to authorize the rescission of the contract must be an unqualified one:" and, it may be added, a voluntary one, like that which took place in *Short v. Stone*, 8 Q. B. 358. In *Prickett v. Badger*, 1 C. B. (N. S.) 296, the plaintiff had done all he was retained to do, and therefore had earned his commission. So, in *Green v. Reed*, 3 Post. & Fin. 226. In *Simpson v. Lamb*, 17 C. B. 603, A. employed B., a clerical agent, to offer an advowson for sale, upon an understanding that, in the event of a sale being effected through the agency of B., the latter should receive a commission of 5 per cent. upon the amount of the purchase-money. A. afterwards, without communicating with B., sold the living himself. In an action charging a *wrongful revocation of the authority*, it was held that, in the absence of evidence of expense or liability incurred by B., he was not entitled to recover anything. No wrongful act is imputable to the defendants here. [Byles, J. What do you conceive is the obligation into which the defendants have entered?] Not that all the shares should be allotted, but that they would not by any voluntary act of theirs prevent their allotment.

[740] ERLE, C. J. The plaintiff in this action claims to recover the sum of 400l. due to him under a contract entered into with him by the defendants by resolution of the board of directors, under which he was to receive 100l. down, and 400l. more when the whole of the shares in the proposed company should be allotted. It is conceded that the whole of the shares never were allotted, so that, taking the contract in its literal terms, the 400l. never became payable. But *Planché v. Colburn*, 8 Bingh. 14, 1 M. & Scott, 51, decides that a party who has come under such a liability cannot prevent its attaching by any wilful act of his own. And I am of opinion that the defendants by their own act in winding up this company did prevent the rest of the shares being allotted, and so prevented the plaintiff from becoming entitled to the 400l. by the terms of his contract. The only question, therefore, which remains to be considered is, what damages the plaintiff is entitled to recover. By the universal rule, the plaintiff is entitled to recover what he has lost by the wrongful act of the defendants. The defendants, after some discussion, thought it prudent to wind up the company, because the vendor of the estates upon the acquisition of which the company's existence was to depend, repudiated the contract which had been made by his agent, and the company could only enforce its performance by a probably protracted litigation. If the company had entered upon that course, the probable consequence would have been that no person would have ventured to buy the shares, and then the plaintiff would have got nothing. On the other hand, a threat of proceed-

ings possibly might have induced the vendor to give way, and in that event the plaintiff might have earned the 400l. He has, however, by the acts of the defendants, lost his chance of obtaining the 400l. Both parties appear to have acted with perfect good [741] faith: but, at the same time, the directors knew of the refusal of Mr. Lascelles to perform the contract in the early part of 1863, but went on trying to make the best bargain they could, without communicating the difficulty to the plaintiff, who only learned it by accident in the month of May. Under all the circumstances, therefore, making the best estimate we can, we think the plaintiff's compensation for the breach of contract should be assessed at 250l.

WILLES, J. I am of the same opinion. One who enters into a contract is bound to perform his engagement in substance. This is illustrated by the case in *Bulstrode*, where the defendant contracted to deliver to the plaintiff a horse, but poisoned him before delivery. That was held not to be a substantial performance of the contract, because one of the contracting parties had done an act which prevented the other from having the benefit of it. I apprehend that wherever money is to be paid by one man to another upon a given event, the party upon whom is cast the obligation to pay is liable to the party who is to receive the money, if he does any act which prevents or makes it less probable that he should receive it. This is a clear proposition of good sense as well as law. Applying it to this case,—the company undertake to pay the plaintiff 400l. on the whole number of the shares being allotted,—nothing, of course, being done by them to prevent the allotment. The directors expected that the whole number would be subscribed for, and so the plaintiff would earn the stipulated sum. The plaintiff also must have contemplated that the whole would be disposed of. In February, 1863, intelligence was received by the directors that Mr. Lascelles, the proprietor of the estates which they had contracted to buy, declined to fulfil the engagement his agent had entered [742] into. The directors should then at once have called upon the plaintiff and arranged with him. It is very probable that persons who otherwise might have been willing to take shares would decline to embark in a company which could only start with litigation with an unwilling vendor: and probably the plaintiff would then have estimated his chance of getting the 400l. at less than he did before. The directors, being unwilling to go to law, preferred winding up the company and returning the deposits,—thus rendering impossible what before was possible, viz. that the whole number of shares might have been subscribed and the 400l. earned by the plaintiff. The result is that the plaintiff is entitled to receive the 400l. less an allowance for the risk. It is extremely difficult to say what sum should represent that risk: but, upon the whole, I am disposed to agree with the rest of the court that 250l. will be a reasonable compensation.

BYLES, J. I am of the same opinion. In the course of the argument, I asked Mr. Prentice what he conceived to be the obligation into which the defendants had entered. The answer he gave me was that it was not that all the shares should be allotted, but that they would voluntarily do no act which should prevent the attainment of that result. Now, the impossibility of all the shares being allotted arose from the winding up of the concern by the directors,—in a very unusual way, certainly, for they returned to the allottees the deposits in full, with 8 per cent. interest. All that we can see is that the winding up was the act of the defendants. With their motives, we have nothing to do. Be their reasons good or bad, the plaintiff is entitled to a verdict. They have broken their contract, and the plaintiff must be compensated for it. As to what that compensation should be, I will only say that, [743] in the uncertainty in which we find ourselves, all we can say is that the damages should be more than nominal and (perhaps) less than the 400l. Considering all the circumstances, acting as a jury, we think we do right in saying that the proper measure is 250l.

KEATING, J. I am of the same opinion. The case is doubtless a peculiar one. The plaintiff has not done what he contracted to do. That is conceded. But it is said that it was by the act of the defendants that he was prevented from doing it. In one sense it certainly was. But it is impossible not to see that the doing that act was not wrongful or voluntary on the part of the defendants, but the result of the owner of the property refusing to ratify the contract made on his behalf by his agent. But for that, the plaintiff would have had a chance of earning the 400l. Under the power reserved to us by consent of the parties, we think the justice of the case will be met by awarding the plaintiff 250l.,—each party paying their own costs of the rule.

Rule accordingly.

CAPEL P. POWELL AND ANOTHER. Nov. 24th, 1864.

[S. C. 34 L. J. C. P. 168 : 11 L. T. 421 : 10 Jur. N. S. 159 : 13 W. R. 159. Adopted, *In re Beauchamp*, [1904] 1 K. B. 581 : 2 *Chenod v. Leslie*, [1909] 1 K. B. 884.]

One who has obtained a sentence of dissolution of marriage in the Divorce court, is not liable to be joined in an action for a tort committed by his wife during the coverture.

This was an action for an assault and false imprisonment.

The declaration stated that the defendant Caroline Nickel, sued as Caroline Powell, at and during the time she was the wife of the defendant Ellison Powell, unlawfully gave the plaintiff into the custody of a policeman, on a false charge of felony, &c., &c.

The defendant Caroline Nickel pleaded,—first, not guilty,—secondly, a justification.

[744] The other defendant pleaded that at the time of the commencement of the action the said Caroline Nickel was not his wife.

The plaintiff new-assigned that the trespasses complained of were committed by the said Caroline Nickel whilst she was the wife of the said Ellison Powell.

To this the defendant Ellison Powell pleaded that, at the time of the commencement of the action, the said Caroline Nickel was not his wife. Issue thereon.

At the trial before Martin, B., at the last Summer Assizes at Kingston, the female defendant did not appear. It was proved on the part of the defendant Ellison Powell that, at the time the transaction complained of took place, Caroline Nickel and himself were living apart by mutual consent, and that, before the commencement of the action, he had obtained a decree for dissolution of the marriage under the 20 & 21 Vict. c. 85.

The learned judge was of opinion that the plea was an answer to the action ; and he desired the jury to assess the damages against the female defendant, reserving leave to the plaintiff to move to enter the verdict against the other defendant, if the court should be of a contrary opinion.

Daly, on a former day in this term, obtained a rule calling upon the defendant Ellison Powell to shew cause why judgment should not be entered against him for 50*l.* non obstante veredicto, on the ground that the husband's liability for the tortious act of the wife during coverture is not discharged by a decree dissolving the marriage on the ground of adultery. He referred to the 25th and 26th sections of the 20 & 21 Vict. c. 85 (*a*).

[745] Hawkins, Q. C., and Sir G. Honyman, now shewed cause. This action is not maintainable against the male defendant. In all cases where the husband is sued with his wife in respect of contracts made by her or torts committed by her before the marriage, he is merely joined for conformity : if he dies before judgment, the right of action survives as against the wife. In 1 Chitty on Pleading, edit. 1844, p. 104, it is said : " Actions for torts committed by a woman *before* her marriage must

(*a*) The 25th section enacts that, " in every case of a judicial separation, the wife shall from the date of the sentence and whilst the separation shall continue, be considered as a feme sole with respect to property of every description which she may acquire, or which may come to or devolve upon her : and such property may be disposed of by her in all respects as a feme sole, and on her decease the same shall, in case she shall die intestate, go as the same would have gone if her husband had been then dead : provided that, if any such wife should again cohabit with her husband, all such property as she may be entitled to when such cohabitation shall take place shall be held to her separate use, subject, however, to any agreement in writing made between herself and her husband whilst separate."

And s. 26 enacts that, " in every case of judicial separation, the wife shall, while so separated, be considered as a feme sole for the purposes of contract, and wrongs and injuries, and suing and being sued in any civil proceeding : and her husband shall not be liable in respect of any engagement or contract she may have entered into, or for any wrongful act or omission by her, or for any costs she may incur as plaintiff or defendant : provided that, where upon any such judicial separation alimony has been decreed or ordered to be paid to the wife, and the same shall not be duly paid by the husband, he shall be liable for necessaries supplied to her use : provided also, that nothing shall prevent the wife from joining, at any time during such separation, in the exercise of any joint power given to herself and her husband."

be brought against the husband and wife jointly: Bac. Abr. *Barron and Fenn* (L.); Co. Litt. 351 b.; Com. Dig. *Barron and Fenn* (Y.). For [746] torts committed by the wife during coverture, as for slander, assaults, &c., or for any forfeiture under a penal statute, they must also be jointly sued: 1 Hawk. P. C. 3, 4; Bac. Abr. *Barron and Fenn* (L.). A person may sue husband and wife jointly for her libel or slander, although she may have committed adultery, and they live separate, but have *not* been divorced a vinculo matrimonii: *Head v. Biscoe*, 5 C. & P. 484. In an action of trespass against husband and wife for her tort before coverture, or a wrong committed by her alone during the coverture, if she die before judgment, the suit will abate; but, if the husband die or become bankrupt, her liability will continue: *Melbourn v. Croft*, Rep. temp. Hardw. 395, 399. The husband cannot after her death be sued for a tort committed by the wife. A divorce a vinculo matrimonii is for this purpose the same as death. The relation of husband and wife has in that case ceased to all intents and purposes. The 25th and 26th sections of the 20 & 21 Viet. c. 85 have been relied on to shew that protection was only intended to be given to the husband quoad by-gone transactions in the case of a judicial separation. But the answer to that is obvious: it was necessary to make such a provision in the case of a judicial separation, because the relation of husband and wife still subsists, though the marital obligations are suspended: but no such provision could be needed where the marriage is altogether dissolved. In *Head v. Biscoe*, 5 C. & P. 484, Tindal, C. J., says: "There is no doubt in point of law that a husband, so long as the relation of husband and wife continues, is answerable to a third person for what is done by the wife. And, whether their separation be permanent or temporary, it does not affect the question, *unless it operates so upon the marriage as to alter the legal relation* : for, by the law of England, you cannot bring an action [747] against the wife without joining the husband: and a man would be without remedy if he could not sue the husband." Here, the plaintiff is not without remedy. There is no impediment in the way of his suing the wife, who is to all intents and purposes a single woman. *Head v. Biscoe* came before the full court (2 Law J., N. S. C. P. 101), when the ruling of Tindal, C. J., was sustained. This probably was the reason why the provisions contained in the 25th and 26th sections were inserted in the Divorce Act.

Daly and Houston, in support of the rule. The husband is clearly liable for the tortious acts of his wife during coverture: Bac. Abr. *Barron and Fenn* (L.). A divorce a vinculo, or a sentence of dissolution of marriage, exonerates the husband from the consequences of acts done by the wife after sentence, but not before. Death of the wife dissolves the liability, upon the principle that *actio personalis moritur cum persona*. The death of the wife is the act of God. Divorce is the act of the party. [Erle, C. J. Marriage does not give a cause of action against the husband. Whilst the husband lives and the relation continues, he must be joined in all actions for his wife's debts and trespasses. If the husband dies, the action goes on against the wife. If the wife dies, the action abates, because the husband is not liable.] Before the sentence of dissolution was pronounced here, the plaintiff had a vested right of action. [Erle, C. J. Against the wife, not against the husband. The separate existence of the wife is wholly ignored during coverture. In *Marshall v. Rutton*, 8 T. R. 545, 548, Lord Kenyon puts the state of widowhood and divorce a vinculo matrimonii in the same category. Keating J. It is difficult to see any reason why the husband should be joined for conformity after the dissolution [748] of the marriage.] When the case of *Head v. Biscoe* was decided, there were no means of dissolving a marriage but by an act of parliament.

ERLE, C. J. I am of opinion that this rule should be discharged. I think the husband who has obtained a decree of dissolution of marriage is not liable to be sued for a wrong committed by the wife whilst the coverture existed. Upon this point the law seems to me to be perfectly clear. During coverture the wife has no such existence as to enable her to be a suitor in her own right in any court: neither can she be sued alone. For any wrong committed by her she is liable, and her husband cannot be sued without her: neither can she be sued without joining her husband. Seeing that all her personal property is vested in the husband, it would be idle to sue the wife alone: the action would be fruitless. Where the husband is joined for conformity, if he dies, the action goes on against the wife: but, if the wife dies, the action abates. It is clear to demonstration, therefore, that there is no cause of action against the husband. He is not liable for the wrong; but he is joined only by reason of the

universal rule that the wife during coverture cannot be either a sole plaintiff or a sole defendant. The reason does not apply where there has been a divorce à vinculo matrimonii. The woman is then no longer under coverture. She is admitted to her former name and station, and is perfectly capable of suing and being sued, as if she never had been married: consequently, the necessity for joining the husband no longer exists. One can well recognize the expediency of making a legislative provision for the case of a decree of judicial separation: for, there, notwithstanding the sentence, the relation of husband and wife is not entirely dissolved. But there was no need of [749] legislation in the case of a sentence which dissolves the marriage. *Head v. Evers*, 5 C. & P. 484, is a distinct decision of a very learned judge to that effect. By a divorce à vinculo, or a sentence of dissolution, the husband is altogether exonerated from the responsibilities which the marriage entailed upon him.

KEATING, J. I am entirely of the same opinion. The moment it is established that the sole liability of the husband in respect of wrongs committed by the wife is to be joined for conformity in the action against her, it follows as a necessary consequence that the dissolution of the relation of husband and wife, by putting an end to the state of things which caused the necessity for joining him, discharges him from that liability.

Rule discharged.

HORWOOD v. WOOD AND OTHERS. Nov. 15th, 1864.

[S. C. 11 L. T. 383; 13 W. R. 94; 10 Jur. N. S. 1132.]

A claim for a balance due as the result of cross consignments and remittances between a merchant here and a merchant (a British subject) domiciled and carrying on business exclusively at the Cape of Good Hope, is "a cause of action which arose within the jurisdiction" of the superior courts at Westminster, or "in respect of the breach of a contract made within the jurisdiction," within the 18th section of the Common Law Procedure Act, 1852.

The defendants, who were merchants carrying on business at Graham's Town, in the colony of the Cape of Good Hope, under the firm of George Wood & Sons, having no establishment and no property in this country, had considerable dealings with a firm of Frederick Joly & Co., merchants in London, down to the month of February, 1853, when Mr. Joly died. On the 23rd of that month, information of that event was communicated to Messrs. Wood & Sons by the [750] now plaintiff, in a letter of which the following is a copy:—

"London, 23rd February, 1853.

"Messrs. G. Wood & Sons, Graham's Town.

"Gentlemen,—I am much grieved in having to communicate to you the sad intelligence of the decease of my very beloved and respected friend and principal, Mr. Frederick Joly, who expired on the 14th instant. With this gentleman I commenced my commercial life in the year 1820: and, having enjoyed his unlimited confidence up to the period of his death, and having also had the principal conduct of his business, I beg to solicit a continuance of the same confidence on my own behalf as hitherto experienced by him, and to assure you that no exertion of mine shall be wanting to give satisfaction in any transaction with which I may be entrusted. It is my intention to carry on the business as heretofore under the firm of Frederick Joly & Co.
"M. HORWOOD."

On the 12th of March, 1853, the following letter was addressed to G. Wood & Sons by "M. Horwood and P. Champion, executors of the late Frederick Joly:—

"In consequence of the lamented death of our mutual friend Mr. Frederick Joly, which took place on the 14th ultimo, we herewith inclose your account current balanced up to that date, and leaving to your debit a balance of 3510l. 9s.: and, as we are desirous to liquidate his estate at an early period, we shall be obliged to you to remit said balance to our account to Messrs. Frederick Joly & Co., whose circular is inclosed."

At the foot of the above was the following, signed by the plaintiff:—

"Gentlemen,—If you so approve, please order us to pay over to the executors of

the late Frederick Joly the balance of your account as above, viz. 3510l. 9s., to your debit in account with us."

[751] On the 26th of April, Wood & Co wrote assenting to this proposal, whereupon the plaintiff, "for self and P. Champion, executors," on the 14th of July, addressed a letter to them, as follows:—

"Gentlemen,—We are in receipt of your favour of the 26th of April, and now beg to acknowledge the settlement of your account with the late Frederick Joly by Messrs. Frederick Joly & Co., who have taken over the balance of your account current to 14th February last, say 3510l. 9s., to your debit, and will have passed to your credit all remittances received since."

The Messrs. Wood continued their dealings with the plaintiff under the new firm down to June, 1864, when the plaintiff, claiming a balance of 2908l. 10s. as being due to him as the result of the cross-consignments and remittances between them, on the 23rd of that month issued a writ of summons against them under the 18th section of the Common Law Procedure Act, 1852 (*a*)¹, [752] requiring him to appear thereto within one hundred and ten days, and claiming that sum with 5 per cent. interest, and 10l. 10s. for costs, within one hundred and ten days from the service thereof.

Watkin Williams now moved for a rule calling upon the plaintiff to shew cause why the writ should not be set aside, on the ground that the above facts (which appeared on affidavit) did not disclose "a cause of action which arose within the jurisdiction" of this court, or "in respect of the breach of a contract made within the jurisdiction," within the statute. He submitted that, to entitle a plaintiff to proceed under this section, it is necessary that the *whole* of the cause of action should have arisen within the jurisdiction of the court: referring to *Schal v. Borch*, 2 Hurlst. & Colt. 954. There, the defendant, a merchant residing in Norway, and not being a British subject, drew, indorsed, and sent in a letter by post to a merchant in London a bill of exchange payable in London, and which was indorsed to the plaintiff, and dishonoured: and it was held (by Pollock, C. B., and Martin, B., dubitante Pigott, B.) that there was no cause of action which arose within the jurisdiction of the superior courts, nor a breach of a contract made within their [753] jurisdiction, and consequently that the plaintiff could not proceed against the defendant under the 19th section of the Common Law Procedure Act, 1852 (*a*)². "The first question," said

(*a*)¹ Which enacts that, "in case any defendant, being a British subject, is residing out of the jurisdiction of the superior courts of common law at Westminster, in any place except in Scotland or Ireland, it shall be lawful for the plaintiff to issue a writ of summons in the form contained in Sched. A. No. 2, which writ shall bear the indorsement contained in the said form, purporting that such writ is for service out of the jurisdiction of the said superior courts: and the time for appearance by the defendant to such writ shall be regulated by the distance from England of the place where the defendant is residing, and it shall be lawful for the court or judge, upon being satisfied by affidavit that there is *a cause of action which arose within the jurisdiction*, or *in respect of the breach of a contract made within the jurisdiction*, and that the writ was personally served upon the defendant, or that it came to his knowledge, and either that the defendant wilfully neglects to appear to such writ, or that he is living out of the jurisdiction of the said courts in order to defeat and delay his creditors, to direct from time to time that the plaintiff shall be at liberty to proceed in the action in such manner and subject to such conditions as to such court or judge may seem fit, having regard to the time allowed for the defendant to appear being reasonable, and to the other circumstances of the case: Provided always that the plaintiff shall and he is hereby required to prove the amount of the debt or damages claimed by him in such action, either before a jury upon a writ of inquiry, or before one of the Masters of the said superior courts in the manner thereafter (s. 94) provided, according to the nature of the case, or as such court or judge shall direct: and the making such proof shall be a condition precedent to his obtaining judgment."

(*a*)² Which enacts that, "in any action against a person residing out of the jurisdiction of the said courts, and not being a British subject, the like proceedings may be taken as against a British subject resident out of the jurisdiction, save that, in lieu of the form of writ of summons in the schedule A No. 2, the plaintiff shall issue a writ of summons according to the form contained in the said schedule A. No. 3, and shall

Martin, B., "is. Does the cause of action arise within the jurisdiction? The 'cause of action,' means the *whole* cause of action, and includes the drawing and indorsement of the name of the drawer on the bill, both of which took place in Norway. Therefore the whole cause of action did not arise within the jurisdiction. Then, was there a breach of a contract made within the jurisdiction? The contract was not made within the jurisdiction, but, on the contrary, in Norway; and, having been made there, a breach of it here is not within the operation of this act of parliament. Therefore it seems to me that this case is not within the language of the act, and it is certainly not within its spirit, for a foreigner can owe no allegiance to the law of England who did nothing more than enter into some mercantile transaction in respect of which he drew a bill abroad." [Erle, C. J. There, there was merely a request to pay money out of the jurisdiction. There is a material [754] distinction between the liability of a foreign drawer or indorser and that of one who writes from abroad to a merchant in London, "Please you pay A. B. 3000l. for me."] How can it be said here that "the cause of action," that is, the *whole* cause of action, arose in this country? Part of it clearly arose at Graham's Town. The receipt of the letter in England makes no difference.

Per Curiam. We think there was a cause of action in this case which arose within our jurisdiction, and a breach of a contract made within the jurisdiction, and therefore that the writ was properly issued.

Rule refused.

ELWOOD AND ANOTHER v. CHRISTY AND OTHERS. Nov. 5th, 1864.

[S. C. 34 L. J. C. P. 130; 11 L. T. 342; 10 Jur. N. S. 1079; 13 W. R. 54.]

It is no ground of objection to the title of an assignee of a patent, that the assignors, the executors of the grantee, had omitted to register the probate until after the date of the assignment; though possibly it might be an obstacle to the maintenance of an action by the assignee for an infringement, if commenced before the registration of the probate.

This was an action for the infringement of a patent for an improved hat or helmet for hot climates.

The cause was tried before Erle, C. J., at the sittings in London after the last Trinity Term, when a verdict was found for the plaintiffs.

Bovill, Q. C. (with whom was Murray), moved for a new trial, on the ground of misdirection, and that the verdict was against the weight of evidence, and also upon affidavits setting forth evidence of user in India long anterior to the date of the patent, which but for the absence of certain witnesses the defendants would have been able to prove. The misdirection complained of was in his Lordship ruling that the patent had been [755] well assigned to the plaintiffs. It appeared that the plaintiffs claimed under an assignment made to them by the executors of one Henry Elwood. The testator died on the 20th of November, 1862. Probate of his will was obtained on the 3rd of December. The assignment to the plaintiffs was made on the 5th of February, 1863; but the probate was not registered until the 10th of April. The 35th section of the 15 & 16 Vict. c. 83, enacts that "there shall be kept at the office appointed for filing specifications in Chancery under this act, a book or books intituled 'The Register of Proprietors,' wherein shall be entered, in such manner as the commissioners shall direct, the assignment of any letters-patent, or of any share or interest therein, any licence under letters-patent, and the district to which such licence relates, with the name or names of any person having any share or interest in such letters-patent or licence, the date of his or their acquiring such letters-patent, share, and interest, and *any other matter or thing relating to or affecting the proprietorship in such letters-patent or*

in manner aforesaid serve a notice of such last-mentioned writ upon the defendant therein mentioned, which notice shall be in the form contained in the said schedule also marked No. 3; and such service shall be of the same force and effect as the service of the writ of summons in any action against a British subject resident abroad, and by leave of the court or a judge, upon their or his being satisfied by affidavit as aforesaid, the like proceedings may be had and taken thereupon."

licence: Provided always that, until such entry shall have been made, the *grantee* or grantees of the letters-patent shall be deemed and taken to be the sole and exclusive proprietor or proprietors of such letters-patent, and of all the licences and privileges thereby given and granted." It was submitted that, under these circumstances, as the name of the deceased would appear upon the register as the proprietor of the patent at the date of the assignment, the executors had not clothed themselves with a perfect title to convey it,—the object of the statute being that no person shall deal in any way with a patent until everything affecting the title to it has been registered; and that, as in the case of an intestacy of the grantee of the patent, the grant of letters of administration must be registered before the [756] representative can deal with the patent, and in the case of bankruptcy the appointment of assignees must be registered, so in this case there could be no valid dealing with the patent by the executors until they had registered the probate.

ERLE, C. J. There is nothing whatever in this point. If the plaintiffs had commenced their action before they had completed their title by registering the probate, the case would probably have been different.

The rest of the Court concurring, the rule was granted only upon the ground that the verdict was against the weight of evidence, and upon the affidavits. It was, however, subsequently discharged.

WHITELEY v. KING AND OTHERS. Nov. 5th, 1864.

[S. C. 11 L. T. 342; 10 JUR. N. S. 1079; 13 W. R. 83.]

Where a will and codicil (the drafts of which were produced) were proved to have been left by the attorney who drew them with the testator after execution, but were not forthcoming after his death,—declarations of the testator to various members of his family down to a few days before his death, expressive of his satisfaction at having settled his affairs, and intimating that his will was left with his attorney, were held to have been properly admitted, to rebut the presumption that the will and codicil had been destroyed by the testator *animo revocandi*.

This was an action of ejectment brought by the plaintiff, the grandson and heir-at-law of one John Whiteley, to recover certain lands in the county of York, which were claimed by the defendants as devisees under a will made by John Whiteley on the 6th of December 1859, and a codicil dated the 17th of December, 1861.

The will, which revoked all former wills, was not to be found at the death of the testator; but a draft was produced by one Sutcliffe, the attorney who prepared [757] it, and in whose custody it had remained down to December, 1861.

The cause was tried before Blackburn, J., at the last Summer Assizes at Leeds. It appeared that, at that time, the testator was desirous of making some alteration in his will, and wrote to Sutcliffe requesting him to let him have the will, and giving him instructions for a codicil thereto; that Sutcliffe accordingly went to him with the will and codicil; that the testator executed the codicil; that Sutcliffe was requested, either by the testator or by one of his daughters who was present, to leave them with the testator; that he did so; and that he saw no more of them; nor did it appear that they had ever been seen by any one since. The testator died in 1863.

In order to rebut the presumption arising from the absence of the will and codicil that the testator had destroyed them, evidence was offered on the part of the defendants, of repeated declarations made by the testator to different members of his family, down to a short period before his death, expressing his satisfaction at having settled his affairs, and telling one person that he had named him one of his executors, and another that his will was at Sutcliffe's.

This evidence was objected to on the part of the plaintiff, but admitted by the learned judge on the authority of *Patten v. Poulton*, 1 Swab. & Trist. 55, 27 Law J., Probate, 41, where it was held by Sir C. Cresswell that the presumption that a will left in the keeping of the testator, if it cannot be found at his death, has been destroyed by him *animo revocandi*, is a presumption of fact which prevails only in the absence of circumstances to rebut it; and that among such circumstances are declarations by the testator of goodwill towards the persons benefited by it, adherence to the will, as

made, and the contents of the will itself : and he left [758] it to the jury to say whether or not the testator had destroyed the will and codicil animo revocandi.

The jury found that the will had not been revoked, and accordingly the verdict was entered for the defendants.

Kemplay now moved for a new trial on the ground that the declarations of the testator were not admissible. In Taylor on Evidence, 4th edit. 164, § 135, it is said, "If a will, traced to the possession of the testator, and last seen in his custody, be not forthcoming on his death, the law presumes that it has been destroyed by himself ; and this presumption, which is obviously founded on good sense, must prevail, unless there be sufficient evidence to rebut it."—citing *Welch v. Phillips*, 1 Moore, P. C. 299, 302, per Parke, B. ; *Dickinson v. Stidolph*, 11 C. B. (N. S.) 341, 357 ; *Brown v. Brown*, 8 Ellis & B. 876 ; *In re Brown*, 27 Law J., Probate, 20, 1 Swab. & Trist. 32 ; *Cutto v. Gilbert*, 9 Moore, P. C. 143, per Dr. Lushington ; *Saunders v. Saunders*, 6 Eccl. & Mar. Cas. 518 ; *Williams v. Jones*, 7 Eccl. & Mar. Cas. 106 ; *Patten v. Poulton*, 1 Swab. & Tr. 55. In *Brown v. Brown*, 8 Ellis & B. 876, A. executed a will, and afterwards executed a second will, which he took away with him. On his death, the earlier will was found, but the second will could not be found. The solicitor who prepared the second will gave evidence (from recollection) of its contents, which were inconsistent with the first will, and revoked it. On a case where the court had power to draw inferences of fact, it was held that secondary evidence of the contents of the last will was admissible, and that the evidence given sufficiently shewed that it had revoked the first will ; and, further, that the facts that the second will was last seen in the custody of the deceased, and could not be found, raised a pre-[759]-sumption that he had destroyed it animo cancellandi, and cast upon those seeking to establish the will the onus of rebutting that presumption. That case fully bears out the proposition stated by Mr. Taylor. [Keating, J. *Brown v. Brown* is criticised by Sir James Wilde in *Wharram v. Wharram*, 33 Law J., Probate, 75.] The criticism of that learned judge does not bear upon the point now under consideration. That the missing will was intentionally destroyed is a presumption of fact which it requires strong evidence to rebut. [Erle, C. J. Surely you may look at a man's words to see what his intentions are. The question here was whether the testator had the intention to destroy his will and codicil. Down to the last moment almost of his life he is found declaring his satisfaction that he has settled his affairs.] Declarations accompanying an act, no doubt, are admissible. But mere loose conversations deposed to by interested persons ought not to outweigh the presumption arising from the absence of the document.

ERLE, C. J. I am of opinion that there should be no rule in this case. The non-appearance of the will and codicil raising a presumption of fact that the testator intended to revoke them, evidence tending to prove the contrary intention was admissible. For this purpose the ordinary channels of information may be resorted to. The declarations of the testator are cogent evidence of his intentions. In this case his repeated declarations down to within a very few days of his death, were abundant evidence that the testator did not intend to cancel or destroy the will. He on several occasions expressed his satisfaction that he had "settled his affairs," and on one occasion said that he had left his will with Mr. Sutcliffe. If declarations are evidence of intention, - as the cases cited shew [760] they are,—there was abundant evidence to satisfy the jury here that the testator had no intention to cancel or revoke the will and codicil, and consequently the verdict was properly found for the defendants.

BYLES, J. I am of the same opinion. I see no reason why the declarations of the testator should not be admitted as part of his conduct, to shew his intentions as to the disposition of his property.

KEATING, J. I am of the same opinion. I think it would be wrong to cast a doubt upon a well-established rule of law by granting a rule.

Rule refused.

MOON v. HALL. Nov. 4th, 1864.

[S. C. 11 L. T. 275 ; 13 W. R. 83.]

After the issuing of a writ, the attorney gave the plaintiff the following memorandum,
—"I undertake to carry on this action on having cash provided for costs out of pocket, such costs not to exceed 15l., including counsel's fee ; not any witnesses'

expenses:—"Held, that this was an engagement on the part of the attorney not in any event to charge the client more than 15l.

This was an action upon an attorney's bill. The cause was tried before Williams, J., at the sittings in London after last Easter Term. The plaintiff's version of the facts was as follows:—A person named Hicks had induced the defendant to give credit to one Cooper, who gave him a bill, which was dishonoured. Hicks thereupon went to Moon, and instructed him to issue a writ against Cooper in Hall's name. This was done, and Cooper obtained leave to defend the action. Hall's wife, having learnt that an action was pending, went with Hicks to Moon, when the latter told her that he would proceed with the action, and trust to getting his costs from Cooper, provided she would pay him the [761] costs out of pocket, which would be about 15l. Ultimately Moon gave Mrs. Hall the following memorandum:—

"Hall v. Cooper.

"I undertake to carry on this action, on having the cash provided for costs out of pocket, such costs not to exceed 15l., including counsel's fee; not any witnesses' expenses.

"FRANCIS MOON."

The 15l. were paid to Moon, and the action against Cooper proceeded to judgment and execution. Cooper proposed a composition of 10s. in the pound, but was taken in execution at the suit of Hall. Cooper while in custody offered terms to Hall, which the latter declined to accept. Hall afterwards called at Moon's office, where he left the following note:—

"I were here at half-past ten until eleven. My terms is, to return me the 15l. paid to you, and the 10s. in the pound on the amount of the bill, and Cooper to pay your costs.

"J. HALL.

"F. Moon, Esq."

In the meantime Moon had sent in his bill of costs to Hall, amounting to 61l. 10s. 2d., after giving credit for the 15l. On the 4th of January, 1864, Hall wrote to Moon, as follows:—

"Sir,—I have received a notice from the Bankruptcy court respecting Cooper. As I have not the means of paying any further costs in the matter, please take no more steps on my account.

"J. HALL.

"F. Moon, Esq."

Mr. Moon's account of the interview with Mrs. Hall was that, Hall being a stranger to him, and knowing Cooper to be in bad circumstances, he declined to carry on the action unless supplied with money for expenses out of pocket, and that the 15l. were paid on that account.

[762] On the part of the defendant, it was submitted that, the 15l. once paid, all liability on the part of Hall to Moon in respect of the costs of the action was to cease; and that, at all events, the document was so ambiguous that evidence was admissible to explain it.

The learned judge left it to the jury to say whether they believed Mrs. Hall's version of what passed at the interview with Mr. Moon, or that given by that gentleman. The jury were of opinion that the evidence of Mrs. Hall disclosed the real agreement: and the learned judge, thinking that was the fair result of the document and of the evidence, directed a verdict to be entered for the defendant,—leave being reserved to the plaintiff to move to enter a verdict for him for the full amount, or for such sum as the Master on taxation should find due.

Digby Seymour, Q. C., in Trinity Term last, accordingly obtained a rule nisi, on the grounds,—first, that the plaintiff's undertaking did not limit his right to recover his costs to the amount mentioned in that undertaking,—secondly, that the construction was for the court, but, if it was matter for the jury, the evidence supported the construction put upon the undertaking and documents by the plaintiff,—thirdly, that the undertaking did not apply to the costs incurred before the date of the undertaking or subsequently to the verdict.

Hardinge Giffard and Besley now shewed cause. The fair construction of the document signed by Moon supports the view taken by the jury, and corroborates Mrs. Hall's evidence. Carrying on a cause for "costs out of pocket," is a well-known thing. And that was the obvious meaning of the plaintiff's undertaking, limiting it to 15*l*. Taking that document and the [763] contemporaneous conversation together, all that the plaintiff stipulated for was, the liability of Cooper plus the 15*l*. The subsequent documents, if they can be looked at for the purpose of explaining the first, are not at all inconsistent with that view of it.

Digby Seymour, Q. C., and Joyce, in support of the rule. Some expenses had been incurred by Moon prior to this undertaking being given: and, knowing the circumstances of the parties, he might well decline to go on without being furnished with a sufficient sum to cover necessary disbursements. The document in question amounts to no more than an engagement on his part that he will carry on the action without requiring a larger advance than 15*l*.: he does not undertake that he will charge nothing for his labour.

ERLE, C. J. I think the fair meaning of the document signed by the plaintiff is, that Hall was not to be liable beyond the 15*l*. agreed to be paid. It fixes that as the maximum, and also that Moon shall carry on the action on being paid by Hall his costs out of pocket. That seems to me to be a reasonable contract for Hall to have entered into: and it also seems to be very reasonable that Moon should consent to it, if he had any hope of making Cooper pay. It is by no means an uncommon bargain for an attorney to make. The surrounding circumstances at the time appear to me to confirm that view: and the jury found that the statement Mrs. Hall made as to what passed between her and Moon was true. The writ seems to have been issued against Cooper at the request of Hicks. There was no ratification of that as having been done for Hall until the interview with Mrs. Hall. It clearly was not intended to leave an outstanding claim for that writ. The subsequent events are not admissible as direct evidence [764] to guide the construction of the defendant's undertaking, though they might be admissible to shew which party was the more entitled to credit: and I think they all tend to confirm Mrs. Hall, and to shew that, on payment of the 15*l*., Hall was to be exonerated from any further claim on the part of Moon.

BYTES, J. I am of the same opinion. The proper mode of construing this undertaking is to ascribe to it the meaning which Moon understood that the other party would understand it to mean. Now, what could Moon imagine that Mrs. Hall would understand by this document? It is said that the undertaking does not cover the costs which had already been incurred, or extend to costs incurred after the verdict was obtained. But the expression "carry on this action" was necessarily used. The action had been brought. It means carry it on from the beginning to the end. Lord Coke says that the attorney's authority continues down to execution, if it be issued within a year. I cannot conceive that the jury could possibly have come to any other conclusion. The defendant's letter of the 4th of January at first occasioned me some difficulty. But the "further costs" there evidently means costs of proceedings in the bankruptcy court.

KEATING, J. I am entirely of the same opinion. The construction put upon the plaintiff's undertaking by my Lord and my Brother Byles is evidently the correct one. And, even if its terms were open to the criticism of the plaintiff's counsel, it is impossible to suppose for a moment that the defendant could have understood it in any other sense than that he was to be exonerated from all costs of the action for the 15*l*. paid. I think it was a perfectly just verdict.

Rule discharged.

[765] THE GENERAL DISCOUNT COMPANY (LIMITED) v. STOKES. Nov. 25th, 1864.

[S. C. 34 L. J. C. P. 18; 11 L. T. 313; 10 Jur. N. S. 1080; 13 W. R. 84.]

Bankruptcy and certificate are no bar to an action for a call in respect of shares held by the defendant in a joint-stock company registered under the Joint Stock Companies Acts of 1856 and 1857, made after the adjudication,—the liability in respect of such call not being a liability at the time of the filing of the petition "to

pay money on a contingency," within the 178th section of the Bankrupt Law Consolidation Act, 1849.

This was an action for calls by a joint-stock company. The defendant pleaded that, before the commencement of the action, he became a bankrupt within the meaning of the statutes in force concerning bankrupts, and that the causes of action in the declaration mentioned accrued before the defendant so became bankrupt. Issue thereon.

The cause was tried before Byles, J., at the sittings in London after last Trinity Term. It appeared that the defendant was the holder of twenty shares of 10l. each, upon which 2l. 10s. per share had been paid, in the General Discount Company,—a company incorporated in September, 1857, under the Joint Stock Companies Acts of 1856 and 1857 (19 & 20 Vict. c. 47, and 20 & 21 Vict. c. 14); that, on the 3rd of November, 1860, the defendant was adjudged a bankrupt, and obtained his certificate on the 4th of February, 1862; that, on the 14th of May, 1861 an order was made for winding up the company; and that, on the 4th July, 1861, a call was made by the official liquidator, the defendant's proportion whereof (110l.) had not been paid.

On the part of the defendant, it was submitted that the claim was one from which he was discharged by his certificate, by force of the 178th section of the Bankrupt Law Consolidation Act, 1849, which enacted that, "if any trader who shall become bankrupt after the commencement of this act shall have contracted before the filing of a petition for adjudication of bankruptcy, a liability to pay money upon a contingency which shall not have happened, and the demand in respect thereof shall not have been ascertained before the filing of such petition, [766] in every such case, if such liability be not proveable under any other provision of this act, the person with whom such liability has been contracted shall be admitted to claim for such sum as the court shall think fit; and, after the contingency shall have happened, and the demand in respect of such liability shall have been ascertained, he shall be admitted to prove such demand, and receive dividends with the other creditors, and, so far as practicable, as if the contingency had happened and the demand had been ascertained before the filing of such petition, but not disturbing former dividends; provided such person had not, at the time such liability was contracted, notice of any act of bankruptcy by such bankrupt committed."

The learned judge directed a verdict to be entered for the plaintiffs for the amount claimed, reserving leave to the defendant to move to enter a verdict for him if the court should be of opinion that his bankruptcy and certificate were a bar to the action.

Archibald, on a former day in this term, obtained a rule nisi accordingly. He submitted that the effect of the order of discharge, under the 161st section of the Bankruptcy Act, 1861 (24 & 25 Vict. c. 134), was, to discharge the bankrupt "from all debts, claims, or demands proveable under his bankruptcy;" and that the demand in question was proveable under the 178th section of the 12 & 13 Vict. c. 106, as a debt payable upon a contingency; and he referred to *Adkins v. Farrington*, 5 Hurlst. & N. 586. There, in May, 1857, the plaintiff and defendant, jointly with and as sureties for one Vigrass, made their promissory note (joint and several) in favour of one Haywood, for timber supplied by Haywood to Vigrass. The note was payable on the 1st of January, 1858. In November, 1857, Vigrass executed an assignment for the benefit of his [767] creditors, under which the plaintiff ultimately received a dividend. In December 1857, the defendant became bankrupt, and obtained his certificate. In January, 1858, the plaintiff paid the note, and afterwards commenced an action against the defendant, his co-surety, to recover contribution; and it was held that, inasmuch as the payment by the plaintiff was within six months from the time of the filing of the petition by the defendant, the plaintiff had a right not merely to *claim* but to prove against the estate of the defendant, in respect of his liability to contribution, as "a liability to pay money on a contingency," within the 178th section of the Bankrupt Law Consolidation Act, 1849, and consequently that the bankruptcy and certificate of the defendant were an answer to the action.

Kemp now shewed cause. The claim in question was neither a contingent debt within the 177th section, nor a contingent liability within the 178th section of the 12 & 13 Vict. c. 106. In *The South Staffordshire Railway Company v. Burnside*, 5 Exch. 129, calls upon shares in a railway company were held not to be proveable under the 51st or 56th sections of the 6 G. 4, c. 16. "If," said Parke, B., "the defendant con-

tracted with the company to take twenty shares upon each of which the capital to be contributed was 20l, he may be said to have agreed with them to pay 20l. per share by such instalments as according to the statute they were entitled to require. If he purchased the shares from another, he may be considered as having taken upon himself the contract of the vendor to the like effect. But, under this section (the 51st), which is taken from the 7 G. 1, c. 31, s. 1, a debt under such a contract could not be proved. It was uncertain how much of the 20l. per share the exigencies of the company would call for: nor could it be told what the time [768] of payment would be, and consequently what the amount to be rebated. Is this, then, a debt payable on a contingency under the 56th section? The contract on which the shareholder's obligation is founded, is not to pay a certain fixed sum upon a future contingency, but such sum or sums as may be required from himself and all the other shareholders from time to time, not exceeding a certain sum, and regulated by the wants of the company. At the time of the bankruptcy, it was uncertain what the sum would be which the defendant would be called on to pay, and no certain debt was then contracted. But, in order to bring a case within the 56th section, the bankrupt must have contracted a certain debt before the bankruptcy, payable after it on a contingency. In *Hopkins v. Thomas*, 7 C. B. (N. S.) 117, it was held that bankruptcy during the currency of a quarter (and subsequent certificate) is no bar to an action by a school-master for board and tuition of the defendant's son under a quarterly contract, —the demand not being a debt “not payable at the time of the bankruptcy,” within s. 172 of the 12 & 13 Vict. c. 106, or “a liability to pay money upon a contingency,” within s. 178. “There was no debt,” said Erle, C. J., “payable in future, or on a contingency, at the time of the defendant's bankruptcy: and we are of opinion that there was no liability within the meaning of the 178th section, though there was a contract to pay if the contract was continued until that day.” [Byles, J. What sort of cases do you suggest come within the 178th section?] Contracts of guarantie and the like. The contingency must be one that can be reduced to a certainty.

Archibald, in support of his rule. The case, it is submitted, falls within the language of the 178th section of the 12 & 13 Vict. c. 106. The subsequent legis[769]-lation on this subject, contained in the 153rd (a) and 154th (b) sections of the 24 & 25 Vict. c. 134, shews that this section ought to receive the most liberal construction. These clauses were introduced in order to get rid of the difficulty raised by the cases of *Warburg v. Tucker*, 5 Ellis & B. 384, in error, Ellis, E. & B. 914, and *Young v. Winter*, 16 C. B. 401. This is a limited company registered under the Joint-Stock Companies Acts, 1856 and 1857. There is no evidence as to what the company's articles were: therefore it must be taken that they were according to the form given in the 9th section of the 19 & 20 Vict. c. 47, Table B. Under these, retaining the shares is contracting a liability to contribute to the assets of the company to the extent of the nominal value of the shares: and by s. 22 of that act, the amount of calls for the time being unpaid on any share is to be deemed to be a debt due from the holder of such share to the company. The 75th section of the 25 & 26 Vict. c. 89, brings calls within the 177th section of the 12 & 13 Vict. c. 106. It enacts that “the liability of any person to contribute to the assets of a company under this act, in the event of the same being wound up, shall be deemed to create a debt (in England and Ireland of the nature of a specialty) accruing due from such person at the time when his liability commenced, but payable at the time or respective times when calls are made as hereinafter mentioned for enforcing such liability; and it shall be lawful, in the case of the bankruptcy of any contributory, to prove against his estate the estimated value of his liability to future calls, as well as calls already made.” [Byles, J. That statute does not ap[770]-ply to this case.] In *Ex parte Barwis, In re Strahan*, 25 Law J., Bankruptcy, 11, a joint and several covenant was entered into by a principal debtor and his surety that the principal would pay a sum of money by three instalments, with interest, on three specified days. The first instalment was duly paid, but, before the second instalment became payable, the surety became bankrupt. The creditor applied to the commissioner to be admitted to claim against the bankrupt's estate in respect of the amount of the two unpaid instalments and interest, and was

(a) Which makes demands in respect of unliquidated damages proveable.

(b) Which provides for premiums on policies of insurance: see *Saunders v. Best*, ante, p. 731.

allowed. The Lords Justices, on appeal, affirmed the decision of the commissioner, holding that the claim was properly admitted to upon a contingent liability under the 178th section of the 12 & 13 Vict. c. 106. The contingency there was, that the *principal* might not pay: the claim was under the bankruptcy of the surety. Lord Justice Turner, in giving judgment, says: "Up to the time of the passing of the Consolidation Act, the law had made no provision for a proof in respect of contingent liabilities, and the 178th section was introduced into the act for the purpose of enabling claims founded on such liabilities to be worked out. That shews that it was the intention of the legislature to exonerate bankrupts, as far as practicable, from such liabilities; and it is the duty of the court to endeavour to carry into effect the intention of the legislature. This claim was clearly a liability depending on a contingency, that is to say, the contingency whether the persons primarily liable would pay. It has been urged, however, that it was not a contingent liability to pay a sum of money, but the covenant was one under which the bankrupts could have been obliged to pay if the other parties did not, and therefore this was in substance a covenant to pay a sum of money if certain other persons did not. Then it was said that the amount [771] was uncertain, as the persons primarily liable might make some payments, so that it was uncertain what the deficiency would be. There was some truth in that observation: but here there was a measure of the liability. It could not exceed a certain sum: and the legislature seem to have intended to provide for such a case, by giving the commissioner a discretion as to the amount for which the claim should be entered." He goes on to say that, as to the cases of *Young v. Winter* and *Warbury v. Tucker*, he did not see how they could be reconciled: and that, if it were necessary to decide between them, he should prefer following *Young v. Winter*. In *Boyd v. Robins*, 4 C. B. (N. S.) 749, this court held that a liability as surety on a guarantee for the debt of another, which liability the party had the option of putting an end to by notice, was a contingent liability within the 178th section. The decision was overruled in the Exchequer Chamber (5 C. B., N. S. 597), on the ground that there the liability was contracted after the bankruptcy. [Erle, C. J. The ground of the decision here was that, having taken the benefit by obtaining the goods for the principal debtor, the surety must take the liability.] *Parker v. Lee*, 4 Hurlst. & N. 53, is clearly distinguishable (*a*). The contingencies there, as is said by [772] Martin, B., are of a nature which could not possibly be susceptible of valuation. "The liability to pay money within that section," says that learned judge, "is where a single sum of money is payable on a contingency, and in such case the court is to say for what sum the claim is to be made. The object is, to enable the creditor to be paid, in the event of the money becoming payable. Here there is no contingency of that kind." The only contingency here is, the making of a call. [Erle, C. J. The case is equally within Baron Martin's principle. There may be ten calls.] There were as many contingencies in *Adkins v. Farrington* as here. The whole course of the legislation has been to free the bankrupt from all debts and liabilities down to the time of the petition. [Keating, J. Do you find any case where the liability has been held to be within the 178th section, in which anything more than the time of payment was con-

(*a*) By deed of separation between the defendant and his wife, the defendant covenanted with the plaintiff that he would every year during the joint lives of himself and his wife pay to the plaintiff, as a trustee for her, to her separate use, such sum as, together with the dividends or interest or other income to arise from 94*l.* 6*s.* 4*d.* Bank 3 per cent. Annuities, or from other funds settled or which might be settled to her separate use and which might be received by her, would make one clear annuity or yearly sum of 200*l.*, such annuity to commence from the 11th of January, 1854, and to be paid by four even and equal quarterly payments: provided that, if the defendant and his wife should at any time thereafter cohabit as man and wife, that then and from thenceforth the said annuity should cease. On the 29th of September, 1854, and while the defendant and his wife continued to live separate the defendant became bankrupt: and it was held that the annual sum so covenanted to be paid by the defendant for the separate use of his wife, was not an "annuity" within the 175th section of the Bankrupt Law Consolidation Act, 1849, nor a "debt payable upon a contingency" within the 177th section, or a "liability to pay money upon a contingency" within the 178th section: and consequently that the certificate was no bar to an action for the recovery of a quarterly payment which became due after the bankruptcy.

urgent? Here it was a contingency whether a call would be made.] In *Adkins v. Farrington*, the contingency was of that sort. [Erle, C. J. If the creditor does not get his money from the principal debtor, he will *certainly* call upon the surety. That is not a contingency.] In *Ex parte Barwis*, there was a contin[773]gency as to liability as well as time. The 18th section of the 20 & 21 Vict. c. 60, enacts that "all calls made or *to be made* on any shareholder or contributory in pursuance of any of the Joint-Stock Companies Acts shall, in the event of such shareholder or contributory, becoming bankrupt or insolvent, be proveable against his estate." [Erle, C. J. That must mean calls made or to be made before the bankruptcy (a).]

ERLE, C. J. I am of opinion that this rule should be discharged. It is an action brought by a joint-stock company against a shareholder for a call. The call in question was made under the Winding-up Acts; but the principle is the same as if it were a call made by a continuing company. The defendant was adjudged a bankrupt on the 3rd of November, 1860, an order was made for winding up the company on the 14th of May, 1861, and a call of 5l. 10s. per share was made upon the contributories on the 4th of July, 1861. The call therefore was made upon a shareholder who was a bankrupt; and the question is whether the certificate which was granted to him in February, 1862, constitutes a bar to the right of the company (or the official liquidator) to enforce payment of the call. The call, having been made after the bankruptcy, would not under ordinary circumstances be a debt proveable against the estate: but the question turns upon the construction of the 178th section of the Bankrupt Act then in force (12 & 13 Vict. c. 106), which enables a party with whom the bankrupt has contracted a liability to pay money upon a contingency which shall not have happened, and the demand in respect whereof shall not have been ascertained before the filing of the petition, to claim for such sum as the court shall think fit. In other words, where the bankrupt has become [774] liable to pay money upon a contingency which shall not have happened at the time of filing the petition, the party with whom such contingent liability has been contracted has the power of proving for its value, and so the bankrupt gets clear from the liability, inasmuch as his certificate is a bar to all claims and demands made proveable against his estate. Then, was the liability of this shareholder to be called upon to contribute to the funds of the company, a liability to pay money upon a contingency within the meaning of this provision? On the first reading of the words of the 178th section, they would seem to raise a presumption that it was intended that the bankrupt should be discharged from such a liability as this: but, upon looking attentively at the authorities, I have come to the conclusion that the intention of the legislature to that effect, if such intention existed, has not been well expressed. Where a party is a holder of shares in a joint-stock company, his liability to pay money depends upon more contingencies than one: there may or may not be a call made; and the bankrupt might not be the holder of the shares when a call is made. There may be no existing liability at the time of the bankruptcy: but a liability may arise from the concurrence of those two contingencies. The authority which induces me to come to this conclusion is, the case of *Parker v. Ince*, 4 Hurlst. & N. 53, where the court of Exchequer held that a liability to pay an annuity to a wife under a deed of separation, on the bankruptcy of the husband, was not a liability to pay money upon "a contingency" within the protection of the 178th section of the 12 & 13 Vict. c. 106, inasmuch as the liability depended upon several contingencies. In *Adkins v. Farrington*, 5 Hurlst. & N. 586, the plaintiff and defendant were both sureties for the purchaser of certain timber. The principal debtor failed before the [775] bankruptcy of the surety, and Adkins had to pay the whole amount. At the time he paid the money, it was a matter of perfect certainty that the deficiency must be paid by him, and he had a right to call upon his co-surety to re-pay him the moiety. There was but one sum and one contingency, and therefore the court held that it was proveable. That is the ground upon which it is put by Bramwell, B. In *Ex parte Barwis*, *In re Strahan*, 25 Law J., Bankruptcy, 10, money had been borrowed on mortgage, with a covenant by the debtor and Barwis the surety to re-pay the money, with interest, by instalments on certain specified days: the surety became bankrupt before all the instalments were due; and it was held that the creditor was entitled to prove in respect of that contingency against the estate of the surety. That is the strongest case in favour of Mr. Archibald's argument: but I think it does not go far

(a) See *Bottle v. Stainsby*, 12 C. B. (N. S.) 477.

enough to sustain it, because, in the case of a continuing company, if they were to come forward in the bankruptcy court and to say that, from the state of their affairs, they expect that the shareholder will be called upon to pay the full amount, they would be exposing the weakness of the concern. It must be a claim depending upon whether or not the company is in a prosperous condition or not. Thus it will depend on a variety of contingencies, whereas the act of parliament seems to have contemplated but one contingency. It may be a hardship on the shareholder to be made to rest under this undefined liability. He, however, has his remedy by paying each call by a fresh bankruptcy. For these reasons, upon the best consideration I can bring to this very doubtful clause, I am of opinion that the defendant's certificate is no bar.

BYLES, J. I am of the same opinion. Almost all [776] the questions which present themselves under this act of parliament are fraught with difficulty. I was at first inclined to think that this case fell within the remedy of the 178th section: but the cases which have been referred to seem to go to this, that, where the liability to pay the money depends upon several contingencies, and not upon a single one, the words of the section are not satisfied. Here, there are two contingencies at the least,—one, whether a call would ever be made,—the other, whether, if a call were made, the bankrupt would at the time be the holder of the shares. If, therefore, any case could be imagined in which the existence of two contingencies would prevent its falling within the 178th section, this is that case. Further, if the bankrupt be discharged, he is discharged from all the liability that ever can happen in respect of these shares; and then we are driven to this,—that the bankrupt will hold his shares (for, the assignees may not choose to interfere), and yet he is freed from all liability in respect of all calls past and future. On the other hand, if he be not discharged, the liability will stick to him in spite of his bankruptcy, only to be got rid of by a succession of appeals to the court. The balance of authority seems to coincide with the balance of convenience. The verdict, therefore, must stand.

KEATING, J. I am of the same opinion. The construction of the 178th, like that of some other sections of this much considered act of parliament, is not free from difficulty. Upon the whole, however, upon the authorities referred to, and for the reasons given by my Lord and my Brother Byles, I concur with them in thinking that the rule should be discharged.

Rule discharged.

[777] ROBINSON v. COLLINGWOOD. Nov. 8th, 1864.

[S. C. 34 L. J. C. P. 18; 11 L. T. 313; 10 Jur. N. S. 1080; 13 W. R. 84. Referred to, *Ex parte Collins*, 1875, L. R. 10 Ch. 369 (n).]

1. A bill of sale was executed by A. to B., but the person who was really interested in the goods was C., who advanced the money, but whose name did not appear either in the bill of sale or in the affidavit filed therewith:—Held that, though B. might be treated in equity as a mere trustee, there was no trust which need under ss. 2 and 3 of the Bills of Sale Act, 17 & 18 Vict. c. 36, appear upon the face of the instrument.—2. Where a bill of sale of goods taken under a *fi. fa.* is made by an officer of the sheriff, the court will presume that he was duly authorized to make it.

This was an issue under the Interpleader Act, to try the right to certain goods seized under a *fi. fa.* against a gentleman named Berkeley.

The issue came on to be tried before Williams, J., at the sittings in London after last Easter Term. The facts were as follows:—In August, 1861, a writ of *fi. fa.* was issued against the goods of Berkeley, upon a judgment obtained against him in an action at the suit of Collingwood. The sheriff of Middlesex having taken possession of the furniture and effects of Berkeley under the writ, Robinson, who was an attorney, and acting as such for one Montague, a friend of Berkeley, paid to one Hall, the sheriff's officer, 138l. 14s., the amount of the condemnation-money, and took from him an assignment of the effects by bill of sale. In February, 1863, Berkeley, in consideration of a further advance of 32l., assigned certain other effects to Robinson by another bill of sale. Both these sums were the moneys of Montague, and were advanced by

Robinson as Montague's attorney; and the two bills of sale were duly registered under the 17 & 18 Viet. c. 36, but Montague's name did not appear either upon the instruments themselves or in the affidavits filed therewith.

Collingwood having brought a second action against Berkeley, and obtained judgment and issued execution, after the date of the second bill of sale, caused the goods which had been conveyed to Robinson under the two bills of sale (but which remained in Berkeley's possession) to be seized by the sheriff of Middlesex; and, Robinson claiming them, an interpleader summons was taken out, under which the present issue [778] was directed, to try the validity of the title of Robinson under the bills of sale.

Hall, the officer who executed the first bill of sale, who was called as a witness, stated that the only authority under which he acted was a *verbal* appointment by the undersheriff.

On the part of the defendant it was objected that both bills of sale were invalid, the assignment to Robinson being subject to a trust which was not mentioned therein: and, as to the bill of sale of August, 1861, it was further objected that Hall, the officer who executed it, was not properly authorized so to do.

The learned judge directed the jury to find a verdict for the plaintiff, reserving leave to the defendant to move to enter a verdict for him, if the court should be of opinion that the bills of sale were invalid for the reasons assigned; but he overruled the objection as to the authority of the sheriff's officer to execute the first bill of sale.

Keane, Q. C., in Trinity Term last, moved for a rule nisi to enter a verdict for the defendant, on the ground that the requisitions of the 2nd section of the Bills of Sale Act, 17 & 18 Viet. 36, had not been complied with. He submitted that the true character of the transaction and the name of the person by whom the advance was made ought to have appeared upon the face of the bill of sale, in order that the execution-creditor, if he wished to pay off the mortgage, might ascertain to whom the money was to be paid.

He also moved for a new trial, on the ground of misdirection. He submitted that Hall, the officer who made the first bill of sale, had no authority to make it; for that, though the undersheriff has power to execute assignments in the name and under the seal of office of the sheriff,—*Doc d. James v. Brawn*, 5 B. & [779] Ald. 243 (a),—yet he could not delegate that power to another, and at all events not by parol.

ERLE, C. J. The rule may go upon the first point, but not upon the second. "When the sheriff appoints his undersheriff, he ex consequenti gives him authority to exercise all the ordinary offices of the sheriff himself:" Com. Dig. *Viscount* (B. 1). We think the undersheriff, therefore, has authority to empower his officers to put the seal to an instrument of this sort.

Henry James now shewed cause. The 2nd section of the Bills of Sale Act enacts that, "if such bill of sale shall be made or given subject to any defeasance or condition or declaration of trust not contained in the body thereof, such defeasance or condition or declaration of trust shall, for the purposes of this act, be taken as part of such bill of sale, and shall be written on the same paper or parchment on which such bill of sale shall be written, before the time when the same or a copy thereof respectively shall be filed, otherwise such bill of sale shall be null and void to all intents and purposes as against the same persons and as regards the same property and effects as if such bill of sale or a copy thereof had not been filed according to the provisions of this act." There was no such trust here as was required to be noticed. Montague, not choosing that his name should appear in the transaction, advanced the money in the name of Robinson, [780] his attorney. As between the latter and Montague there may be a trust: but it is not such a one as the statute contemplated. It is neither within the words nor the mischief of the act. The arrangement between Montague and Robinson had nothing to do with the *making* or *giving* the bill of sale: it was neither a defeasance, a condition, or a trust as between the parties to the bill of sale.

(a) There, an assignment of a lease by deed taken in execution was made in the name and under the seal of office of the sheriff by A. B., acting as undersheriff; and it was held that such assignment was sufficiently proved, without proving further the appointment of A. B. as undersheriff, and that he had power by deed to execute deeds in the name of the sheriff.

Bovill, Q. C., and Keane, Q. C., in support of the rule. These instruments do not comply with the requisites of the statute. The title of the act is, "An act for preventing frauds upon creditors by secret bills of sale of personal chattels:" and it recites that "frauds are frequently committed upon creditors by secret bills of sale of personal chattels, whereby persons are enabled to keep up the appearance of being in good circumstances and possessed of property, and the grantees or holders of such bills of sale have the power of taking possession of the property of such persons, to the exclusion of the rest of their creditors." The 1st section enacts that "every bill of sale of personal chattels made after the passing of this act, either absolutely or conditionally, or subject or not subject to any trusts, and whereby the grantee or holder shall have power, either with or without notice, and either immediately after the making of such bill of sale or at any future time, to seize or take possession of any property and effects comprised in or made subject to such bill of sale, and every schedule or inventory which shall be thereto annexed or therein referred to, or a true copy thereof and of every attestation of the execution thereof, shall, together with an affidavit of the time of such bill of sale being made or given, and a description of the residence and occupation of the person making or giving the same, or, in case the same [781] shall be made or given by any person under or in the execution of any process, then a description of the residence and occupation of the person against whom such process shall have issued, and of every attesting witness to such bill of sale, be filed," &c., "otherwise such bill of sale shall, as against all assignees of the estate and effects of the person whose goods or any of them are comprised in such bill of sale, under the laws relating to bankruptcy or insolvency, or under any assignment for the benefit of the creditors of such person, and as against all sheriffs' officers and other persons seizing any property or effects comprised in such bill of sale, in the execution of any process of any court of law or equity authorizing the seizure of the goods of the person by whom or of whose goods such bill of sale shall have been made, and against every person on whose behalf such process shall have been issued, be null and void to all intents and purposes whatsoever, so far as regards the property in or right to the possession of any personal chattels comprised in such bill of sale, which at or after the time of such bankruptcy, or of filing the insolvent's petition in such insolvency, or of the execution by the debtor of such assignment for the benefit of his creditors, or of executing such process (as the case may be), and after the expiration of the said period of twenty-one days, shall be in the possession or apparent possession of the person making such bill of sale, or of any person against whom the process shall have issued under or in the execution of which such bill of sale shall have been made or given, as the case may be." And then comes the 2nd section, which enacts that, if such bill of sale shall be made or given subject to any defeazance, condition, or *declaration of trust*, not contained in the body thereof, such defeazance, condition, or declaration of trust shall be taken as part of the instrument, and be [782] written on the same paper or parchment. The object of these provisions was, to compel a complete and true disclosure of the real nature of the bargain, in order that creditors or assignees may have the means of inquiry as to the *bonâ fides* of the transaction between the assignor and the assignee under the bill of sale. [Erle, C. J. If Berkeley had an equity of redemption, no doubt that must appear. But, why should the grantee disclose upon the face of the bill of sale where he got the money which he advanced? Suppose Robinson had been trustee for Berkeley's wife, and had advanced this money out of the trust-fund?] That fact should have appeared. The provision is not limited to trusts for the grantor: it deals with trusts generally. [Keating, J. Read with the preamble, that must mean trusts in favour of the grantor.] The whole act consists of a series of provisions applying to the grantee, not merely to the grantor. These requirements are to be pursued most strictly. This is illustrated by the 3rd section, which requires the officer to keep a book or books, "in which he shall cause to be fairly entered an alphabetical list of every such bill of sale, containing therein the name, addition, and description of the person making or giving the same, or, in case the same shall be made or given by any person under or in the execution of process as aforesaid, then the name, addition, and description of the person against whom such process shall have issued, and also of the person to whom or in whose favour the same shall have been given, together with the number, and the dates of the execution and filing of the same, and the sum for which the same has been given, and the time or times (if any) when the same is thereby made payable," according to the

form contained in the schedule. In the second column of the schedule is to be inserted the name and description of [783] the person to whom the bill of sale is made or given. It is of the utmost importance that this should be *truly* stated, in order that the validity and fairness of the transaction may be tested. The legislature evidently contemplated the possibility of fraud being committed in a variety of shapes: and, in order as much as possible to guard against that, it has made the most stringent provisions for the purpose of compelling a disclosure of the *whole* of the transaction.

ERLE, C. J. I am of opinion that these bills of sale are valid notwithstanding the arguments which have been urged against them founded upon the provisions of the Bills of Sale Act, 17 & 18 Vict. c. 36. The statute, as I read it, requires that, where the bill of sale is made or given subject to any defeasance or condition or declaration of trust in which the grantor or giver thereof has an interest, it shall be registered with the bill of sale. The evil to be avoided was, the baffling of creditors by sham bills of sale by which the whole interest of the grantor in the subject-matter was apparently transferred to the grantee, whereas in truth some interest or trust remained in the former. Creditors or assignees, provided no interest remains in the grantor, cannot require to be informed whether the grantee holds the goods assigned on his own behalf or as trustee for another. Here, Robinson is the grantee. The money he advanced as the consideration for the grant was the money of Montague. But I see nothing in the act of parliament which requires that the relation in which Robinson stood to Montague shall appear upon the face of the instrument.

BYLES, J. I am of the same opinion: and I have derived my notions on the subject from the observations made by Mr. James upon the 2nd section of the [784] statute, which have convinced me that the trusts there referred to clearly are trusts in favour of the *grantor*. It appears to me that any other construction would be highly inconvenient. It might be that the persons advancing the money were trustees, and it might be convenient that the security should be taken in the name of one of their number: and, if the argument on the part of the defendant were well founded, the instrument would be void unless all these circumstances were explained upon the face of it. The words "any defeasance, condition, or declaration of trust not contained in the body thereof," seem to me to point to such trusts as would ordinarily appear upon the face of such an instrument, and which affect its operation as between the grantor and the grantee. These alone are within the mischief to be remedied, and are what the legislature intended should be remedied. I agree that the 3rd section, which requires an entry of the name of the person to whom or in whose favour the bill of sale is given, is not confined to bills of sale executed by the sheriff, but extends to all bills of sale by whomsoever given. But I do not think that affects the present question. I do not think it necessary that the name of Montague should appear.

KEATING, J. I am of the same opinion. I agree with the rest of the court that the object of the statute is sufficiently attained by compelling the registration of all conditions or declarations of trust which are made in favour of the grantor. To require the grantee to disclose upon the face of the register where he obtained the money wherewith to purchase the goods, might possibly convey to the execution-creditor information which might under some circumstances be useful. But I do not think that that is the effect of the statute. I see nothing in its provisions to require [785] this trust to appear. In truth there was no "declaration of trust." All that could have been put upon the register here, if the entire transaction had been disclosed, would have been a state of facts which would have induced a court of equity to declare a trust as between Robinson and Montague. That clearly is not the sort of trust which the statute contemplated.

Rule discharged.

BARKER v. THE METROPOLITAN RAILWAY COMPANY. Nov. 7th, 1864.

[S. C. 11 L. T. 312; 10 Jur. N. S. 1127; 13 W. R. 82.]

The plaintiff, who had a leasehold interest in premises held by a tenant from year to year, received notice from a projected railway company that the premises were required for the purposes of their undertaking; and the company subsequently arranged with the *tenant* and received from him the key. The plaintiff thereupon gave the company notice, under the 68th section of the Lands Clauses Consolidation

Act, 1845, of the amount of her claim and the nature of her interest in the premises, and requiring them to issue their warrant to the sheriff to summon a jury; and, upon their neglecting so to do, she brought an action for the sum claimed:—Held, that these facts warranted the jury in finding that the company had *actually taken* the premises, and consequently that they were liable for the amount demanded.

This was an action brought by the plaintiff to recover compensation from the Metropolitan Railway Company for her interest in certain leasehold premises in Conduit Street East, Paddington, which were alleged to have been *taken* by the company under the powers contained in their special acts.

The declaration stated that the defendants were a railway company incorporated by the Metropolitan Railway Act, 1854, and the plaintiff was entitled to compensation in respect of an interest in certain land which had been taken by the defendants, as being the promoters of the undertaking, to make the said railway in the said act mentioned and thereby authorized to be made, for the execution of the works of the said [786] railway; that the defendants as such promoters as aforesaid had not made satisfaction to the plaintiff in respect of her interest in the said land, which exceeded the sum of 50l.; that the plaintiff, desiring to have the said compensation settled by a jury, gave notice in writing of such her desire to the defendants as such promoters as aforesaid, stating in the said notice the nature of her interest in the said land in respect whereof she claimed compensation, and the amount of compensation so claimed by her, being 850l.; that the defendants, as such promoters as aforesaid, were not willing to pay the amount of compensation so claimed, nor did they enter into a written agreement for that purpose, nor did they within twenty-one days after the receipt of the said notice issue their warrant to the sheriff to summon a jury for settling the same, in the manner provided by law; and that, by reason of their default to issue their warrant as aforesaid, the defendants became and were liable to pay to the plaintiff, being so entitled as aforesaid, the amount of compensation so claimed by her as aforesaid; and that all conditions were fulfilled and all things happened and all times elapsed necessary to entitle the plaintiff to recover the last-mentioned sum from the defendants, yet that the defendants had not paid the said amount of compensation: Claim, 850l.

The defendants pleaded, —that the plaintiff was not entitled to compensation as alleged; and that the land in the declaration mentioned was not and had not been taken by the defendants as alleged. Issue thereon.

The cause was tried before Erle, C. J., at the sittings at Westminster after last Trinity Term. The facts were as follows:—In 1858, notice was given by the defendants to the plaintiff that the premises in question were required for the purposes of their under-[787]-taking, and that they were ready to treat, and in 1860 they gave a bond under the 85th section of the Lands Clauses Consolidation Act, 1845. 8 & 9 Vict. c. 18. At this time the premises were in the occupation of one Taylor as tenant from year to year to the plaintiff. Nothing further was done until January, 1864, when, the company having arranged with Taylor for the transfer of his interest to them, the key was handed over to them. Taylor paid rent for the premises down to Christmas, 1863.

The plaintiff thereupon gave the company a notice, under s. 68, claiming 850l. as compensation for her interest in the land so taken, and requiring the company to issue their warrant to summon a jury. The company did not issue their warrant, and intimated that they did not at present require the premises for the purposes of their railway.

On the part of the defendants, it was submitted that there was no evidence that they had *taken* the plaintiff's land under the compulsory powers given to them by the Lands Clauses Consolidation Act and the special act; but that they had merely possessed themselves of Taylor's interest.

His Lordship, however, ruled that there was evidence enough to warrant the jury in finding, if they were so minded, that the company had taken the premises under the acts of parliament.

The jury returned a verdict for the plaintiff for the amount claimed.

Keane, Q. C., pursuant to the leave reserved to him, moved to enter a verdict for the defendants, on the ground that there was no evidence to go to the jury of their having taken possession of the premises so as to entitle the plaintiff to claim compensa-

tion. The 6th section of the 8 & 9 Vict. c. 18, enacts that, "sub-[788]ject to the provisions of this and the special act, it shall be lawful for the promoters of the undertaking to agree with the owners of any lands by the special act authorized to be taken, and which shall be required for the purposes of such act, and with all parties having any estate or interest in such lands, or by this or the special act enabled to sell and convey the same, for the absolute purchase for a consideration in money of any such lands, or such parts thereof as they shall think proper, and of all estates and interests in such lands of what kind soever." The 68th section enacts that. "if any party shall be entitled to any compensation in respect of any lands, or of any interest therein, which shall have been *taken* for or injuriously affected by the execution of the works, and for which the promoters of the undertaking shall not have made satisfaction under the provisions of this or the special act, or any act incorporated therewith, and if the compensation claimed in such case shall exceed the sum of 50l., such party may have the same settled either by arbitration or by the verdict of a jury, as he shall think fit; and, if such party desire to have the same settled by arbitration, it shall be lawful for him to give notice in writing to the promoters of the undertaking of such his desire, stating in such notice the nature of the interest in such lands in respect of which he claims compensation, and the amount of the compensation so claimed therein; and, unless the promoters of the undertaking be willing to pay the amount of compensation so claimed, and shall enter into a written agreement for that purpose within twenty-one days after the receipt of any such notice from any party so entitled, the same shall be settled by arbitration in the manner herein provided; or, if the party so entitled as aforesaid desire to have such question of compensation settled by a jury, it shall be [789] lawful for him to give notice in writing of such his desire to the promoters of the undertaking, stating such particulars as aforesaid, and, unless the promoters of the undertaking be willing to pay the amount of compensation so claimed, and enter into a written agreement for that purpose, they shall, within twenty-one days after the receipt of such notice, issue their warrant to the sheriff to summon a jury for settling the same in the manner herein provided, and, in default thereof, they shall be liable to pay to the party so entitled as aforesaid the amount of compensation so claimed, and the same may be recovered by him, with costs, by action in any of the superior courts." The words "lands which have been *taken* for or injuriously affected by the execution of the works," in that section, have been held to include such lands only as are *actually* taken or *actually* affected by the works: *Burkshaw v. The Birmingham and Oxford Junction Railway Company*, 5 Exch. 475. The 84th, 85th, and 89th sections plainly shew that "taken" here does not mean merely acquiring a right to take, but an actual physical taking. One of the objects of these provisions was, to give the undertakers a right to exercise a discretion as to the time and manner of taking possession of lands required for their works. As between the company and Taylor, the tenant, they took *his* interest under the compulsory powers of the act. But there was no evidence whatever of any taking possession of the interest of the reversioner. All they did was to get rid of the particular tenant.

ERLE, C. J. I think there should be no rule in this case. I think there was abundant evidence to warrant the jury in finding that the land was in fact taken by the defendants. The plaintiff had an interest in the premises as a termor. The company having given [790] notice of their intention to take them for the purposes of their works, the plaintiff gave them notice of her claim, and of her desire to have the compensation to which she was entitled assessed by a jury. It then became their duty to issue a warrant for summoning a jury. They have failed to do so, and consequently the plaintiff is entitled to the money claimed by her. The case comes clearly within the words of s. 68.

BYLES, J. I am of the same opinion. The jury found that the land was taken under the act and for the purposes of the act: and I do not see how they could have found otherwise. The company clearly did not intend to become tenants from year to year under the plaintiff. The case falls within the very words of the 68th section. I cannot see the smallest ground for doubt.

KEATING, J. I am of the same opinion. The case was properly left to the jury, and they found that the company had taken the land so as to bring them under the obligations of the 68th section. I cannot see how they could have come to any other conclusion.

Rule refused.

[791] HOBBS v. HENNING. Nov. 16th, 1864.

[S. C. 34 L. J. C. P. 117; 12 L. T. 205; 11 Jur. N. S. 222; 13 W. R. 431.]

1. Goods that are contraband of war, in the course of transport from a neutral port to a neutral port, in a neutral ship, are not by the law of nations liable to seizure by the cruisers of a belligerent state, even though the shipper may know or intend that they shall ultimately reach a port belonging to the enemies of the captors. To render goods contraband of war liable to seizure, they must be taken in delicto, that is, in the actual prosecution of a voyage to an enemy's port.—2. Nor does the mere fact that the ship carries simulated papers per se operate a forfeiture of either ship or goods, though it may afford evidence from which a prize court may infer that the ship or goods were enemies' property, or that her destination was to a blockaded port or to an enemy's port with contraband of war.—3. The sentence of a foreign court of Admiralty condemning a ship or goods as lawful prize, is not conclusive in the courts of this country as to the ground of condemnation, unless stated upon the face of it without ambiguity. It is competent to our courts to examine the sentence carefully to see whether it proceeds on that which would be a just ground of condemnation by the law of nations, or on another ground which would amount only to a breach of the municipal regulations of the condemning country.—4. To an action upon a valued policy on goods on board the "Peterhoff" at and from London to Matamoras (a port in Mexico notorious for being the place to which goods contraband of war intended for the use of the confederate states of North America were sent, for the purpose of being forwarded to Wilmington or Charleston), against capture amongst other things, and averring a loss by a peril insured against,—the defendant pleaded (seventhly) that the goods were contraband of war, and were shipped by the insured for the purpose of being sent to and imported into a port in North America situate in a state engaged in hostilities with the United States of America, and were liable to be seized by the cruisers of the United States as contraband of war, and that the ship was during the continuance of the risk and at the time of the loss carrying goods and papers which rendered her liable to be seized by such cruisers, and that the ship and goods were seized accordingly,—of all which the defendant at the time of subscribing the policy was wholly ignorant.—The plaintiff replied to the seventh plea, that the voyage in the declaration and in the policy of insurance mentioned was a voyage to a certain port in Mexico, to wit, to Matamoras, and not a voyage to any port in North America situate in a state engaged in hostilities with the United States of America, and that the said ship and goods while proceeding on the said voyage to Matamoras were seized as in the declaration alleged.—The plaintiff also demurred to the seventh plea, on the ground that it disclosed no defence to the action:—Held, that it was consistent with the plea that the goods were sent from a neutral port to a neutral port in a neutral ship, and therefore not liable to seizure; that the allegation that they were shipped for the purpose of being sent to an enemy's port, did not deny the destination to the neutral port to which the insurance related, but merely introduced a purpose existing in the mind of the assured for the ulterior disposition of the cargo and ship after the termination of the voyage insured, and consequently that the plea was no answer to the action; that the allegation that the ship was carrying papers which rendered her liable to be seized, was not an accurate statement in reference in the law of nations, the having simulated papers alone not being a breach of neutrality so as to work a forfeiture of the ship; and that the allegation that the defendant at the time of effecting the insurance was ignorant of the premises was under the circumstances an immaterial allegation.—5. The eighth plea stated that, before action brought, the ship and goods were during hostilities between the United States of America and the confederate states seized by the cruisers of the United States of America, and carried to a port in the said United States, and such proceedings were duly and according to the law of nations had that it was duly adjudged and determined by an United States prize-court held at New-York, and having competent jurisdiction, that the said ship was knowingly on the voyage aforesaid laden in whole or in part with articles contraband of war, and had them in the act of transportation at sea, and that the said ship with her said cargo was not truly destined to the port of Matamoras, but, on the contrary, was destined to

some other port or place and in aid and for the use of persons then at war with the said United States, and in violation of the law of nations, and that the ship's papers were simulated and false as to her real destination, and thereupon it was considered and adjudged by the said court, then having competent jurisdiction in that behalf, that the said ship and her cargo were subject to condemnation and forfeiture, and that the same should be condemned and forfeited accordingly:—Held, that the conclusion to be arrived at from an examination of the judgment set out in the plea was, that the court did not intend to find, as a matter of fact, either that the ship had not sailed on a voyage to Matamoras, or that, after having so sailed, she had deviated from that voyage: but that, on the contrary, they condemned her as lawful prize because she was in the prosecution of that voyage with an ulterior destination either for the cargo or the ship, or both, as before explained; and that therefore the judgment did not sustain the inferences of fact which the defendant sought to establish thereby, or sustain his claim of right to prevent the plaintiff from shewing the truth in respect of this fact; and therefore that the plea was bad.—6. Held also, that the eighth plea was open to the further objection that it did not plead the issuable fact in respect of the voyage, but the *evidence* which might prove that fact.—7. And held by Erle, C. J., and Byles, J. (Keating, J., not dissenting), that the eighth plea and the rejoinders hereafter mentioned were bad, because the finding of a matter of fact in the course of the adjudication of a prize-court, cannot be pleaded as an estoppel in the cases where, if adduced in evidence, the judgment would be received as conclusive evidence of the fact so found.—8. The rejoinder to the replication to the third plea stated that the plaintiff ought not to be admitted to take issue on the third plea, and deny the truth thereof, because before action brought the ship and goods were during hostilities between the United States of America and the confederate states seized and carried into port as in the eighth plea mentioned, and such proceedings were thereupon had and such adjudication made as in that plea mentioned: and that, before action brought, all things had happened and all times had elapsed necessary to make the said adjudication binding on the plaintiff, and to entitle the defendant to rejoin the same as an estoppel to the plaintiff's said replication. The rejoinder to the second replication to the seventh plea set out the sentence of the New York prize-court, as in the eighth plea. To each of these rejoinders the plaintiff demurred, on the ground that it could not be pleaded as an estoppel in answer to the replication:—Held, that the rejoinders were bad for the same reasons as those for which the eighth plea was held bad.

This was an action upon a valued policy of insurance on goods on board the "Peterhoff" at and from London to Matamoras, with leave to call at any intermediate port or ports. The perils insured against were declared to be [792] "of the seas, men of war, fire, *enemies*, pirates, rovers, thieves, jettisons, letters of mart and countermart, surprizals, *takings at sea*, arrests, restraints, and detainerments of all Kings, princes, and people of what nation, condition, or quality so ever, barratry of the master and mariners," &c., &c. The policy was effected by the plaintiff as agent for Messrs. Weatherall & Co., and averred a loss by a peril insured against, and that all conditions were fulfilled and all things happened and all times elapsed to entitle the plaintiff to be paid the sum insured by the defendant and to maintain this action; yet that the defendant had not paid the said sum.

The third plea stated that the said ship, with the [793] said goods on board thereof, did not sail on the voyage covered by the said policy, as in the declaration alleged.

The seventh plea stated that the said goods were contraband of war, and were shipped by the plaintiff and the said Messrs. Weatherall & Co. for the purpose of being sent to and imported into a port in North America situate in a state then and now engaged in hostilities with the United States of America, and were liable to be seized by the cruisers of the United States as contraband of war; that the ship in the policy mentioned, was during the continuance of the risk, and at the time of the loss, carrying goods and papers which rendered her liable to be seized by such cruisers; and that the said ship and goods were seized accordingly, which was the loss complained of,—of all which the defendant before and at the time of making the said insurance and subscribing the said policy was totally ignorant.

The eighth plea stated that, before action brought, the said ship and goods were,

during hostilities between the United States of America and the confederate states, seized by the cruisers of the United States of America, and carried into a port of the United States : that such proceedings were thereupon duly and according to the law of nations had, that afterwards, and before action brought, it was duly adjudged and determined by an United States prize-court held at New York, in the said United States, and then having competent jurisdiction in that behalf, that the said ship was knowingly on the voyage aforesaid laden in whole or in part with articles contraband of war, and had them in the act of transportation at sea : and that the said ship with her said cargo was not truly destined to the port of Matamoras, but, on the contrary, was destined to some other port or place, and in [794] aid and for the use of persons then at war with the said United States, and in violation of the law of nations : and that the ship's papers were simulated and false as to her real destination : that thereupon it was considered and adjudged by the said court, then having competent jurisdiction in that behalf, that the said ship and her cargo were subject to condemnation and forfeiture, and that the same should be condemned and forfeited accordingly, which was the loss complained of : that, before action brought, all things had happened and all times had elapsed necessary to make the said judgment binding on the plaintiff, and to entitle the defendant to plead the same as an answer to this action : and that the said judgment so pronounced was absolutely final and conclusive, and was still in full force and effect, not reversed, annulled, or otherwise vacated.

The plaintiff by his first replication took issue on all the pleas.

The second replication to the seventh plea stated that the voyage in the declaration and in the policy of insurance mentioned was a voyage to a certain port in Mexico, to wit, to Matamoras, and not a voyage to any port in North America situate in a state then or now engaged in hostilities with the United States of America : and that the said ship and goods, while proceeding on the said voyage to the said port of Matamoras, were seized as in the declaration alleged. Joinder.

The plaintiff also demurred to the seventh and eighth pleas, on the ground that those pleas respectively disclosed no defence to the action. Joinder.

First rejoinder, as to so much of the plaintiff's first replication as related to the third plea, —that the plaintiff ought not to be admitted to take issue on the third plea and deny the truth thereof, because the defendant said that before action brought the said ship [795] and goods were, during hostilities between the United States of America and the confederate states, seized and carried into ports as in the eighth plea mentioned, and such proceedings were thereupon had, and such adjudication made, as in that plea mentioned : that, before action brought, all things had happened and all times had elapsed necessary to make the said adjudication binding on the plaintiff, and to entitle the defendant to rejoin the same as an estoppel to the plaintiff's said replication to the defendant's third plea : and that the said judgment was absolutely final and conclusive, and still was in full force and effect, not reversed, annulled, or otherwise vacated.

Third rejoinder to the second replication to the seventh plea, —that the plaintiff ought not to be admitted to plead the said second replication to the seventh plea, because the defendant said that, before action brought, the said ship and goods were, during hostilities between the United States of America and the confederate states, seized by the cruisers of the said United States, and carried into a port of the said United States, and such proceedings were thereupon duly and according to the law of nations had that, afterwards, and before action brought, it was duly adjudged and determined by an United States prize-court held at New York, in the said United States, and then having competent jurisdiction in that behalf, that the said ship was knowingly on the voyage aforesaid laden in whole or in part with articles contraband of war, and had them in the act of transportation at sea, and that the said ship, with her said cargo, was not truly destined to the port of Matamoras, a neutral port, and for the purpose of trade and commerce within the authority and intendment of public law, but, on the contrary, was destined for some other port or place, and in aid of and for the use of the enemies of the said United States, and [796] in violation of the law of nations, and that the ship's papers were simulated and false as to her real destination, and that it was considered and adjudged by the said court, then having competent jurisdiction in that behalf, that the said ship and her cargo were subject to condemnation and forfeiture, and that the same should be condemned and forfeited accordingly : that, before action brought, all things and times had happened

and elapsed necessary to make the said judgment binding on the plaintiff, and to entitle the defendant to rejoin the same as an estoppel to the plaintiff's second replication to the seventh plea: and that the said judgment of the said prize-court was and is absolutely final and conclusive, and still was in full force and effect, and not reversed, annulled, or otherwise vacated.

The defendant also demurred to the second replication to the seventh plea, the ground stated in the margin being, "that the fact of the ship being bound to Matamoras is no answer to the seventh plea." Joinder.

The plaintiff took issue on the rejoinder to the replication to the third plea. He also demurred thereto, the ground of demurrer stated in the margin being, "that the matter contained in the said rejoinder cannot be pleaded as an estoppel in answer to the replication." Joinder.

The plaintiff also took issue on the further rejoinder to the second replication to the seventh plea, and also demurred thereto on the same ground as last mentioned. Joinder.

S. Temple, Q. C. (with whom was Hannen), for the plaintiff (*a*). Two questions arise upon these demur[797]rers,—first, whether the seventh plea is a good answer to the action,—secondly, whether the sentence of the prize-court at New York is conclusive as an estoppel to prevent a recovery in this action.

1. The fact of the goods being contraband of war of [798] itself is no answer to the action. In Arnould on Insurance, 2nd edit., vol. 1, p. 765, the law upon this

(*a*) The points marked for argument on the part of the plaintiff were as follows:—

As to the demurrer to the seventh plea,—"1. That, as the policy is against capture, the facts set forth in the plea, if they shewed that the capture was legal, are wholly irrelevant:

"2. That it does not appear from the said plea that the said goods were at the time of the said seizure on a voyage to any port in a state engaged in hostilities with the United States, and therefore that the character of contraband could not attach to them:

"3. That it is consistent with the said plea that the said goods were on their way to Matamoras, a neutral port, for the purpose of their being sent from that port by canal or by another sea voyage to a port in a state engaged in hostilities with the United States, in which case the seizure of them by the United States cruizers would not be justifiable:

"4. That it is consistent with the plea that the goods which rendered the vessel liable to be seized were other goods than those of the plaintiff, and that the plaintiff's goods were seized solely in consequence of the presence on board the ship of other goods and papers, of which the plaintiff and the other persons interested were wholly ignorant:

"5. That it is consistent with the said plea that the goods were at the time of the seizure on a lawful voyage to a neutral port, in which case the plea affords no answer to the action."

As to the demurrer to the eighth plea,—"1. That the alleged grounds of adjudication in the prize-court are irrelevant in this action:

"2. That it is ambiguous on the face of the said judgment of the prize-court as set out in the eighth plea, what the ground of condemnation was, and therefore it is not conclusive against the plaintiff:

"3. That the said judgment does not necessarily proceed on any ground falsifying any warranty contained in the policy as to the plaintiff's goods:

"4. That it is consistent with the said judgment that the plaintiff's goods were part of the cargo not contraband of war shipped for and intended to be unshipped at Matamoras, and that the 'Peterhoff,' after landing the plaintiff's goods there, was about to proceed with the contraband cargo to some other port."

"The plaintiff will also contend that the rejoinders demurred to are respectively bad on the same grounds upon which the eighth plea is bad, and also on the ground that they ought not to be pleaded by way of estoppel: and that the second replication to the seventh plea is good as an answer to that plea if the plea be good, inasmuch as it shews that the vessel was seized while on a voyage to a neutral port, and therefore the character of the goods or papers on board were in no way material in relation to the said policy."

subject is thus laid down, "All insurances on articles contraband of war are wholly void and incapable of being enforced in the courts of the *belligerent* country : Marshall on Insurance, 75 : *Gibson v. Service*, 5 Taunt. 433, 1 Marsh. 119. If, however, effected by or for neutrals, and sought to be enforced in the court of a *neutral* state, the case would be different : for, it is not deemed unlawful in a neutral by his own government to be engaged in a contraband trade. The contraband articles, indeed, are liable to seizure and confiscation at the hands of the enemy : but the neutral is never punished by his own sovereign for his contraband shipments. The insurance, therefore, by a neutral of articles contraband of war, being per se a valid contract, may be enforced in the courts of the neutral country, provided *the nature of the trade and of the goods was disclosed to the underwriter*, or provided there be just ground, from the circumstances of the trade or otherwise, to presume that he was duly informed thereof : " 3 Kent's Comm 267, edit. 1844. There is nothing illegal in shipping goods for a neutral port like Matamoras (which is on the Mexican side of the Rio Grande), though the merchant may well know that their ultimate destination is most likely to be [799] Wilmington or Charleston. And the allegations in the seventh plea do not go beyond that. It is true, the plea goes on to allege that the ship was liable to be seized : but it should have set out in what respect it was so liable. [Erle, C. J. The plea alleges, and the demurrer admits, that the insurer was ignorant of the facts. It may be that, if the premises are all immaterial, the ignorance of them is immaterial. The observation is suggested by the passage cited from Arnould.] The insurer may be ignorant of facts which he ought and is presumed to know.

2. The eighth plea in terms sets out the judgment of the prize-court at New York, and pleads it by way of estoppel. A sentence of a foreign court of Admiralty, however, is conclusive in this country only provided the court here can see that the grounds upon which it proceeded are in accordance with the law of nations and with natural justice, if it professes to set out the grounds of its judgment. That is clearly laid down by Tindal, C. J. in *Dalghish v. Hodgson*, 7 Bingh. 495, 5 M. & P. 407. The plaintiff insured goods on board the ship "George," upon a voyage "from Liverpool to Buenos Ayres, and any port or ports in the river Plate : and, in the event of a blockade, or being ordered off the river Plate, with liberty to proceed to any other port in South America not round Cape Horn." The declaration averred a loss by capture. It appeared that a notification of the blockade of the ports in the river Plate belonging to the government of Buenos Ayres had been published in the *London Gazette* : that the "George" sailed from Liverpool on the 2nd of August, bound for Buenos Ayres, with instructions to the captain, in the event of his being warned off by an intimation from the Brazilian cruizers of the existence of the blockade, to proceed to Monte Video, and there land the cargo ; that, on the 6th of October, about 6 [800] p.m., the vessel arrived abreast of the port of Monte Video, two leagues distance : that, the wind blowing from the port, and the master not meeting with any ship of war, or any other vessel from which he could obtain any intelligence respecting the state of the port of Buenos Ayres, he continued his voyage, and proceeded further up the river Plate in pursuance of his instructions, conceiving that the blockade of Buenos Ayres no longer existed, until he had got somewhat beyond the point of Lara, about 10 p.m. on the night of the 7th of October, when he descried the Brazilian squadron, and immediately let go his anchor in sight of the squadron : that, while the ship was at anchor, an officer belonging to the Brazilian corvette of war "Ymperica" came on board the "George," and took away the ship's register, log-book, and the instructions relative to the voyage, together with other papers relating to the ship and cargo : that the master was at the same time conveyed on board the commodore's frigate "Nitrov," and one half of the crew sent on board the corvette "Ymperica" ; that the master was detained on board the frigate until the 11th, on which day the "George," with the goods on board, was carried into Monte Video as a prize by the Brazilian squadron ; and that, after the "George" and the goods were taken into Monte Video, proceedings were commenced in the prize-court there, and on the 13th of December, the following sentence was pronounced by the judge of that court :— "In virtue of summary process against the English brig 'George,' taken by the vanguard of the imperial squadron now blockading the enemy's port in the river Plate, it plainly appears from all the documents brought forward in the said process, that the said brig sailed from Liverpool knowing of the said blockade, and which the captured do not even deny, neither that her desti-[801]-nation was Buenos Ayres,

from which port at only a short distance she was taken; and for this reason it is evident she ought to be considered as violating the said blockade, and which she would have effected but for the diligence of the capturers, in spite of all the means tried to evade it: neither are the endeavours used by the captured to get a part of the cargo of this prize into Buenos Ayres less notorious, but which having not been able to accomplish in other vessels, and the same being returned to England, they were in hopes to do in this: and this with all diligence, as is proved by the official report, fol. 57, and as is clear by the evasions the captain had recourse to in his answers to the interrogatories, and in the clause shewn in the translated letter, fol. 44 and 65: for as much as besides not doing away the proof that Buenos Ayres was the first port the shipment was destined for (in itself criminal), it also happened that the captured had not even the plausible excuse of coming to this port of Monte Video first to get intelligence, and thereby comply with the published instructions; on the contrary, it is proved by the log-book translated, fol. 68, that they saw it and passed even much beyond it, and where they were captured: from all which, and from what the documents state, I judge the said brig 'George' and her cargo to be good and lawful prize to the capturers." This court held that the grounds of condemnation did not appear so explicitly on this sentence as to prevent the courts of this country from inquiring into them. "The general law upon this subject," says Tindal, C. J., "is well known, that the sentence of a foreign court of Admiralty of competent jurisdiction is binding upon all parties, and in all countries, as to the fact upon which the condemnation proceeded, where such fact appears on the face of the sentence free from doubt and ambiguity. But it is at [802] the same time as well established that, in order to conclude the parties from contesting the ground of condemnation in a court of law, such ground must appear clearly upon the face of the sentence; it must not be collected by inference only, or left in uncertainty whether the ship was condemned upon one ground which would be a just ground of condemnation by the law of nations, or on another ground which would only amount to a breach of the municipal regulations of the condemning country." After criticising the language of the document, his Lordship concludes,—“Under a sentence, therefore, expressed with so much doubt and ambiguity as to the real ground on which it proceeded, we hold ourselves at liberty to determine, whether, upon the evidence given at the trial, such violation of the blockade did in fact take place or not: and, upon that question, we are satisfied on the evidence that the captain did not break nor did he intend to break the blockade, but that he honestly intended to obtain instructions from the blockading squadron, not having been before warned off by any of the Brazilian cruizers.” The adjudication here is against the *ship* on the ground that she was carrying simulated papers and goods contraband of war really destined for an enemy's port. It is no where alleged that the plaintiff's goods were contraband of war: and the allegation that the goods were not truly destined for the neutral port of Matamoras is traversed. The mere fact of the ship's papers being simulated is no ground of condemnation. It is true, the eighth plea does allege that the ship and goods were destined to some other port or place and in aid and for the use of persons then at war with the United States, and in violation of the law of nations. But the sentence, so far as it appears, does not shew in what respect the law of nations has been violated. [803] [Byles, J. Contraband of war alone may have one effect; but, coupled with simulated papers, the effect may be different.] In *Bernardi v. Motteux*, 2 Dougl. 575, it was held that a condemnation by a foreign court of Admiralty is not conclusive evidence that the ship was not neutral, unless it appear that the condemnation went upon that ground. Lord Mansfield there says: “The first principles are clear and admitted. All the world are parties to a sentence of a court of Admiralty. Here, there is a monition published at the Exchange, and in other countries at some place of general resort, and any person interested may come in and appeal at any time, if there has been no laches. If there *has*, the time of appeal is limited. But the sentence, as to that which is within it, is conclusive against all persons, unless reversed by the regular court of appeal. It cannot be controverted collaterally in a civil suit. The difficulty here is, what the ground was on which the French court of Admiralty went,—whether the ground of enemy's property, or that of the papers having been thrown overboard. By the maritime law of all countries, throwing papers overboard is considered as a strong presumption of enemy's property, and upon that principle

the Arrêt of 1778 (a) is founded. But, in all my experience in England, I have never known a condemnation on that circumstance only. It is made use of as a strong [804] ground of suspicion. The arrêt is very rigid. It is difficult to find out what the ground of this sentence was. I *incline* to think the court went upon the ground of *enemy's property*, and considered the want of the papers as a strong presumption of that fact: but they did not examine the captain upon interrogatories as to the contents of the papers: and, upon the whole, enough does not appear on this obscure sentence to ascertain precisely upon what it was founded, and some other method ought to be taken to inquire what the ground of it was. As to whatever it *meant* to decide, we must take it as conclusive." In *Pollard v. Bill*, 8 T. R. 434, it was held that a warranty of neutrality in a policy of insurance is not falsified by a sentence of a foreign court of Admiralty condemning a ship for navigating contrary to the ordinances of that belligerent state, to which the neutral country had not assented. Lord Kenyon, in delivering judgment, says: "This is one of the numberless questions that have arisen in consequence of the extraordinary sentences of condemnation passed by the courts of Admiralty in France during this war. I do not think that they were characterized too strongly at the Bar, when it was stated that they all proceeded on a system of plunder; but, still, until the legislature interferes on this subject, we, sitting in a court of law, are bound to give credit to the sentences of a court of competent jurisdiction. If, therefore, in this instance, the French court had condemned this ship on the ground that it was not Danish property, we should have been concluded by that sentence in this action, and must (however reluctantly, it being stated as a fact in the beginning of the case that it was a Danish ship), have given judgment for the defendant. This is proved by the different cases cited in the argument, with the decisions in which I concur, and it is supported by rea[805]-sons." And, after going through the facts, and referring to *Mayne v. Walter*, 2 Park, Ins. 531, his Lordship concludes,—“On the whole, therefore, I am of opinion that, though, if contrary to justice the ship had been condemned simply because she was not a Danish ship, we should have been concluded by that sentence; yet, as the courts abroad have endeavoured to give other supports to their judgment which do not warrant it, and have stated as the foundation of the sentence of condemnation, one of their own ordinances which is not binding on other nations, this sentence does not prove that the ship in question was not a neutral ship, and, consequently, the plaintiff is entitled to recover.” So, in *Calcott v. Barill*, 7 T. R. 523, a sentence of a French prize-court was held not to be conclusive evidence against a warranty of neutrality, because the special grounds assigned for the sentence did not necessarily lead to such a conclusion. “If,” said Lord Kenyon, “that court had stated in their sentence that they condemned the goods because they were British property, I should have considered myself bound by their sentence; but they have assigned other reasons for their adjudication: the express grounds of the sentence of condemnation are, that the ship was destined for one of the West India islands, that she was hired and loaded at London, and that she had a certain quantity of gunpowder on board, therefore they condemned her and her cargo as good prize. Then it is impossible for us to conclude that the French court decided on the ground that this was British property, when all the evidence in the cause, and the reasons expressly given by them for their judgment, lead to a contrary conclusion.” That is an extremely strong case. [Erle, C. J. The substance of the decision is that, if the premises set out in the foreign sentence do not warrant the conclusion, the court here will [806] not hold itself bound by it.] Precisely so. Again, in *Fisher v. Ogle*, 1 Camph. 418, Lord Ellenborough says: “We shew a sufficient respect for French sentences, if we attach credit in our courts to what they distinctly say. It is often painful to go this length, considering the piratical way in which they proceed. But this sentence does not say that the ship was *not* American, and it is not to be considered as evidence of what it does not specifically affirm. I

(a) For the regulation of the marine, &c., 26th July, 1778, art. 3. “All vessels taken, of what nation soever, either neutral or allied, from which it is known that *any papers* have been *thrown* into the sea, suppressed, or abstracted, shall be declared good prize, together with their cargoes, upon the mere proof that *some papers* have been thrown into the sea, without any necessity of examining what those papers were, by whom they were thrown, or even though a sufficient quantity should remain on board to *justify* that the ship and its cargo belonged to friends or allies.”

date say such sentences will be positive enough in future, since those who frame them are disposed to consider everything as good prize against all mankind. When they do speak out, I will give them the same effect here which they receive in other places. But there is no proof in the present case that the property was not American, though such an inference might be drawn from certain indirect statements in the sentence now presented to us." In the following term a rule for a new trial was moved for, but refused, Lord Ellenborough saying: "I must look to the adjudicative part of the sentence, and there I find nothing distinctly stated as to the ship or her cargo not being American. Have you any case in which it was held that judges must fish for a meaning, when a sentence of this kind is produced to them? Here, the foreign court seems not to have formed any settled opinion upon the subject, and not to have known or cared on what grounds it proceeded to a condemnation. It is by an overstrained comity that these sentences are received as conclusive evidence of the facts which they positively aver, and upon which they specifically profess to be founded." In *Saloucci v. Woodmass*, Park, Ins. 362, Lord Mansfield laid it down as a rule that, where no other ground appeared, the condemnation of a ship *as prize* must be taken to have proceeded on the ground of enemies' property, and distinguished that case from *Bernardi v. [807] Motteux*, as there another ground, namely, the arrêt, appeared, on which the condemnation might have proceeded. These cases are all commented on in the notes to *The Duchess of Kingston's case*, 2 Smith's Leading Cases, 642, 691, 692, where the result is thus summed up: "Upon the whole, the rule appears to be,—1. That the sentence of a foreign court of Admiralty of competent jurisdiction pronounced in rem, is conclusive against all the world as to the existence of the ground on which the court professes to decide. 2. It would seem from *Saloucci v. Woodmass* that such a court shall *perhaps*, where it states no ground of decision, be presumed to have decided on the ground which would warrant its decision in the terms in which it is pronounced; and that, therefore, where a vessel is condemned *as prize*, the court would be presumed to have condemned it on the proper ground, namely, an infraction of neutrality, or, what amounts to the same thing, a breach of treaty. But thirdly, that this presumption ends where it appears doubtful upon the face of the sentence itself whether the ship was not condemned upon some other ground, such, for instance, as the infraction of a mere local ordinance. In such a case, it is apparent that the words *as lawful prize*, even if used, may be, and probably are, a mere misapplication of terms, so far as they may lead to the inference that a breach of neutrality has been committed." As to that part of the judgment of the prize court which alleges that the ship carried simulated papers,—why, it may be asked, should the falsity of the ship's papers affect the innocent owners of the goods? It is not alleged that they were parties to any deceit. It may be that the captain of the "Peterhoff" intended to land the plaintiff's goods at Matamoras, and then to proceed to break the blockade at Wilmington or elsewhere. But the owner of the goods may, [808] nevertheless, have been guiltless of any violation of the law of nations. Simulated papers, unless the underwriters consent to their being carried, have been held to avoid an insurance on ship: *Horniger v. Lushington*, 15 East, 46, 3 Campb. 85; *Fomin v. Oswell*, 3 Campb. 357, 1 M. & Selw. 393; *Oswell v. Figue*, 15 East, 70; *Bell v. Bromfield*, 15 East, 364; *Steel v. Lacey*, 3 Taunt. 285. But it is otherwise in the case of a mere assured of goods, who is not answerable for the proper documenting of the ship, without a warranty or representation of her national character: *Bell v. Carstairs*, 14 East, 374. Throughout the cases, the having simulated papers is considered as conclusive evidence of the ship being enemies' property. Mr. Arnould says upon this subject,—1 Arnould on Insurance, 2nd edit. 734,—“Owing to the unexampled difficulties thrown in the way of English commerce by the ambition of Napoleon during our last great maritime wars, it became necessary, in order to carry on trade with the continent at all, to do so by the aid of simulated papers: but, although it was notoriously impossible for our own or neutral ships to trade, especially to the Baltic ports, without having such papers on board, yet our courts uniformly held that the sentences of foreign tribunals of prize expressly proceeding on the ground of the ship's carrying simulated papers, were conclusive to discharge the underwriter from his liability, except where there was an express leave given in the policy to carry them.” There is nothing upon this record to shew that the having simulated papers on board formed a ground for the condemnation of the goods as being enemies' property. For these reasons, it is submitted that the adjudication which is the subject of the eighth plea and of the rejoinder to

the replication to the third plea is not conclusive, but that it is competent to the assured to shew that it may have [809] proceeded upon a ground which is not warranted by the law of nations.

Lush, Q. C. (with whom was Sir George Honyman), *contra* (a)¹. The plaintiff declares upon a policy on goods on a voyage from London to Matamoras. The seventh plea alleges that the goods were contraband of war, and were shipped by the insured for the purpose of being sent to and imported into a port in North America situate in a state engaged in hostilities with the United States of America, and were liable to be seized by the cruisers of the United States as contraband of war, and that the ship was during the contin-[810]-uance of the risk and at the time of the loss carrying goods and papers which rendered her liable to be seized by such cruisers, and that the ship and goods were seized accordingly,—of all which the defendant at the time of subscribing the policy was wholly ignorant. A neutral, no doubt, has a perfect right to trade with either belligerent party: nor is a policy intended to cover the risk of conveying goods to an enemy's port, or of breaking a blockade, illegal, except in the sense that the party attempting it subjects the ship and cargo to confiscation, whether the goods are contraband of war or not. A neutral trades at his own peril with a blockaded port. Where there is no blockade, or no efficient blockade, a neutral may trade to the port with everything which is not contraband of war. If he attempts to carry thither contraband of war, he violates his neutrality and renders himself liable to capture (a)². In 1 Kent's Commentaries, 10th edit. 149, the law is thus laid down:—"When goods are once clearly shewn to be contraband, confiscation to the captor is the natural consequence. This is the practice in all cases, as to the article itself, excepting provisions; and as to them, when they become contraband, the antient and strict right of forfeiture is softened down to a right of preemption on reasonable terms. But, generally, to stop contraband would, as Vattel observes (book 3, c. 7, § 113), prove an ineffectual relief, especially at sea. The penalty of confiscation is applied, in order that the fear of loss might operate as a check on the avidity for gain, and deter the neutral merchant from supplying the enemy with contraband articles. It is a general understanding, grounded on true principles, that the powers at war may seize and confiscate all contraband goods, without [811] any complaint on the part of the neutral merchant, and without any imputation of a breach of neutrality in the neutral sovereign himself. It was contended on the part of the French nation, in 1796, that neutral governments were bound to restrain their subjects from selling or exporting articles contraband of war to the belligerent powers. But it was successfully shewn, on the part of the United States, that neutrals may lawfully sell, at home, to a belligerent purchaser, or carry themselves to the belligerent

(a)¹ The points marked for argument on the part of the defendant were as follows:—

"1. That the third plea is a valid answer to the plaintiff's claim, as it shews that there never was any inception of the voyage insured:

"2. That the judgment of the American prize-court set out in the defendant's first rejoinder estops the plaintiff from denying the truth of the said third plea:

"3. That the seventh plea is good, as shewing a loss by peril not insured against:

"4. That such seventh plea is good, as shewing that the said venture was one in violation of the law of nations:

"5. That the seventh plea is good, as shewing a loss caused by the default and act of the assured:

"6. That the second replication to the seventh plea gives no answer to it: such replication admitting that the goods were shipped for the purpose of importation into the confederate states, and were liable to seizure:

"7. That the second replication to the seventh plea, if good, is sufficiently answered by the judgment of the American prize-court set out in the defendant's third rejoinder, which estops the plaintiff from setting up the matters relied on by him in his replication:

"8. That the eighth plea shews a valid answer to the plaintiff's claims, as the judgment of the American prize-court there stated estops the plaintiff from controverting the matters stated in such judgment, and shews that the plaintiff is not entitled to recover in this action."

(a)² See *Gist v. Mason*, 1 T. R. 88, and *Dalmady v. Molteaux*, there cited.

powers, contraband articles, subject to the right of seizure in transitu. This right has since been explicitly declared by the judicial authorities of this country (a). The right of the neutral to transport, and of the hostile power to seize, are conflicting rights, and neither party can charge the other with a criminal act." Wheaton (on International Law), edit. 1863, pp. 727, 767, 806, is to the same effect. Both those learned authors shew that it is not necessary that the ship or the goods should be going to a belligerent port: it is enough if the object and purpose of the shipper is that they shall ultimately reach a belligerent port. The insurance is not valid; the insurer being put in a position of risk which he never contemplated when he underwrote the policy. [Erle, C. J. You say the insurance is void by reason of a supposed purpose in the mind of the shipper?] Yes. It is the purpose in the mind of the assured which determines the character of the transaction. Suppose the plaintiff had an agent at Matamoras ready on receipt of the goods to ship them across the river;—would not the first step taken for that purpose be illegal? and would not the goods be contraband and liable to seizure immediately on leaving England? [812] [Erle, C. J. The consignee at Matamoras would be as willing to send the goods to New York as to Wilmington, if he could get as good a price, or a better.] There are numerous cases in which it has been held that a contract is avoided by reason of an illegal purpose in the mind of one of the contracting parties: see *The Gas-Light Company v. Turner*, 5 N. & C. 666, 7 Scott, 779 (in error, 6 N. C. 324, 8 Scott, 609); *Lightfoot v. Tenant*, 1 Bos. & P. 551; *Lutington v. Hughes*, 1 M. & Selw. 593; *Waymell v. Reed*, 5 T. R. 599. In *Lightfoot v. Tenant*, Eyre, C. J., says: "No man ought to furnish another with the means of transgressing the law, knowing that he intends to make that use of them. And it will seldom happen that this will be the whole for which he will have to answer. The man who knows that an illegal use is intended to be made of that which he is selling will be thereby impelled to use his knowledge to make the contract more beneficial to himself, and it may become his interest to stipulate for himself that the illegal use shall be made of the goods he sells: and so the illegal use may be the very gist of the contract. It is a possible case that a tradesman may wish to speculate in this contraband trade, and to do it by dividing the profits with some man of spirit and enterprize but without capital. Such a man would stipulate that the goods which he sold should be put on board a ship under a foreign commission, and should be sent to Calcutta to be there sold. His share of the profits would be found in the price originally fixed on the goods, but his hopes of payment would rest entirely on the returns of this contraband trade. Such a man would not advance 5l. worth of goods which were not to be employed in the contraband trade. It is essential to his views, and it enters into the spirit of his contract, that the goods shall be employed according to [813] their destination." Here, the seizure is the loss complained of: and that is brought about by the illegal act of the plaintiff himself. Capture, rightful or wrongful, is a total loss.

Then, as to the effect of the judgment in the prize-court at New York. The judgment of the foreign court is conclusive as to all the material facts which it finds as the basis of its adjudication. Lord Chief Justice Tindal, in *Dalglish v. Hodgson*, 7 Bingh. 495, 504, 5 M. & P. 497, says: "The general law upon the subject is well known, that the sentence of a foreign court of Admiralty of competent jurisdiction is binding upon all parties, and in all countries, as to the fact on which such condemnation proceeded, when such fact appears on the face of the sentence free from doubt and ambiguity. But it is at the same time as well established that, in order to conclude the parties from contesting the ground of condemnation in an English court of law, such ground must appear clearly on the face of the sentence. *It must not be collected from inference only.*" Assuming that to be a correct exposition of the law, what are the statements in this judgment? That the ship was knowingly on the voyage aforesaid laden in whole or in part with articles contraband of war, and had them in the act of transportation at sea, and that the said ship with her said cargo was not truly destined to the port of Matamoras, but, on the contrary, was destined to some other port or place, and in aid and for the use of persons then at war with the said United States, and in violation of the law of nations, and the ship's papers were simulated and false as to her real destination: and the sentence goes on to say that *thereupon*

(a) America. See *Richardson v. Marine Insurance Company*, 6 Mass. R. 102, 113; *The Santissima Trinidad*, 7 Wheaton, R. 283.

it was considered and adjudged that the ship and her cargo were subject to condemnation and forfeiture, and that the same should be condemned and forfeited accordingly. Here ample ground for a sentence of forfeiture is disclosed. The possession of simulated papers has always been held to justify seizure and condemnation of both ship and cargo. In the case of *The Franklin*, 3 C. Rob. Adm. R. 217, 224, Sir W. Scott, after time taken to consider, says: "I have deliberated upon this case, and desire it to be considered as the settled rule of law received by this court, that the carriage of contraband, with a false destination, will work a condemnation of the ship as well as the cargo. In the earlier case of *The Sarah Christina*, 1 C. Rob. Adm. R. 237, the court from a favourable regard to some particular circumstances, practised an indulgence in restoring the ship, but without freight and expenses, declaring it at the time to be an indulgence hardly reconcileable to just principle. Having now maturely and upon discussion considered the general point, I am decidedly of opinion that confiscation of the vessel is the legal result of the carriage of contraband under a false destination." The judgment of the prize-court is conclusive as to the possession of simulated papers and the false destination. It is not left in doubt upon what ground the condemnation proceeded. [Byles, J. Chancellor Kent says,—1 Comm. 150, 10th edit.,—"The act of carrying contraband articles is attended only with the loss of freight and expenses, unless the ship belongs to the owner of the contraband articles, or the carrying of them has been connected with malignant and aggravating circumstances; and, among those circumstances, a false destination and false papers are considered as the most heinous. In those cases, and in all cases of fraud in the owner of the ship, or in his agent, the penalty is carried beyond the refusal of freight and expenses, and is extended to the confiscation of the ship and the innocent parts of the [815] cargo (*a*). This is now the established doctrine."] The ground of condemnation here is, having on board goods contraband of war, and papers fraudulent and simulated as to their destination. If carrying contraband of war is not enough: if the possession of simulated papers is not enough: the essential inquiry was whether Matamoras was the true destination of the goods. The conclusion the court came to was that the papers were false, and that the true destination of the goods was some confederate port. [Erle, C. J. That the ship with her cargo was destined, not to Matamoras, but "to some other port or place:" it may be some neutral port.] It goes on, "and in aid and for the use of persons at war with the United States, and in violation of the law of nations." The propriety of the decision, it is conceded, cannot be inquired into: it is as conclusive as if the facts had been found by the verdict of a jury here.

Temple, in reply. It clearly is not illegal to supply a belligerent with contraband of war either in this country or in a neutral port. If a neutral be conveying contraband of war for the purpose of being converted to the use of one of the belligerents, if they are seized by a cruiser of the opposite party, the merchant can claim no protection or redress from his own sovereign. he takes the goods at his own risk: but any contract he may have made in respect of them in his own country is perfectly valid. The rule is well stated [816] in 1 Arnould on Insurance, 765: "All insurances on articles contraband of war are wholly void and incapable of being enforced in the courts of the *belligerent* country. If, however, affected by or for neutrals, and sought to be enforced in the court of a *neutral* state, the case would be different, for, it is not deemed unlawful in a neutral by his own government to be engaged in a contraband trade. The contraband articles, indeed, are liable to seizure and confiscation at the hands of the enemy; but the neutral is never punished by his own sovereign for his contraband shipments. The insurance, therefore, by a neutral of articles contraband of war, being per se a valid contract, may be enforced in the courts of the neutral country, provided the nature of the trade and of the goods was disclosed to the underwriter, or provided there be just ground, from the circumstances of the trade or otherwise, to presume that he was duly informed thereof." The seventh plea does not shew with any certainty that the object and purpose of the plaintiff was that the goods should be sent into a port in North America situate in one of the confederate states.

(a) In support of these positions the learned commentator cites Bynk. Q. J. Pub. b. 1, cc. 12, 14; Heinec. de Nav. ob Vect. Merc. Vetit. com. c. 2, § 6; Opera, tom. ii., 348; *The Stadt Enbden*, 1 C. Rob. Adm. R. 26, *The Jonge Tobias*, 1 C. Rob. Adm. R. 329; *The Franklin*, 3 C. Rob. Adm. R. 217; *The Neutralitet*, 3 C. Rob. Adm. R. 295; *The Edward*, 4 C. Rob. Adm. R. 68; *The Ranger*, 6 C. Rob. Adm. R. 125.

It may be that the plaintiff knew that they would arrive at a market at Matamoras principally frequented by confederate buyers: but it does not follow that he shipped the goods for that port with the intention that they should be forwarded thence to a confederate port. The ignorance of the underwriter alleged in the plea, is ignorance of that which it did not import the assurers to know, and therefore that allegation is wholly immaterial. There is nothing in the destination of the ship or goods to taint this contract with illegality, within any of the authorities referred to. Then, as to the sentence set out in the eighth plea, the grounds therein stated are not sufficient to justify the seizure. The court finds that *part of the cargo* was contraband [817] of war: it may be that the plaintiff's goods were not of that character; and the ship had liberty (by the policy) to touch and stay at any intermediate port or ports. The possession of simulated papers may afford evidence against *the ship*; but the owner of *the goods* is not responsible for the regularity of the ship's papers. In all the cases where simulated papers have been held to be a ground of condemnation, there have been circumstances which warranted the conclusion that the goods were enemy's property. Here, the adjudication proceeds upon a totally different ground, viz that the goods were intended to reach the hands of an enemy. [Lush. The prize-court has found as a fact that "the said ship with her cargo was not truly destined to the port of Matamoras, but, on the contrary, was destined to some other port or place, and in aid and for the use of persons then at war with the United States, and in violation of the law of nations,"—in effect, that the vessel did not sail on the voyage insured: and it is submitted that the plaintiff is bound by that finding.]

Cur. adv. vult.

ERLE, C. J., on a subsequent day delivered the judgment of the court (a):—

The declaration is on a policy of insurance on goods, from London to Matamoras, in the usual form, and alleges a loss in the course of that voyage by a peril insured against.

The seventh plea alleges that the goods were contraband of war, and were shipped by the plaintiff for the purpose of being sent to and imported into a port in a state engaged in hostilities with the United States, and were liable to be seized by the cruisers of the [818] United States as contraband of war: that the ship was carrying goods and papers which rendered her liable to be seized by such cruisers; and that the ship and goods were seized accordingly, which is the loss complained of,—of all which the defendant at the time of subscribing the policy was wholly ignorant.

The demurrer to this plea raises the question whether the facts alleged shew a defence: and our answer is in the negative.

The plea was probably intended to be a defence on the ground of the concealment by the plaintiff of material facts. But we do not find sufficient averments to establish that defence. As we read the plea, we take it to be consistent therewith that the goods of the plaintiff were sent from a neutral port to a neutral port in a neutral ship. The allegation in the declaration that the goods were sent from London to Matamoras, is admitted by the plea: and, although we cannot notice judicially the situation of Matamoras, so neither can the defendant rely on its proximity to the confederate states, or make any unfavourable inference therefrom against the plaintiff, if the goods were in the course of transport from a neutral to a neutral port. The better opinion seems to be that war does not give to a belligerent any right to seize goods on account of their quality: see the authorities collected in *Ortolan Diplomatie de la Mer*, vol. 2, pp. 165-213.

The allegation that the goods were shipped for the purpose of being sent to an enemy's port is an allegation of a mental process only. We are not to assume therefrom either that the plaintiff had made any contract or provided any means for the further transmission of the goods into the enemy's state, or that the shipment to Matamoras was an unreal pretence. If the goods were in a course of transmission, not to [819] Matamoras, but to an enemy's port, the voyage would not be covered by the policy: and that defence is raised in direct terms by the third plea. Here, the allegation does not deny the destination to the neutral port to which the insurance relates, but introduces a purpose existing in the mind of the assured, after the termination of the voyage insured, for the ulterior destination of the cargo and ship. It is consistent with that purpose, as here alleged, that the plaintiff made the consignment

(a) The case was argued before Erle, C. J., Byles, J., and Keating, J.

for mercantile profit as the end to be attained by him; in other words, that he knew of an effective demand for warlike stores at Matamoras, and was induced to send a supply by the expectation of a higher price, and that he expected that the purchase would probably be made on behalf of the confederate states, and in that sense had the purpose that the goods should pass into those states. In that sense, *price* was the ultimate end which he purposed to attain; and federal and confederate were alike indifferent as a means, provided he attained that end: and in a neutral territory he might lawfully sell to either.

The distinction between a mere mental purpose that an unlawful act should be done, and a participation in the unlawful transaction itself, is made more clear by reference to the cases of *Holman v. Johnson*, Cowp. 341, and *Lightfoot v. Tenant*, 1 Bos. & P. 554. In the former, the plaintiff in a foreign country sold goods to the defendant, knowing that he purposed to smuggle them into England: and in one sense the plaintiff there sold them with the purpose that they should be so smuggled; but, as he did not participate in any way in the unlawful transaction, the mere mental purpose did not avoid the contract of sale. In the second case (*Lightfoot v. Tenant*), the plaintiff sold goods to the defendant, to be delivered abroad in order that they should be sent unlawfully to the East Indies: [820] after verdict for the defendant on a plea alleging this fact, on motion for judgment non obstante verdicto, the objection was raised that the mere mental purpose of the vendor did not avoid the contract of sale: but the objection was answered by suggestion of the fact that the plaintiff's participation in the unlawful transaction went beyond the mere mental purpose, that he was taken to be a party to the whole project, and to be acting in the execution thereof in the sale, which was the cause of action: and upon these facts the contract was held void.

For these reasons, we think the averment "that the goods were shipped for the purpose of being sent to an enemy's port" (construing those words as we have done), is insufficient to establish that they were liable to seizure for a breach of neutrality.

The effect of the other allegations in the plea depends much on that which we have last considered. If goods fit for immediate use in war, and therefore of the quality described by the term contraband of war, are passing between neutrals, it seems that they are not liable to seizure by a belligerent. The right of capture, according to Sir William Scott's opinion expressed in the case of *The Imina*, 3 C. Rob. Adm. R. 168, attaches only where they are passing on the high sea to an enemy's port,—“They must be taken in delicto, that is, in the actual prosecution of a voyage to an enemy's port.”

The liability, therefore, of these goods to lawful seizure, although their quality was such as might make them contraband of war, depended on their destination: and they were not liable, unless it distinctly appeared that the voyage was to an enemy's port.

The further allegation that the ship was carrying goods and papers which made them liable to be seized, is immaterial as a ground of defence: for, these goods [821] are not alleged to be the plaintiff's goods, and the plaintiff is not shewn to be responsible for the ship's papers, nor for any other goods than his own. Also, if the voyage was to a neutral port, and the law be as above stated, the facts alleged do not shew that the ship and goods were liable to seizure.

Furthermore, the allegation that the ship was carrying papers which made her liable to be seized, is not strictly accurate, in reference to the law of nations. The papers alone are not a breach of neutrality so as to work a forfeiture of the ship: they are only evidence from which cause of forfeiture may be inferred: they may be evidence either of enemies' property or of destination to a blockaded port, or to an enemy's port, with contraband, and so be evidence on which the judge may find a cause of forfeiture proved: but they are in themselves no cause of forfeiture. The language of Sir William Scott, in the case of *The Franklin*, 3 C. Rob. Adm. R. 221, speaking of simulated papers, and saying that “this fraudulent conduct justly subjects the ship to confiscation,” must be taken with reference to the question before him,—whether the ship should be confiscated as well as the contraband cargo: and his decision is in the affirmative, and rightly if the ship-owner was knowingly conveying contraband to an enemy's port, of which knowledge papers indicating a false destination would raise a presumption.

These being the premises alleged in the plea, the allegation that the defendant

was ignorant of them is of no avail. If the defence is that the plaintiff has concealed a fact which he was bound to disclose, the plea should have been framed accordingly. As it stands, it shews no wrongful act on the part of the plaintiff towards the insurers.

If the proper construction of the premises in the [822] plea be different from that which we have come to, still the allegation of the defendant's ignorance of those premises would not make the plea a good defence on the ground of concealment. The insurance is against capture, lawful and unlawful; and the defendant, in order to discharge himself, must shew a concealment by the assured. Mr. Phillips,—Phillips on Insurance, vol. 1, § 531,—says: "Concealment is where one party suppresses or neglects to communicate a material fact." It is quite consistent with anything appearing on this record, that a letter from the plaintiff may have miscarried, or that the defendant may have remained in ignorance, without any default of the plaintiff. The allegation, therefore, of the ignorance of the defendant is of itself immaterial, and has no effect in avoiding the policy; and the result is that we consider the seventh plea to be bad.

We proceed now to the eighth plea, which in substance alleges that the ship did not sail on the voyage covered by the policy.

The third plea pleads the same ground of defence as a fact in direct terms: the eighth plea pleads it by way of estoppel, setting out a judgment in which the fact is supposed to be stated as a matter whereon the court had adjudicated, and then relying on the judgment to estop the plaintiff from denying that fact. The same estoppel is the ground of two rejoinders to two replications: and the eighth plea and the two last-mentioned rejoinders may be considered together.

The defendant, in support of these pleas, relied on the rule that sentences of foreign courts deciding questions of prize are to be received as conclusive evidence in actions on policies, on every subject immediately and properly within the jurisdiction of the court on which it has professed to decide judicially: see the opinions of the judges in *Lothian v. [823] Henderson*, 3 Bos. & P. 499: and he contended that the judgment as pleaded shewed that the voyage on which the ship was captured was not a voyage from London to Matamoras. The plaintiff, in answer, contended,—first, that the decision does not profess to determine the matter of fact on which the defendant relies,—and, secondly, if it had decided that matter of fact, still that the decision could not be pleaded as an estoppel. And we are of opinion that the plaintiff is right.

The rule making the decision of a court which creates the status of a person or thing conclusive upon all persons as to the existence of that status, has been regarded as salutary. Sentences of nullity of marriage in the Ecclesiastical courts, of forfeiture in the Exchequer, of settlement of paupers by the quarter sessions, and of prize in prize-courts, are examples. In *Hughes v. Cornelius*, 3 Show. 495, the rule was applied within salutary limits, where, in trover for a ship by the former owner, the sentence of a prize-court was held conclusive to shew that the property had been changed. See *Doi v. Oliver*, 2 Smith's Leading Cases, p. 677, where the whole subject is fully considered with much learning and lucid arrangement.

But the rule making the finding of a judge upon any matter of fact upon which he professes to form his judgment conclusive upon all the world, has been supposed to be anomalous, and to produce pernicious results: see Lord Eldon's opinion in *Lothian v. Henderson*, 3 Bos. & P. 499, to that effect. Also in *Geyer v. Aguilar*, 7 T. R. 695, 681, Lord Kenyon speaks of the rule as a source of the grossest injustice. So, in *Fisher v. Ogilby*, 1 Campb. 418, Lord Ellenborough, speaking of this rule, says: "The doctrine rests on a case in Shower, which does not fully support it; and the practice of receiving these sentences often leads in its consequences to the grossest injustice."

[824] We would further refer to *Dalgleish v. Holmson*, 7 Bingh. 495, 5 M. & P. 407, where Tindal, C. J., says that the sentence of a prize-court is not conclusive as to the ground of condemnation, if there be any ambiguity as to what the ground is. It must not be left in uncertainty whether the ship was condemned on a ground which would be just by the law of nations, or on another ground, which would amount only to a breach of the municipal regulations of the condemning country. Although these sentences must be received in evidence, still the precedents shew that, when received, they have been carefully examined, for the purpose of seeing whether the matter of fact in proof of which they are adduced was clearly and certainly found by the

judge whose sentence is relied on. *Bernardi v. Mottous*, 2 Dougl. 581, and *Calvert v. Borill*, 7 T. R. 523, are two among numerous cases which might be cited to this effect.

We now proceed to examine the judgment set out in the eighth plea. The condemnation appears to us to have been for carrying contraband of war intended to be for the use of the enemies of the United States : and the sentence, so far from deciding that the ship with the said goods did not sail on the voyage from London to Matamoras, appears to us to express that she was on that voyage when she was taken. The first matter of fact found by the judge is, that the ship was knowingly on *the voyage aforesaid* (that is, from London to Matamoras), laden with contraband. The second is, that the said ship with the said cargo was not truly destined to Matamoras, a neutral port, and for the purpose of trade and commerce within the authority and intendment of public law, but was destined for some other port or place, and in aid and for the use of the enemy, and in violation of the law of nations : and that the ship's papers were simulated and false.

[825] If the judge meant to find that the ship was not bound to Matamoras, but, on the contrary, to a port of the enemy, the finding would have been so expressed. But, if he meant to find that she was bound to Matamoras, not for the purpose of commerce with the inhabitants thereof, but for the purpose of such a sale or transfer there as that the confederates should get the use of the cargo, all the words of the judgment have their usual meaning and effect. We have no jurisdiction to inquire into, nor are we at all considering, the validity of the legal grounds of the judgment : our task is, to ascertain what matter of fact the judge found to exist. He may have considered that trading with the confederates was not within the authority and intendment of public law, and was in violation of the law of nations ; and that a voyage to Matamoras, in order that the cargo should be transferred from thence to some port or place for the use of the confederates, was a destination of the cargo for such port or place, and made it liable to confiscation : and that the papers were simulated and false, because they represented Matamoras as the final destination, and concealed a purpose of ulterior destination.

By this examination of the judgment set out in the plea, we are led to the conclusion that the learned judge did not intend to find as a matter of fact, either that the ship had not sailed on a voyage to Matamoras, or that, after having so sailed, she had deviated from that voyage. But, on the contrary, he condemned her as lawful prize because she was in prosecution of that voyage with an ulterior destination, either for the cargo or the ship, or both, as above explained.

The judgment, therefore, does not sustain the inferences of fact which the defendant seeks to establish thereby ; nor does it sustain his claim of right to prevent the plaintiff from shewing the truth in respect of this fact : and the plea is therefore bad.

[826] Thus far the judgment is the judgment of myself, my Brother Byles, and my Brother Keating. The other answer to the eighth plea is the opinion of my Brother Byles and myself. My Brother Keating neither assents nor dissents.

We are further of opinion that the eighth plea and the same rejoinders as last mentioned are bad, because the finding of a matter of fact in the course of the adjudication of a prize-court cannot be pleaded as an estoppel in the cases where, if adduced in evidence, the judgment would be received as conclusive proof of the fact so found. Although the cases are numerous in which the evidence has been admitted, still there is no precedent for the plea of the fact as an estoppel, that we have been able to find.

The principle on which the evidence was held admissible is not clear. Lord Eldon, in *Lotham v. Henderson*, 3 Bos. & P. 499, says it was introduced at first against the insurers to prove the loss, and was afterwards used by the insurers for their defence. Lord Ellenborough, in *Fisher v. Ogle*, cited *supra*, speaks of it as a matter of comity between the two courts. Such evidence does not fall within any legal description of matter of estoppel ; nor is it guarded by the safeguards against abuse which restrict matters of estoppel in respect of parties and of subject-matter. In *Barrs v. Jackson*, 1 Y. & C. C. C. 585, cited in *Doe v. Oliver*, 2 Smith's Leading Cases, 677 (5th edit.), Knight Bruce, V. C., gives an elaborate judgment on estoppel, and lays down the principle thus,—“Generally, neither the judgment of a concurrent nor of an exclusive jurisdiction is conclusive evidence of any matter which came collaterally in question before it, though within the jurisdiction, or of any matter incidentally

cognizable, or of any matter to be inferred by argument from the judgment; and a judgment is final only for its proper purpose and object."

[827] The admissibility of the judgments of prize-courts upon matters of fact, is not restricted within these limits; and, although we are bound here to hold that they are admissible so far as the decided cases have established their admissibility, yet beyond that limit we would not go: and we consider that the attempt to use the judgment as an estoppel does transgress that limit, there being no precedent for it. In relying upon the absence of any precedent, we do not consider that this objection is confined to matter of form. It restricts in some degree the tendency of such evidence to defeat real truth by technical proof: and it may have the effect of preventing the foreign judgment from being misunderstood or misapplied.

If the judgment can only be adduced in evidence, and is not pleadable as an estoppel, the meaning may be ascertained by adducing in evidence the preliminary proceedings and other matters referred to in the judgment.

In *Bernardi v. Mabbau*, 2 Dougl. 575, Lord Mansfield admitted a French arrêt, and expressed his opinion that the procès verbal on which the judgment was founded ought to have been given in evidence at the trial by the plaintiff, to shew the meaning of the judgment, that is, to shew whether the court intended to find enemy's property, and so to prove a breach of warranty of neutrality, or to condemn by reason of an arrêt against throwing papers overboard. So, in *Christie v. Secretan*, 8 T. R. 192, the court by the special case had power to refer to the proceedings before the Tribunal de Commerce, and also to a printed copy of a treaty between France and America, to shew the meaning of the judgment. So, in *Pollard v. Bell*, 8 T. R. 434, the court referred for the same purpose to the judgments in the Tribunal de Commerce at Bordeaux, in the Tribunal Civil de la Gironde, and in the [828] Cour de Cassation at Paris. So, in *Dalrymple v. Hudson*, 7 Bingh. 494, 5 M. & P. 407, the circumstances under which the ship entered the River Plate were admitted in evidence, to shew the meaning of the judgment,—that is, to shew whether she was condemned for breaking blockade or for disobedience to a municipal law of Brazil.

These are the considerations which induce us to adhere to precedent and reject the plea of estoppel.

If the judgment here in question should be hereafter adduced in evidence in support of the third plea, it may be that it would be found to refer to pleadings and doctrines of public law, and to various classes and items of proof relating to acts and declarations of parties on board, and so forth: and, if the judgment was given in evidence, these matters so referred to therein might be also adduced in evidence, and might shew that the fact was not found by the judge, as supposed by the defendant. This inquiry would not tend to impeach the conclusive effect of the judgment upon the question of prize, but might prevent a mistaken assumption from prevailing over the truth.

For these reasons, we give our judgment on these demurrers for the plaintiff.

We consider the eighth plea open to the further objection, that it does not plead the issuable fact in respect of the voyage, but the evidence which might prove that fact. It pleads the probans, and not the probandum. But, as this objection would not apply to the rejoinder to the replication to the third plea, we do not further advert to it.

Judgment for the plaintiff (a).

[829] IN THE EXCHEQUER CHAMBER.

MICHAELMAS VACATION, 1864.

MADDICK AND ANOTHER v. MARSHALL. Nov. 30th, 1864.

[S. C. 11 L. T. 611; 10 Jur. N. S. 1201; 13 W. R. 205. Followed, *Riley v. Packington*, 1867, L. R. 2 C. P. 541.]

The defendant and others, as provisional directors of a projected joint-stock company, resolved at a meeting that the company should be advertized in several newspapers,

(a) The matter was not further contested.

and directed their secretary to take the necessary steps for that purpose. The secretary accordingly applied to an advertizing agent, to whom (on his calling at the company's offices to inquire under what authority the secretary was acting) *he showed the prospectus and the above resolutions*; — Held, — affirming the judgment of the Common Pleas, — that there was evidence to go to the jury that the directors who were parties to the resolutions were responsible for the debt thereby incurred, notwithstanding they had been induced to allow their names to appear as directors upon the faith of the secretary's assurance that all the preliminary expenses would be provided for by *him*, and that they would incur no liability, — there being nothing to shew that the secretary, in giving the orders, or in communicating to the plaintiffs the resolutions of the directors, had acted beyond the scope of his actual or apparent authority as secretary.

This was an action brought by the plaintiffs, who are advertizing agents in London, against the defendant, a merchant in London, for the recovery of 1376l. 5s. for advertizing "The Adelaide (North Arm) Port and Railway Extension and Land Company, South Australia." The declaration contained counts for work and materials provided, for money paid, and money due on an account stated. Plea, never indebted. Issue.

The cause was tried before Erle, C. J., at the Kingston Surrey Assizes, 1864. The evidence was in substance as follows:—

Alfred Maddick, one of the plaintiffs, stated that he became acquainted with one Payne (the secretary of the company) in January, 1863, who promised to get him and his partner appointed agents to the company: that, in June of that year, he called at the company's offices, 36 Old Broad Street, City, and there saw Payne, and asked him who were to be the responsible parties for his account, to which Payne answered, "The directors, of course," telling him that "the minutes were passed," and handing him a prospectus which described the company as consisting of a capital [830] of 400,000l., in 20,000 shares of 20l. each, and stated the company to be formed for the purpose of affording more convenient accommodation for the shipping and commerce of the colony of South Australia, and contained (amongst others) the name of Marshall (the defendant) as one of the directors, and that of Payne as secretary: that, on the 10th of June, 1863, he received from Payne an order (which was also signed by one Allen, who was represented by Payne to be the "manager" of the company) to advertize the company in a great number of newspapers in town and country; that the first advertizement was accordingly inserted on the 11th of June; that he again saw Payne on the 11th of June, when that gentleman produced to him the minute-book of the company, and pointed out to him the minutes dated the 2nd of April, 1863, and 2nd and 5th of June, 1863, all of which were signed by Marshall as chairman.

The minute of the 2nd of April, 1863, purported to be a minute of a meeting of "the gentlemen interested in the establishment of the company." The proposed prospectus having been read and discussed, it was resolved, amongst other things, that certain persons (amongst whom was the defendant) should be directors; that the prospectus then read be approved and adopted and printed forthwith; that Payne be the secretary; and "that it is inexpedient to advertize the company pending the Easter Holidays, but that the prospectus of the company be forwarded to the daily papers, with a request to announce its issue; and that the prospectus be advertized in the necessary newspapers on Wednesday next, the 8th instant; and that, in the meantime, it be distributed and circulated by post and otherwise to such persons as are likely to become subscribers of capital."

The minute of the 2nd of June stated that it was [831] resolved, amongst other things, "that the prospectus be finally settled and revised by a committee consisting of Mr. Marshall, Mr. Spicer, and Mr. Browne, with power to deal with any matters connected therewith; and that, when approved by them, the prospectus be printed and forthwith advertized."

And by the minute of the 5th of June "authority was given to the secretary to have the prospectus printed, as finally revised."

The witness further stated that the whole of the advertizements charged for were inserted between the 11th of June and 25th of August, 1863, on which last-mentioned day the plaintiffs received notice to cease advertizing; that, his account having been sent in to the offices of the company, he made repeated applications to Payne for

a settlement without effect: that he addressed a letter to Mr. Marshall containing the following passage.—"We informed your secretary before commencing the business that we could not undertake the advertizing unless we were furnished with the proper authority from the gentlemen then serving on the direction: copies of the usual minutes passed authorizing the insertion of the advertizements were then handed to us, upon which we acted;" and that, no answer being returned to this letter, the plaintiff instructed their solicitors to apply for payment to Marshall, who repudiated all liability.

On cross examination, the witness stated that he had had a great deal to do with advertizing public companies: that he was never told that Payne was the promoter of this company, or that he (Payne) had procured several gentlemen to act as directors and that the promoters were to pay the preliminary expenses; and that he was never either by Payne or by Allan informed that he was to look to them for payment, and that they were to be the responsible parties.

[832] Payne, who was called as a witness for the plaintiffs, on his examination in chief, stated that he was secretary of the company; that the defendant was introduced to him in March, 1863; that twenty-five shares qualified as a director; that the defendant was to have free shares presented to him; that the resolutions were signed by the defendant; that the defendant was present when the prospectus was settled; that he afterwards saw the plaintiff, Maddick, who said he would like to see if he (Payne) had a proper authority, before advertizing the prospectus; that he said it was generally given in the form of a minute from the board, and he should like to see it; that he (Payne) then shewed him the minute, when he said it was satisfactory, and he would advertize the company; that the newspapers and lists were always laid on the board table; that the defendant took great interest in the company, and saw the newspapers and lists; that, with the defendant's sanction, he, on the 23rd of June, 1863, addressed a letter to one Purdy, the manager of the Australian Bank, informing him that advertizements inviting subscriptions for the company's capital would be inserted in the leading papers in Adelaide, Melbourne, and Sydney, and requesting him to instruct the agents of the bank to receive deposits for the company; and that the advertizements were laid before the board.

On cross-examination, Payne stated that Allan and his co-owner of the estates agreed to be purchased by the company had contracted to pay him 10,000l. out of the purchase-money, in consideration of his services; that he (Payne) had never agreed to pay the preliminary expenses; that it was always understood that Allan was to pay them; that he (Payne) had applied to several gentlemen to become directors, but not to the defendant; that he wrote letters to the directors. [833] agreeing that they were not to be looked to for preliminary expenses, telling them that Allan was in a position to pay and would pay all preliminary expenses, including advertizements, and that they (the directors) were not to be called upon; that there was no allotment of shares; and that he did not tell the plaintiff before the orders were executed that there was an agreement that Allan should pay all the preliminary expenses.

The plaintiffs' books were then put in, shewing that the company alone was debited in them.

The defendant's evidence was in substance as follows:—I came to arrangements that I was not to be liable for preliminary expenses, before I joined as a director. The arrangement was, that the directors were to be guaranteed against all preliminary expenses by Payne and Allan, who, I was told, were the promoters of the company. On the faith of that, I joined the company. I remember a board meeting before November, at which the question of preliminary expenses was discussed. Phillips (the solicitor to the company), Allan, and Payne, were present. Several directors, and I among them, asked who was to pay the preliminary expenses; when Payne and Allan said arrangements had been made; and Phillips said he had satisfied himself that was so. Something was said about an undertaking. Mr. Phillips was asked to give his undertaking; but he said it was unusual for professional men to give guaranties, but we might trust to his professional character that it was all right. It was after that I attended at the meetings. I never saw the defendant before to-day; and I never had any communication with him by letter, and never heard of any contract made by Payne with him on my behalf, until the dispute with the plaintiff. I never knew that Payne had shewn the minute-book. I was not aware [834] he had shewn it to any one. The plaintiffs' account was never submitted to the board by Payne;

nor was it ever mentioned. I did not hear of the claim until I received Maddick's letter of the 5th of January last.

Allan, who was called on the part of the defendant, stated that he and his partner were the owners of the property in Australia; that he first became acquainted with Payne in 1861; that Payne volunteered him his services; that he was to give him 10,000*l.* out of the first moneys, out of which he (Payne) was to pay every preliminary expense; that they made an estimate of them, in which 1000*l.* was put down as the probable expense of advertizing; that the subject of the preliminary expenses was discussed at the first meeting of the company; that Payne was present, and said that all arrangements had been made; that the defendant was present, and he then asked Phillips, the solicitor, to give a letter or undertaking, when he said it was not usual for solicitors to give an undertaking; that he never heard the advertizements discussed at board-meetings, that is, the paying for advertizements; that the advertizements were to be paid for by Payne, as part of the preliminary expenses; and that Payne told him he had arranged with Mr. Maddick as to the advertizing question.

Mr. M^r Arthur stated that he was applied to by Payne to become a director; that, at first, he declined altogether; that he afterwards consented to join; that he asked who was to pay preliminary expenses; that Payne then said he would give him a letter of guarantie that none of the directors should be liable to pay preliminary expenses; that he took up and paid for shares to qualify him as a director; that he understood from Payne that some letter of guarantie had been given to other directors, and that the money was not to come from the funds of the company.

[835] On the part of the defendant it was submitted that there was no evidence to go to the jury of the defendant's liability to the plaintiffs' claim.

The learned judge thought there was evidence to go to the jury, but reserved leave to the defendant to move to enter a nonsuit, if the court should think he ought to have given such leave; and, subject thereto, he left to the jury the questions whether the defendant had held out Payne, the secretary, to the plaintiffs as having authority to pledge the defendant's credit for the advertizements, and whether the plaintiffs had trusted to the defendant's credit or had trusted Payne and Allan,—telling the jury that, if the plaintiffs looked to Payne and Allan, the defendant was entitled to the verdict.

The jury returned a verdict for the plaintiffs for the amount claimed, subject to arrangement.

In the following Easter Term the defendant moved for a rule nisi to enter a nonsuit. The court, however, refused to grant it,—holding that the directors who were parties to the resolutions authorizing the insertion of the advertizements were responsible for the cost thereby incurred, notwithstanding they had been induced to allow their names to appear as directors upon the faith of the secretary's assurance that all preliminary expenses would be provided for by him, and that they would incur no liability: there being nothing to shew that the secretary, in giving the orders, or in communicating to the advertizing agents the resolutions of the directors, had acted beyond the scope of his actual or apparent authority as secretary: see 16 C. B. (N. S.) 387.

Against this decision the defendant, with the leave of the court, appealed, and the case now came on for argument in the Exchequer Chamber before Pollock, C. B., Crompton, J., Bramwell, B., Mellor, J., and Shee, J.

[836] Lush, Q. C. (with whom was J. Brown), for the appellant. The question is whether there was any evidence to go to the jury to fix the defendant, to shew that he authorized the secretary (Payne) to pledge his credit. [Pollock, C. B. He gave the secretary the means of obtaining credit, by shewing a plausible ground which might induce any one to give him credit.] Payne, without authority from the defendant or any of the other directors, shewed the plaintiff the resolutions directing him to advertize the company, without disclosing the circumstances under which the parties had agreed to become directors. In giving judgment in the court below, Willes, J., states the substance of the evidence to be that the work was done in procuring advertizements to be inserted in certain newspapers for a company of which the defendant was a provisional director, that his name appeared as such in the prospectus, that it was necessary to the process of forming a company that advertizements should be published, and that the defendant and others of the directors at a meeting had resolved that they should be so published, and had given directions which ordinarily would have authorized their secretary to order the work in question to be done. That

might be so, provided there was no arrangement to the contrary. The learned judge then goes on, "Up to this point the case is a clear one. In none of the numerous cases to which allusion has been made has the question ever arisen in the present form; because nobody ever entertained a doubt, whatever the position occupied by provisional directors as to the secretary that, upon a resolution of the provisional directors that advertizements shall be inserted, acted upon by the secretary, the person advertizing may sue the persons who made the resolutions and so authorized the advertizements to be inserted. The resolutions of the 2nd of June, [837] therefore, was a plain direction to the secretary, on the part of the provisional directors, to cause the work to be done *for them*." This, it is submitted, is not correct. The secretary had no authority to communicate a part of the arrangement, and withhold the rest. After observing upon the "secret arrangement" between the directors and the secretary, his lordship adds,—“It appears to me that the directors *did* authorize the secretary to represent, if the inquiry were made of him, what was the authority under which he acted. It was most natural that such an inquiry should be made. It is in the ordinary and necessary course of what would take place upon such a resolution being entered into. If a man is to be bound by the ordinary and necessary consequences of his acts, the defendant must be responsible for the orders given by the secretary.” That reasoning, it is submitted, is entirely fallacious. If the resolution had gone on to say, “such advertizements to be inserted at the sole expense of Payne,” could it have been said that the secretary had authority from the directors to shew part of the arrangement and conceal the rest? That is, in effect, what Payne did here. The minute-book is a mere private record of the transactions of the company. The only authority Payne had was to advertize at his own expense. The directors did not authorize him to go to the plaintiffs and tell them half the truth. [Pollock, C. B. The signing the resolution was a fact. The enveloping it in other circumstances does not affect the question, which is, whether the directors are not responsible for the representations which they enabled the secretary to make.] There is no evidence that the directors authorized the secretary to make any representations at all. The mere fact of their being provisional directors does not impose any liability on the parties or confer upon the secretary [838] any authority to fix them with contracts. The true doctrine is that put by Pollock, C. B., in *Reynell v. Lewis* and *Widd v. Hopkins*, 15 M. & W. 517, 526: “The plaintiff, on whom the burden of proof lies in all these cases, must, in order to recover against the defendant, shew that he (the defendant) contracted expressly or impliedly; expressly, by making a contract with the plaintiff; impliedly, by giving an order to him under such circumstances as shew that it was not to be gratuitously executed: and, if the contract was not made by the defendant personally, it must be proved that it was made by an agent of the defendant properly authorized, and that it was made as his contract. In these cases of actions against provisional committee-men of railways, it often happens that the contract is made by a third person: and the point to be decided is whether that third person was an agent for the defendant for the purpose of making it, and made the contract as such. The agency may be constituted by an express limited authority to make such a contract, or a larger authority to make all falling within the class or description to which it belongs, or a general authority to make any; or it may be proved by shewing that such a relation existed between the parties as by law would create the authority, as, for instance, that of partners, by which relation, when complete, one becomes by law the agent of the other for all purposes necessary for carrying on their particular partnership, whether general or special, or usually belonging to it; or the relation of husband and wife, in which the law, under certain circumstances, considers the husband to make his wife an agent. In all these cases, if the agent, in making the contract, acts on that authority, the principal is bound by the contract, and the agent's contract is his contract, but not otherwise.” In *Lindley on Partnership*, p. 45, it is said that “the doctrine that a person [839] holding himself out as a partner, and thereby inducing others to act on the faith of his representations, is liable to them as if he were in fact a partner, is nothing more than an illustration of the general principle of estoppel by conduct acted on and explained in *Pickard v. Sears*, 6 Ad. & E. 469, 2 N. & P. 488, and *Freeman v. Cooke*, 2 Exch. 654.” Suppose the directors had given the secretary 1000*l.* to pay for these advertizements at the time the resolution for their insertion was passed, and the secretary had shewn the plaintiffs the resolution, suppressing the fact of his having received the money, —could it have been contended in that case that the directors would have been

liable? And, in what does that case differ from the actual facts? In *For v. Clifton*, 6 Bingh. 776, 4 M. & P. 676, the fact of the plaintiff being shown by the secretary a book containing the names of the defendants as shareholders and partners in the concern, was held to be no evidence of their having been held out as such by their authority. The resolution here contained mere instructions from the directors to their agent; it never was intended to be communicated to any one. [Shee, J. It was passed for the purpose of being acted upon: and it was a direct order to the secretary to advertize.] No doubt: but that must be taken with reference to the previous agreement, that this and all the other preliminary expenses were to be provided for by Payne. He never had authority to pledge the credit of the directors. [Bramwell, B. The Lord Chief Justice seems to think that the transaction amounted to an authority by Marshall and the others to Payne to give the orders for the advertizements upon their responsibility, they looking to him for an indemnity.] The arrangement was, not that Payne should reimburse the directors the preliminary expenses, but that he was to pay them himself.

[840] Montagu Chambers, Q. C. (with whom was J. Murphy), contra (a)¹. According to all the cases, beginning with *Rennell v. Lewis* and *Wgld v. Hopkins*, the learned judge would have been wrong if he had withdrawn this case from the jury. The defendant, as one of the directors of this company, not only held out Payne as a person authorized to do all acts usually falling within the scope of a secretary's duty, but, further, he signs the resolution authorizing him to do the very thing which the plaintiffs now seeks to be paid for. The defendant is an active party throughout. He now says that, notwithstanding all that he did and authorized to be done, he is not responsible, because he only consented to act as a director upon Payne's assurance that all the preliminary expenses of setting the concern afloat were to be paid by Payne, and that he did not authorize Payne to shew the plaintiffs the resolution directing the insertion of the advertizements. [Pollock, C. B. There is no evidence that Payne was desired not to shew the minute-book: and I apprehend the secretary did perfectly right in shewing it for any lawful purpose.] The insertion of these advertizements was essential to the launching of the concern: and it is an universal rule that, if a thing is done for [841] the benefit of another, and he knows it has been done, and takes advantage of it, he is responsible for it. Where an agent appears to be clothed with a general authority, the principal cannot repudiate his acts because of some secret arrangement qualifying and restricting the apparent general authority. [Crompton, J. That does not quite agree with the doctrine laid down by the majority of the court of Common Pleas in *Jolly v. Rees*, 15 C. B. 628 (a)². The authority of a wife seems to stand upon peculiar and perhaps not very accurately-defined grounds. A strong instance of the liability of a principal for the act of his agent is found in the case of *Horn v. Nichols*, 1 Salk. 289, Holt, 462, which is frequently cited. There, in an action on the case for a deceit, the plaintiff set forth that he bought several parcels of silk for silk, whereas it was another kind of silk, and that the defendant, well knowing this deceit, sold it him for silk. On the trial, upon not guilty, it appeared that there was no actual deceit in the defendant, who was the merchant, but that it was in his factor beyond sea: and the doubt was, if this deceit could charge the merchant. And Holt, C. J., was of opinion that the merchant was answerable for the deceit of his factor, though not criminaliter, yet civiliter; for, "seeing somebody must be a loser by this deceit, it is more reason that he that employs and puts a trust and confidence in the deceiver should be a loser, than a stranger." Here, the defendant and his co-directors employed Payne, and put a trust and confidence in him: and

(a)¹ The points marked for argument on the part of the plaintiffs, were as follows:—

"That there was evidence that Payne was authorized to pledge the defendant's credit,—that the defendant authorized the performance of the actual work in respect of which the action was brought,—that Payne had at least apparent authority to pledge the defendant's credit,—that there was evidence that the defendant authorized Payne to represent him as ordering the advertizements to be inserted,—that the defendant, by becoming a party to the resolutions, enabled Payne to get credit from the plaintiffs,—and that the private arrangements between Payne and Allan and the directors were not properly admitted in evidence against the plaintiffs."

(a)² See *Ligan v. Sams*, 12 Q. B. 460, which was not referred to in *Jolly v. Rees*.

it is fit that he rather than the plaintiffs should be the loser if that confidence was misplaced. Not only was there evidence of authority in Payne to do as he did, which it was the duty of the learned [842] judge to leave to the jury, but evidence which could lead the jury to no other conclusion than that to which they came. The defendant's own evidence puts him out of court. "The arrangement," he says, "was, that the directors were to be guaranteed against all preliminary expenses by Payne and Allan." What is a guarantie? It is an engagement by a third party to indemnify or hold one harmless if he is called upon to pay. [Crompton, J. It might well have been supposed that the advertizements would not have been inserted on Payne's credit only. Channell, B. It clearly was a question for the jury. Shee, J. And I do not see how they could have come to any other conclusion than they did.]

Lush was heard in reply.

POLLOCK, C. B. It is the opinion of the whole court that the judgment of the court of Common Pleas must be sustained. We are all clearly of opinion that the resolution, signed by the defendant which, directed the secretary to cause the advertizements to be inserted, could not be excluded from the consideration of the jury. So far as that went, the case is altogether unaffected by the private arrangement between the directors and Payne as to the preliminary expenses. And, even if that was to have any weight, the question must still have been left to the jury. I concur in every one of the reasons given by the judges in the court below. In fact, this was attempting to set up a secret agreement inconsistent with the contract with the plaintiffs for the purpose of binding them. The only question, however, for us is, whether there was any evidence to go to the jury. We think there was, and on that ground affirm the judgment.

Judgment affirmed.

COMMON BENCH REPORTS. New Series. CASES
 ARGUED and DETERMINED in the COURT of
 COMMON PLEAS, and in the EXCHEQUER
 CHAMBER, in Hilary and Easter Terms and
 Vacations, 1865. By JOHN SCOTT, Esq., of the
 Inner Temple, Barrister-at-Law. Vol. XVIII.
 London, 1865.

[1] CASES UPON APPEAL FROM DECISIONS OF REVISING BARRISTERS, ARGUED
 AND DETERMINED IN THE COURT OF COMMON PLEAS, IN MICHAELMAS AND
 HILARY TERMS, IN THE TWENTY EIGHTH YEAR OF THE REIGN OF VICTORIA.

The judges present at the argument of these cases, were.—Erle, C. J., Byles, J.,
 and Keating, J.

BOROUGH OF DEVONPORT.

RICHARD BENNETT ORAM, *Appellant*: EDWARD WILLIAM COLE, *Respondent*.
 Nov. 18th, 1864.

[S. C. H. & P. 87: 34 L. J. C. P. 52: 11 L. T. 451: 10 Jur. N. S. 1206;
 13 W. R. 268.]

The borough of Devonport consists of the parish of Stoke Damerel and the parish or
 township of East Stonehouse. Each of these parishes has distinct churchwardens
 and overseers, and distinct places of worship; and separate list of voters are stuck
 up at the several places of worship by the respective churchwardens and overseers
 of each parish or township:—Held, that the objector sufficiently described himself
 in his notice of objection by stating that he was “on the list of voters for the
 borough of Devonport and township of East Stonehouse.”

1. At a court held for the revision of the lists of voters for the borough of Devon-
 port, Edward William Cole objected to the name of John Adams being retained upon
 the list. The notices of objection were duly served both upon the overseers and on
 the voter, and were in the following form:—

[2] “To Mr. John Adams, 33 Union Street, East Stonehouse.

“I hereby give you notice that I object to your name being retained on the list
 of persons entitled to vote in the election of members for the borough of Devonport
 and township of East Stonehouse.

“Dated this 24th day of August, 1864.

“EDWARD WILLIAM COLE,
 of 69 Durnford Street, on the list of voters
 for the Borough of Devonport and town-
 ship of East Stonehouse.”

2. It was objected to these notices that it did not appear from them on what list
 the objector's name was to be found, and moreover that there was in fact no such list
 as that described in the notice of objection.

3. The borough of Devonport consists of the parish of Stoke Damerel and the parish or township of East Stonehouse. Each of these parishes has distinct churchwardens and overseers, and distinct places of worship; and separate lists of voters are stuck up at the several places of worship by the respective overseers and churchwardens of each parish or township.

4. The list stuck up by the churchwardens and overseers of Stoke Damerel is headed,—“List of persons entitled to vote for the borough of Devonport, in respect of property occupied within the parish of Stoke Damerel.”

5. The list stuck up by the churchwardens and overseers for the parish or township of East Stonehouse is headed,—“List of persons entitled to vote for the borough of Devonport, in respect of property occupied within the township of East Stonehouse.”

6. On this list the name of the said Edward William Cole appeared with the place of residence as stated in the notice of objection. There is no other Durnford Street in the borough of Devonport than the Durnford [3] Street in which the said Edward William Cole lives; and that is within the township of East Stonehouse.

7. The like objection was made to the names of thirty-nine other persons being retained on the lists, the notice of objection in each case being in the same words.

8. The revising-barrister held the notices of objection to be good, and expunged the several names from the register. The appeals were consolidated.

9. If the court should be of opinion that the notices of objection were insufficient, the name of John Adams and those of the thirty-nine other persons mentioned in the schedule annexed to the case, were to be restored to the list of voters from which the same had been expunged, and the register of voters was to be altered accordingly. But, if the court should be of opinion that such notices of objection were sufficient, the register of voters was to remain unaltered.

Karslake, Q. C. (with whom was Lopes), for the appellant. The description of the objector at the foot of the notice in question is not sufficient: there is no such list of voters as that described. It is not enough to follow strictly the form given in Sched. B. No. 10 to 6 & 7 Vict. c. 18. In *Eidsforth, App., Farrer, Resp.*, 4 C. B. 9, 1 Lutw. Reg. Cas. 517, in a notice of objection the objector was described as “R. F., of, &c., on the list of voters for the borough of L.” The register of voters for the borough of L. consisted of four separate lists,—one, of 101. householders for each of three townships comprised in it,—and one of the freemen of the borough. The objector’s name was on the last-mentioned list only: and it was held that he was insufficiently described in the notice, and that the inaccuracy of description was not cured by s. 101. Wilde, C. J., there says that the legislature evidently meant to re [4]quire the particular parish to be designated. “We may collect from that,” says his Lordship, “that the legislature intended that reference should be made to the particular list upon which the name of the objector is to be found. The objector, therefore, does not do that which the statute requires, by stating generally that he is on the list of voters for the borough; or, at all events, he does not do it so distinctly and explicitly as it ought to be done. It is not enough to say that the notice is so framed that the required information may, with more or less difficulty, be obtained elsewhere.” And Maule, J., says: “The opinion expressed by Tindal, C. J., in pronouncing the decision of the court in *Tudball, App., The Town Clerk of Bristol, Resp.*, 5 M. & G. 5, 7 Scott, N. R. 486, 1 Lutw. Reg. Cas. 7, would have been wholly inapplicable to the case, unless the statute did, in the judgment of the court, require the objector, if on the list of freemen, to state so.” So, in *Crowther, App., Bradney, Resp.*, 15 C. B. (N. S.) 536, 1 Hopw. & Ph. 63, it was again held that, where there are two lists of voters for a borough, the notice of objection should distinctly state on which the objector’s name appears. There, as here, each division had its separate churchwardens and overseers, though it did not appear that there was more than one parish church: and yet Erle, C. J., said: “Where there are two separate lists, the person objecting must state distinctly which of the two he is on.” The party must describe himself so as to preclude the possibility of mistake.

Manley Smith (with whom was Philbrick), for the respondent, was not called upon.

ERLE, C. J. I think the decision of the revising barrister was right. Sched. B. Nos. 10 and 11 require [5] the objector in his notice to state his place of abode and also the list of voters upon which his name appears: and it has been decided that, where there are more lists than one for a borough, he must accurately define the particular list which the party whose vote is objected to must examine in order to see that he

has a real objector. I think the objector here has properly complied with the requirement of the statute. He describes himself as "of 69 Durnford Street, on the list of voters for the borough of Devonport and township of East Stonehouse." I think this is an extreme endeavour to pervert the meaning of the words of the notice. It appears that the borough of Devonport consists of the parish of Stoke Damerel and the parish or township of East Stonehouse, each having distinct churchwardens and overseers and distinct places of worship, and that separate lists, properly headed, are stuck up by the respective functionaries. The list stuck up by the churchwardens and overseers of the parish or township of East Stonehouse is headed, "List of persons entitled to vote for the borough of Devonport, in respect of property occupied within the township of East Stonehouse;" and Durnford Street is in the township of East Stonehouse. I think, therefore, this objector has sufficiently referred the party objected to to the list which relates to the township of East Stonehouse. I do not see how he could have given a more accurate description.

The rest of the court concurring,

Decision affirmed, with costs.

[6] LANCASHIRE.—SOUTHERN DIVISION.

THOMAS GOAD BLAIN, *Appellant*: THE OVERSEERS OF THE TOWNSHIP OF PILKINGTON, *Respondents*. Nov. 18th, 1864.

[S. C. H. & P. 92; 34 L. J. C. P. 55; 11 L. T. 452; 10 Jur. N. S. 1237; 13 W. R. 269.]

1. Two barristers, A. and B., were appointed to revise the list of voters for a county. At a court held by A., the name of C. was, upon objection, expunged from the list on which it appeared, C. not being present to support his right, and A. duly initialed the erasure, and signed the list as settled by him. At a court held by B. on the following day, C. attended and satisfied B. that his absence on the preceding day was excusable: whereupon B. consented to rehear the matter (though his power to do so was contested), and ultimately restored C.'s name to the list:—Held,—it not appearing that the objector was present on the second occasion *with the proofs necessary to sustain his objection*,—that the course taken by B. was not justifiable.—
2. Whether B. could under any circumstances lawfully re-open the decision of his colleague, *Quere?*

1. This was an appeal from a decision of one of the revising-barristers appointed to revise the lists of voters for the southern division of Lancashire, upon certain points of law arising out of the following facts:—

2. "At a court held by adjournment in Bury, on the 13th of October, 1864, before me, appointed to revise the list of voters in the election of members of parliament for the southern division of Lancashire, the Rev. Thomas Corser, incumbent of Stand, in the township of Pilkington, applied to have his name restored on the list for that township.

3. "The name had been removed from the Pilkington register in due course of proceeding by my colleague, one of the other revising-barristers for the same division of the county, at a previous sitting of the court in Bury, in consequence of its having been duly objected to, and of the absence of the applicant, or any one on his behalf, when the name in its order was called. At the time in question, the applicant had been in attendance on his bishop, in performance of his duties as rural dean of Bury; but, with due precaution, he had provided a fit and proper person to attend the revising-barrister's court on his behalf, and support his right to remain on the register.

4. "Upon this application being made, objection was taken that I had no power to entertain it.

[7] 5. "But I was of opinion, —firstly, that, although the list in question had been gone through and been duly initialed and signed by my colleague, yet, as it was still in my hands, my power to do in open court all things proper for perfecting the list in accordance with the intention and purpose of the statutes in that case provided still remained,—Secondly, that the marks of erasure upon the name and qualification of the applicant in the list, accompanied by the initials of my colleague in the margin,

were to me sufficient evidence that a valid notice of objection in this particular instance had been duly proved in open court: and that it was competent for me, without further proof of such notice, to investigate the right of the applicant to be upon the register.—thirdly, that such investigation, after being initiated by proof of such notice, is a proceeding in the hands of the revising-barrister solely, and is not invalidated by the absence of the objector or his agent, or, if present, by any refusal on their part to assist.

6. "Being further of opinion that the applicant through no default in him had been removed from the register, I did, in the exercise of my discretion, entertain the application: and, upon investigation of his right, being satisfied that he was entitled to be on the register, I restored his name.

7. "If the court should be of opinion that I had power so to do, the name is to remain on the register; but, if otherwise, it is to be erased."

Keane, Q. C., for the appellant. Two gentlemen, A. and B., were appointed to revise the list of voters for the southern division of Lancashire. The list in question being brought before A. with an objection to the name of the Rev. Mr. Corser being retained therein, and no one being there to sustain his right, A. struck [8] out his name. Having done this, it was perfectly competent to A. at once to transmit the list as settled by him to the clerk of the peace by post at the rising of the court. The whole list, however, not having been gone through on that day, his colleague, B., appeared in court on the following day to finish it. Mr. Corser attended, and, suggesting what was no doubt a very sufficient excuse for his non-appearance on the preceding day, prayed B. to re-open the matter, and B. accordingly did so, and restored Mr. Corser's name to the list. This, it is submitted, he had no power to do. The appointment of revising-barristers is regulated by the 28th and 29th sections of the 6 & 7 Vict. c. 18. The 30th section enacts that, "where two or more barristers shall be appointed for the same county, riding, parts, or division of a county, or for the same city or borough, they may hold separate courts at the same time and place for the despatch of business, or may hold separate courts at different times and places, as shall be deemed most expedient." The mode of proceeding at the court of revision is regulated by s. 11, which enacts that "every such barrister shall upon the hearing in open court *finally determine upon the validity of the claims and objections*, and shall for that purpose have the same powers and proceed in the same manner (except where otherwise directed by this act) as the returning-officer of any county, city, or borough, according to the laws and usages observed at elections previous to the passing of the recited act [2 W. 4. c. 45]: and such barrister shall in open court write his initials against the names respectively expunged or inserted, and against any part of the said lists in which any mistake shall have been corrected or any omission supplied, or any insertion made by him, and shall sign his name to every page of the several lists so settled." [Byles, J. It sufficiently ap[pears] that the objector was present when the name of Mr. Corser was reinstated.] That may be so: but it is one thing to be present, and another to be prepared with proofs. The revising-barrister who had the list before him upon the first occasion heard the matter, and *finally* determined the validity of the objection, by writing his initials against the erasure, and signing the list so settled. The second revising-barrister had no authority to correct what had been done by the first. Even judges of the superior courts never interfere with each others' decisions at Chambers, except on appeal. Some light is thrown upon the matter by s. 40, which provides, amongst other things, that, "if any person whose name is included in any such list, or his place of abode, or the nature or description of his qualification, shall in the judgment of the revising-barrister be insufficiently described for the purpose of being identified, such barrister shall expunge the name of every such person from such list, unless the matter or matters so omitted or insufficiently described be supplied to the satisfaction of such barrister *before he shall have completed the revision of such list*, in which case he shall then and there insert the same in such list." But there all the parties are present, and the matter is properly proved.

No person was instructed to appear on behalf of the respondent.

ERLE, C. J. I very much wish I could have supported the revising-barrister in this case: but I feel compelled to come to the conclusion that he has done wrong. Two barristers were appointed to revise the lists of voters for the southern division of the county of Lancaster; and at a court held by one of them a question was raised

between a person whose name ap-[10]peared upon the list of voters and one who had duly given notice of objection to his name being retained therein. It was a trial in foro contentioso. The objector was there to sustain his objection: the voter was not there to support his right to be upon the register. The revising-barrister disposed of the question against the voter, expunging his name from the list, and placing his initials against it. On the following day, as I read the case, the voter came before the other revising-barrister, and satisfied him that his absence on the preceding day was justifiable, and prayed a re-hearing. The last-mentioned revising-barrister thought fit to accede to the application: and eventually he restored the name of the voter to the list. Now, the ground upon which I hold that this was an unjustifiable proceeding is, that it does not appear to me that the objector was there *and ready to be heard*: and so there was really a decision in foro contentioso in the absence of one of the litigant parties.

When a proper occasion arises, I should wish to say a word or two upon the other point. I should be to the last degree desirous of sanctioning the power in any tribunal to correct any error in point of form in its own proceedings: but I cannot but see that there is a material distinction between amendments which are made whilst a proceeding is pending, and amendments which are made after a matter has been heard and finally determined: and I much doubt the power of a revising-barrister to do that which in effect amounts to granting a new trial. But I entertain still greater doubt whether, where two revising-barristers are appointed with power to act jointly and severally, and one of them has heard and finally decided as to the validity of a claim or objection, the other has authority to re-open the matter, and hear the case over again and come to a different conclusion. But I am clearly of [11] opinion that, as it does not appear that the objector was present with his proofs on the second occasion, we ought to hold that the decision first come to was conclusive, and that the reversal of that decision was wholly unwarranted. For this reason I think the appeal must be allowed.

The rest of the court concurring,

Decision reversed.

BOROUGH OF BARNSTAPLE.

JOHN GAYDON, *Appellant*: LIONEL BENCRAFT, *Respondent*. Nov. 18th, 1864.

[S. C. H. & P. 97: 34 L. J. C. P. 53: 11 L. T. 483: 10 Jur. N. S. 1206:
13 W. R. 267.]

1. In a borough in which prior to the passing of the Reform Act freemen by birth were entitled to vote on attaining the age of twenty-one, that right is by s. 32 preserved to all the lineal descendants of such freemen.—2. Therefore, a freeman by birth, whose *grandfather* was a freeman so entitled previously to the 1st of March, 1831, but whose *father* (being then under age) was not on that day entitled to be admitted a freeman, is entitled to be registered.

1. At a court held for the revision of the lists of voters for the borough of Barnstaple, on the 19th of September, 1864, William Saunders was inserted in the list of freemen entitled to vote for the said borough, thus,—

Consent of the Court of the freeman to be registered.	Place of birth.
William Saunders	Holland Street, Barnstaple.

2. His name was duly objected to by Tom John Pitts Tucker. The facts proved were as follows:—

3. In the borough of Barnstaple there is a body of [12] freemen. The sons of these freemen are entitled, on proving their fathers marriage, that they were born of that marriage, and that they have attained the age of twenty-one years, to be admitted as freemen of this borough: but they cannot claim from or through any other relative than their father, and in no other way than that described. The said

William Saunders was duly admitted as a freeman (by right of birth, from his father) to the said borough on the 31st of July, 1856. His father was admitted also, by right of birth, on the 2nd of May, 1831, having only come of age on the 4th of April in that year. The grandfather was admitted, by right of birth, on the 14th of October, 1810.

4. On this state of facts, it was contended on the part of the objector that, as the said William Saunders derived his right to be admitted as a freeman of the said borough through his father, from and through whom alone he could claim, and as it was necessary by the 32nd section of the Reform Act, 2 W. 4, c. 45, that the father, to give him the right claimed (viz. to be on the list of freemen voting for the borough), should have been admitted a freeman, or have been entitled to be admitted as a freeman, previously to the 1st day of March, 1831, and that, as he (the father) was not admitted till the 2nd of May, 1831, nor entitled to be admitted till he came of age, on the 4th day of April in that year, his right to be placed on the list of freemen voting for that borough could not be sustained.

5. On the other side, it was contended, in support of the vote, that, although the father could not have been admitted as a freeman till he came of age, he had an inchoate right to be so admitted previously to the 1st day of March, 1831, which was perfected on his coming of age; and that this was sufficient to satisfy the provisoes of the 32nd section of the Reform Act, and to sustain the vote.

[13] 6. The revising-barrister held that the said William Saunders originally derived his right from or through his father, and that there was no one from or through whom he thus derived his right who was a freeman or entitled to be a freeman previously to the 1st day of March, 1831, and that the vote could not be sustained: and he struck his name out of the list.

7. If the revising-barrister was right in this opinion, the list of freemen for this borough was to remain as it is: if he was not right, the list was to be amended by inserting the names of the appellant William Saunders, and John Gaydon, an appellant thereafter mentioned in a consolidated appeal. And he declared that the appeal of the said John Gaydon and this appeal depended on the same decision, and ought to be consolidated: and he named Gaydon to be appellant and the town-clerk of Barnstaple to be respondent.

8. The name of John Gaydon stood in the list of the freemen for the borough of Barnstaple entitled to vote at the election of members of parliament for that borough, thus,—

Christian and surname of each freeman at full length.	Place of abode.
John Gaydon.	Boutport Street.

W. M. Cooke, Q. C. (with whom was the Hon. R. Bourke), for the appellant. The revising barrister, it is submitted, has taken an erroneous view of the second proviso in the 32nd section of the 2 W. 4, c. 45. That section enacts, that "every person who would have been entitled to vote in the election of a member or members to serve in any future parliament for any city or borough not included in the schedule marked A. to this act unexed, either as a burgess or freeman, [14] or, in the city of London, as a freeman and liveryman, if this act had not been passed, shall be entitled to vote in such election, provided such person shall be duly registered according to the provisions hereinafter contained; but that no such person shall be so registered in any year, unless he shall on the last day of July in such year be qualified in such manner as would entitle him then to vote if such day were the day of election and this act had not been passed, nor unless, where he shall be a burgess or freeman or freeman and liveryman of any city or borough, he shall have resided for six calendar months next previous to the last day of July in such year within such city or borough," &c., &c. "Provided always, that no person who shall have been elected, made, or admitted a burgess or freeman since the 1st of March, 1831, otherwise than in respect of birth or servitude, or who shall hereafter be elected, made, or admitted a burgess or freeman otherwise than in respect of birth or servitude, shall be entitled to vote as such in any such election for any city or borough as aforesaid, or to be so

registered as aforesaid: Provided also, that no person shall be so entitled as a burgess or freeman in respect of birth, unless his right be originally derived from or through some person who was a burgess or freeman, or entitled to be admitted as a burgess or freeman, previously to the 1st of March, 1831, or from or through some person who since that time shall have become or shall hereafter become a burgess or freeman in respect of servitude." The question is, whether by that section the right of freemen and burgesses to vote in right of birth and servitude is preserved to them in perpetuity, or only to the sons of those who were burgesses or freemen entitled to be admitted as burgesses or freemen on the 1st of March, 1831,—the day on which the first Reform Bill was brought into the House of Commons. At the [15] time of the passing of the Reform Act, the right of voting as a burgess or freeman was obtainable by purchase or by gift, and in some boroughs by marriage, as well as by birth and servitude. The object of the 32nd section, as Maule, J., observes, in *Crowther, App., Browne, Resp.*, 2 C. B. 97, 107, 1 Lutw. Reg. Cas. 388, was, "to prevent the repetition of the corrupt practices that had before existed in certain boroughs, of making on some particular occasion a large number of new voters, for the purpose of swamping the old constituency." The present claimant clearly is not one whom the legislature intended to exclude. The words "from or through," the revising-barrister construes to mean claiming by direct descent from his father, and therefore, he holds, where, as here, the father was not of age on the 1st of March, 1831, the son acquires no vote. That clearly is not the meaning of the act. This person claims from his grandfather, through his father. *Gale, App., Chubb, Resp.*, 4 C. B. 41, 1 Lutw. Reg. Cas. 544, is precisely in point. The corporation of Malmesbury consists of four classes of burgesses or freemen,—1. Capital burgesses (in whom alone was the right of voting prior to the passing of the Reform Act). —2. Assistant-burgesses. —3. Land-holders. —4. Free burgesses or commoners. Vacancies in the third class are supplied from the fourth, by seniority, and, in the other classes respectively, by election. It was held that one who was a member of the fourth class, *by right of birth*, before the 1st of March, 1831, and became a "capital burgess" by election after that day, was not disqualified as an elector by the 2 W. 4, c. 45, s. 32. But for the second proviso in that section, the sons of honorary freemen would have been entitled to be registered. Mr. Elliott remarks upon this section,—Elliott on Registration, 2nd edit. 214,—“The elective rights of all burgesses and freemen and of the freemen [16] and liverymen of the city of London are reserved in perpetuity, subject to the exceptions and conditions mentioned in this section. Thus, persons made or admitted burgesses or freemen after the 1st day of March, 1831, will not have the right to be registered, unless admitted in respect of birth or servitude; and, further, where the claim is in respect of birth, the right must be originally derived from or through some person who was actually a burgess or freeman, or entitled to be admitted as such, previously to the 1st day of March, 1831, or from or through some person who since that time has become a burgess or freeman in respect of servitude. Thus, all honorary freemen and burgesses made after the 1st day of March, 1831, are excluded from the right of voting; so, also, it would appear, persons acquiring their freedom by marriage subsequently to that day.” To this the editor appends the following note, putting this very case,—“The following question has been raised upon these words, whether a freeman by birth is entitled to vote, whose grandfather was actually a freeman previously to the 1st day of March, 1831, but his father, being under age at that time, was not entitled to be admitted till after that date. It is contended that his right, though directly derived through his father, was originally derived from the grandfather. Such a construction appears consistent with the words and principle of the proviso.” [Bytes, J. The claimant is within the qualifying words: the only question is whether he is disqualified by the proviso.] It is submitted that he is not. Some light may be thrown upon the matter by a reference to the 4th and 5th sections of the Municipal Corporation Reform Act, 5 & 6 W. 4, c. 76, amended by the 7 W. 4 & 1 Vict. c. 78, s. 27. [Bytes, J. Those provisions merely reserve the rights, whatever they might be.]

[17] Dowdeswell, for the respondent. The evident intention of the second proviso in the 32nd section of the Reform Act was, to limit the right to vote in respect of freedom by birth to those who were themselves entitled to be admitted freemen on the 1st of March, 1831, or who are the immediate descendants of those so entitled on that day: and not to extend it to all time. From whom did this person derive his

right? From his father, not from his grandfather. Suppose the son of a freeman died without having been admitted, though it might be otherwise in some boroughs, in Barnstaple it is plain the grandson could not be admitted. In *Ashby v. White*, 2 Ld. Raym. 938, 943, 6 Mod. 46, 1 Salk. 19, 3 Salk. 17, Ld. Holt, 524, Powys, J., says: "There is a vast intricacy in determining the right of electors, and there is a variety and a different manner and right of election in every borough almost. As, in some boroughs, every potwaller has a right to vote: in some, residents only vote; and in others, the outlying burgesses that live a hundred miles off: nay, I know Ludlow, a borough where all the burgesses' daughters' husbands have a right to vote." [Byles, J. Was there in this borough a right acquired by servitude?] That is common to all boroughs. In respect of birth, the revising-barrister finds that, in Barnstaple, the party must claim through his father. [Cooke. It may be conceded that, if the father had never taken up his freedom, the son could not take from his grandfather.] The contention before the revising-barrister was, that the father had an inchoate right to be admitted a freeman prior to the 1st of March, 1831. If that be so, a child in ventre sa mere might acquire the right. [Erle, C. J. Your contention is that the right in respect of freedom by birth is continued only for one generation?] Yes. [Erle, C. J. I do not see why a freeman's son should have [18] the franchise preserved to him, and not his son's son.] The limit was an arbitrary one, no doubt: but it must be borne in mind that this was the result of a compromise in parliament. If this man's father had died under twenty-one, the son never could have been admitted by right of birth: he must derive the right from a person who was admitted or entitled to be admitted. [Byles, J. Do you find any instance in the act of a reserved right being continued for one generation only? Erle, C. J. The right is certainly continuous as regards the votes of freemen by servitude: and so I should say the legislature intended that the freeman should transmit the right in respect of birth so long as he has lineals.] Could a man claim from his maternal grandfather? As to *Gale, App., Chubb, Resp.*, 4 C. B. 41, 1 Lutw. Reg. Cas. 544, all that was decided was, that a man who was a member of the fourth class of burgesses or freemen *by right of birth* before the 1st of March, 1831, did not lose any right which that gave him, by being promoted to the first class.

Cooke was not called upon to reply.

ERLE, C. J. I think the revising-barrister was wrong in this case. The question is, whether the right of voting as freemen is by the 32nd section of the Reform Act preserved to freemen (by birth) for one descent only, or is preserved continuously to the lineal descendants of one who was a burgess or freeman, or entitled to be admitted a burgess or freeman, previously to the 1st of March, 1831. I think the legislature intended to preserve it continuously to all descendants of burgesses or freemen. The 32nd section begins with a general enactment that every person who would have been entitled to vote in the election of a member [19] or members to serve in any future parliament for any city or borough (not disfranchised), either as a burgess or freeman, or in London as a freeman and liveryman, if the act had not been passed, shall be entitled to vote, being duly registered. Then comes a proviso that no person who shall have been or who shall hereafter be elected, made, or admitted a burgess or freeman, *otherwise than in respect of birth or servitude*, shall be entitled to vote or be registered. The right, therefore, to vote is preserved to all who become freemen by birth or servitude. Then comes the proviso or exception upon which this question arises,— "Provided also that no person shall be so entitled as a burgess or freeman in respect of birth, unless his right be originally derived from or through some person who was a burgess or freeman, or entitled to be admitted a burgess or freeman, previously to the 1st of March, 1831." This is a limitation upon the general enactment contained in the earlier part of the section. I think the present claimant fulfils the requirement of the proviso. He derives his right to be admitted a freeman by or through a person who was a freeman previously to the 1st of March, 1831, viz. from his grandfather. His grandfather was admitted a freeman by right of birth in 1810, and his father became entitled to be admitted on the 4th of April, 1831, and was actually admitted on the 2nd of May in that year. I think the legislature intended to preserve the right of voting to freemen by birth as a continuous lineal right to all persons claiming to be freemen by or through some person having that right at the time limited by the act, and did not intend to restrict it to one generation after the passing of the act. This person claims from his grandfather and through his father. I am confirmed in that

view, because the legislature has preserved the right to freemen by servitude, and enacted that persons claim-[20]ing by descent from freemen by servitude are to be continued in their right in perpetuity; for, the proviso goes on,—“or from or through some person who since that time [viz. the 1st of March, 1831] shall have become or shall hereafter become a burgess or freeman in respect of servitude.” It contemplates, therefore, the preservation of the right in all future time to the sons of freemen by servitude; and it is in the highest degree improbable that the legislature should have intended to limit the right in the case of freemen by birth to one generation. The revising-barrister here finds that, in the borough of Barnstaple “the sons of freemen are entitled, on proving their fathers’ marriage, that they were born of that marriage, and that they have attained the age of twenty-one years, to be admitted as freemen, but that *they cannot claim from or through any other relative than their father.*” But I take it that statement is to be construed with reference to this statute. No doubt, a freeman claiming by lineal descent must claim through his father. The statute clearly did not contemplate that no freeman should claim in right of birth unless his *father* was admitted or entitled to be admitted a freeman on the 1st of March, 1831. The decision of the revising-barrister must be reversed.

BYLES, J. I am of the same opinion. I have paid the utmost attention to Mr. Dowdeswell’s argument; but I cannot entertain a doubt as to the true construction of this proviso. The facts are extremely simple. In this borough, prior to the passing of the Reform Act, freemen by birth were entitled to vote. In the year 1810, the grandfather of the claimant was admitted a freeman by birth. At the time mentioned in the act, viz. the 1st of March, 1831, his son (the father of the claimant) was a minor. He came of age on the 4th of April in that year, and was admitted a [21] freeman by right of birth on the 2nd of May. It is plain, therefore, that the claimant is within the preserving words of the 32nd section of the Reform Act, and entitled to be registered, unless his right is taken away by the second proviso. But it seems to me that he satisfies that proviso; for he claims by or through some person who was a burgess or freeman previously to the 1st of March, 1831. There is no reason why the words “his father” should be substituted for “some person.” And there is no instance throughout the act in which the right of voting is preserved for one generation only.

KEATING, J. I am of the same opinion. The question raised by the case is, whether a freeman by birth is entitled to vote, where his father was entitled as a freeman before the 1st of March, 1831, and his father, not being then of age, was not entitled to be admitted a freeman until after that date. Looking at the whole scheme of the enactments contained in the Reform Act, I think it was not the intention of the legislature by anything contained in the 32nd section to exclude such a person from the exercise of the franchise.

Decision reversed.

[22] COUNTY OF LEICESTER.—NORTHERN DIVISION.

GEORGE STEELE, *Appellant*; JOHN ALLEYNE BOSWORTH, *Respondent*.
Nov. 18th, 1864.

[S. C. H. & P. 106; 34 L. J. C. P. 57; 11 L. T. 507; 10 Jur. N. S. 1239;
13 W. R. 260. See *Simey v. Marshall*, 1872, L. R. 8 C. P. 278.]

In 1692, the Earl of Rutland founded a hospital at Bottesford for fourteen poor men; and by a deed of 1762 the lands belonging thereto were *vested in trustees*, in trust to permit the rectors for the time being of two parishes named to receive the rents and profits, and thereout pay to each of the fourteen inmates certain periodical sums (in the whole amounting to 6l. 12s. 8d. per annum), and to expend upon them certain other sums in clothing, coals, medical and other attendance, &c. Since the year 1778, the trustees had been in the habit of allowing the surplus revenue to be distributed amongst the inmates of the hospital, so that each had down to the present time been in the receipt of 9s. 2d. per week, exclusive of the allowance for clothing, &c.: but there appeared nothing in the deed of 1762 to warrant this increased allowance:—Held, that the inmates had not any equitable freehold estate

or interest in the lands belonging to the hospital, so as to entitle them to be registered for the county.

At a court held to revise the lists of voters for the northern division of the county of Leicester, at Bottesford, John Alleyne Bosworth duly objected to George Steele as not having been entitled on the last day of July, 1864, to have his name retained upon the list of voters for the parish of Bottesford, in the said division.

1. The name of George Steele stood on the copy of the register of the said parish as follows :—

Christian and surnames.	Place of abode.	Nature of qualification.	Street, lane, &c., where the property is situate, &c., or name of the property, if known by any, &c.
Steele, George.	Bottesford.	Freehold interest in land.	Hospital land.

2. It was proved in evidence before the revising-barrister, that George Steele was an inmate of the Bottesford Hospital for men, in the same parish, founded by the Earl of Rutland in or about the year 1692, which from time to time was augmented until the year 1762, when certain lands and tenements in Bottesford, Muston, Abkettleby, Holwell, and Long Clawson, were re-conveyed to certain trustees therein named, and which conveyance,—after reciting that the rents of premises comprised in certain indentures [23] therein recited had for some time been found sufficient for the support of fourteen poor people, and the said Duke being desirous to extend the said charity to the maintenance of two other poor persons, had directed two more to be added to the twelve poor people already provided for out of the revenues of the said hospital,—declared that the said trustees should stand possessed of the said lands and tenements, upon the following trusts, that is to say, “In trust that they the said trustees and the survivors and survivor of them should permit and suffer the rectors of the rectories of Bottesford and Harly, respectively, for ever, to receive and take the rents and profits of all and singular the said messuages, lands, and premises thereby respectively granted, bargained, and sold, as often as the same should become due and payable, to the intent and purpose that they the said rectors and their successors, or the rectors for the time being of Bottesford and Harly aforesaid, respectively, for ever, should and would by and out of the said rents and profits pay and distribute to the fourteen poor men who then were or thereafter should be legally and rightfully admitted into and placed in the said hospital, that is to say, to each and every of them once in every month the sum of 10s. 8d. of current British money, and also the sum of 6d. to each and every of the said poor men at four several times in the year, namely, at Easter, Whitsuntide, Bottesford Feast, and Christmas, for pye-money; and also the sum of 10d. to each and every of the said poor men in December every year, for and in lieu of capon-money; and also in February and August, yearly to every of the said poor men 6d. a time for buying them salt; and also to every of them the said poor men the sum of 10d. in September yearly for the finding them with candles; and also the sum of 1s. 6d. every month to the fire-maker for the making each of [24] the said poor men's fires; and also the sum of 30s. for each and every of the said poor men in April yearly for the providing every of them a suit of clothes, and to each and every of them a good cloth gown and making at Easter every other or second year; and also the sum of 6s. 8d. a man to the laundress for washing each poor man, at Lady-day and Michaelmas yearly, by even and equal portions; and also, out of the said rents, to find and provide for each of the said poor men 20 cwt. of hard coals to be laid in yearly in the month of May; and also thereout from time to time and at all times thereafter to find and provide all necessary and reasonable beds and bedding, household goods, and other necessary utensils, for the use and benefit of the said poor men, but at the discretion of the said trustees parties to these presents; and should maintain, repair, and keep the said hospital or almshouse with all necessary amendments and reparations, and also provide physic and attendance for the sick: And, in case the said trustees or their successors, or the rectors for the time being of

Bottesford and Harly aforesaid, should neglect or refuse to act or concern themselves in the said trust pursuant to and to be guided by the directions aforesaid, then and in such case it was thereby declared and agreed by and between all the said parties to these presents, and the said John Duke of Rutland (party thereto) did authorize and empower the said trustees or any three of them, by any writing under their hands respectively, and also any subsequent grantees of the said premises, to nominate and appoint three or more honest and discreet persons to act and be concerned in the said trust, in such manner as the rectors aforesaid or any of them might or were to do by virtue of these presents and of the powers aforesaid: And it was thereby declared and agreed by and between all the said par-[25] ties to these presents, and the said John Duke of Rutland (party thereto) did declare, that the sole power of nominating and appointing any person or persons whatsoever to be placed and admitted in the said hospital should be and remain in the said present Duke (party thereto) and his heirs male for ever: and, in case of failure of such heirs male, then the lord or lords of the manor of Bottesford aforesaid at the time of such failure, and their successors, lord or lords for the time being there, should have the right of nomination and placing of poor persons in such manner as the said Duke then had, and his heirs might have: And it was further declared that, in case any of the said poor men, after such their nomination or admission into the said hospital, should any ways abuse the said charity by their immoral-like profaneness or lewdness, or other misbehaviour, then it should and might be lawful for and be in the power of the said then present Duke (party thereto) or his heirs, or, for failure of such, for the lords of Bottesford and their successors or lords of Bottesford for the time being, to remove and displace such person or persons, so as he or they should have no benefit or advantage of the said charity, and to nominate and appoint any other person or persons in the place and stead of such person or persons so to be removed."

3. In the said conveyance is also contained a declaration that the said trustees should demise or lease all or any part of the said premises for a term not exceeding twenty-one years, so as upon every such lease there be reserved the full and improved rent, without any fine to be paid.

4. It was further proved that the said George Steele was paid by the trustees of the hospital the sum of 9s. 2d. per week: that the appointment of the hospital men by the Duke of Rutland for the time being was [26] by word of mouth or by letter to his agent who reduced such appointment in writing, and forwarded it to the parties so appointed: that there was in the said hospital a common hall where the hospital men had their meals: that each man occupied a separate room with a pantry, and that all the apartments were numbered: that the entrance to the said hospital is by one outer door into a passage at the end of which is a second door, and all the inner doors of the said apartments open into the said passage: that a matron is appointed by the said trustees, who has apartments allotted to her, and who receives a salary of 20l. per annum, and whose duties consist in the general superintendence of the hospital, in cleaning the apartments, and in cooking and washing for the said hospital men: that the said hospital men pay no rates or taxes, and never repair the apartments; that they enjoy the use of an orchard and garden adjoining the hospital, and are supplied from the funds of the trust with coal, medicine, medical attendance, and all necessaries (except meat and provisions): that they also receive a cloak apiece once in two years: that they have uninterrupted enjoyment of their apartments, together with a key, and with a power of ingress and egress at any time, but that, after 9 o'clock at night, the matron by arrangement among the hospital men locks the outer door, and hangs up the key in the passage: that no instance has been known of any one of the hospital men being removed, although a power of amotion is contained in the deed, for immorality, profaneness, lewdness, or other misbehaviour: nor has any instance been known of any of the poor men having ever sub-let their apartments: that, as the rents of the said lands and tenements mentioned in the said deed of reconveyance increased, such increased rents were distributed amongst the hospital men from time to time: [27] and that, so far back as the year 1778, each man has been in receipt of upwards of 10l. per annum, and each man is now in actual receipt of 9s. 2d. per week, exclusive of the coals and gown.

5. Upon proof of the above facts, the revising-barrister held,—First, that, although the weekly payments to each of the hospital men amounted to more than 10l. per year, as the power of appointment and amotion expressed in the deed appeared to

him to be discretionary with the Duke of Rutland for the time being, the said George Steele had not such an equitable freehold interest in land as to entitle him (under the provisions of the 2 W. 4, c. 45, s. 18) to have his name retained upon the register of voters for the said parish of Bottesford, in the said division of the said county,—Secondly, that, even if that were not so, the said George Steele was simply a member of an eleemosynary institution, and as such was not entitled to have his name retained upon the said register.

6. There were thirteen other names upon the existing register for the said parish, and two on the list of new claimants, whose right to be retained or otherwise depended upon the decision of the court in the case of George Steele.

7. The revising-barrister expunged the names of the said thirteen persons on the old register, and disallowed the said two new claims.

8. If the court should be of opinion that the revising-barrister was wrong, then the name of the said George Steele, together with the names of the thirteen other persons, were to be restored to the register, and the two new claims were to be allowed.

Mellish (Q. C.), for the appellant. It will not be disputed that, if these persons have any estate at all, it is an equitable freehold for life. The case finds that [28] the inmates of this hospital are removable only for misbehaviour. Then, does the mere circumstance of this being a charitable foundation prevent the parties from acquiring the franchise? If an estate be given to a man from motives of charity, that clearly will not prevent the donee from acquiring the right to vote. According to the deed set out in the case, certain sums are to be paid to each of the fourteen inmates of Bottesford Hospital, which in the aggregate exceed 10l. per annum. No mode of disposing of the surplus arising from the increase in the value of land is pointed out: but it is found as a fact that the trustees do divide the whole surplus among the inmates: and it must be assumed that that is in accordance with the true construction of the deed. If the trustees were without just cause to remove one of these persons, would he not have a remedy by bill in equity to recover his aliquot share of the rents? If so, he clearly has an equitable freehold within the 18th section of the Reform Act. In *Davis, App., Waddington, Resp.*, 7 M. & G. 37, 8 Scott, N. R. 807, 1 Lutw. Reg. Cas. 159, the inmates of Jesus Hospital, Rothwell, were held not to have such an estate as entitled them to be registered as freeholders, because the trustees had power to remove them “toties quoties sibi *conueniens* fore videbitur (a). In *Simpson, App., Wilkinson, Resp.*, 7 M. & G. 50, 8 Scott, N. R. 814, 1 Lutw. Reg. Cas. 168, the qualification in respect of which the right to vote was claimed was, the room in which the party lived, and not the share in the profits of the land. That case has been observed upon and somewhat shaken since. The cases, however, which will be mainly relied upon on the other side are, *Hearthley, App., Banks, Resp.*, 5 [29] N. C. 40, K. & G. 219, and *Freeman, App., Gainsford, Resp.*, 11 C. B. (N. S.) 68, K. & G. 448. In the former of these cases, the claim was of a borough vote by the military knights of Windsor, in respect of a supposed interest in the houses occupied by them: and Cockburn, C. J., in delivering the judgment of the court, says: “Whether the interest of these parties in the benefits of the charity be a freehold interest or not, we are of opinion that there is no such estate or interest in these houses as can properly be deemed an ownership. The legal estate is in the dean and canons of Windsor: and, though they may be bound to allow the knights to occupy these houses, yet it appears that the dean and canons have power and authority to impose such restrictions on the enjoyment as to divest the occupation of the character of ownership. The knights cannot let their houses in the whole or in part, except with the assent and sanction of the dean and canons. The language, too, of the grant, and of the statutes of the institution, speaks of the houses or rooms of the knights (for, both terms are used), in language inconsistent with the idea of ownership.” The decision in *Freeman, App., Gainsford, Resp.*, proceeded entirely upon the authority of *Hearthley, App., Banks, Resp.* The claim there was in respect of the house in which the party lived: and the court held that he did not take “an equitable freehold in the chambers in the hospital wherein he resided, so as to entitle him to vote under the 8 H. 6, c. 7.” “When,” says Erle, C. J., “the governor assigns him rooms for his residence, he does not confer upon him any estate

(a) He referred to a learned note by Serjeant Manning, 7 M. & G. 45 et. seq.

which he could enforce by bill in equity." That, it is submitted, is the true test. Here, the claim is in respect of an interest in the lands themselves. If the surplus profits are to go to the inmates, they clearly have an equitable interest in the lands.

[30] *Hayes, Serjt.*, for the respondent. The terms of the deed negative there being any freehold interest whatever in the recipients of this charity. The lands, and even the household goods, are all vested in the trustees: all that the inmates are entitled to under the deed is, 10s. 8d. per month, and certain other trifling money payments, amounting altogether to considerably less than 10l. a year. And the trustees are to do all the repairs. The same point that is raised here was raised in *Ashmore, App., Loe, Resp.*, 2 C. B. 31, 1 Lutw. Reg. Cas. 337. The inmates of an hospital in the county of York, founded and endowed by the Duke of N. in 1673, claimed to be registered for the county of Nottingham. It appeared that the revenues of the hospital were derived from lands, and corn-rents in lieu of tithes of lands, in Yorkshire and Nottinghamshire, which were vested in trustees: that the whole formed one fund, out of which the trustees paid a weekly stipend to each inmate; that, originally, each inmate received 2s. 6d. per week, and a certain weekly allowance of coals and clothing: but that the weekly payment had subsequently been increased to 10s.: that, by one of the constitutions of the charity, it was provided that, if at the end of any year there should be found in the treasury of the hospital above 100l., the surplus should be divided amongst the pensioners: and that the appointment was for life, no instance of dismissal being known. By an act of parliament modifying the constitutions of the charity, it was provided that, instead of having the surplus revenues distributable amongst the original number of pensioners, additional pensioners should be chosen: and the trustees, under the direction of the Duke, were empowered and directed from time to time to add as many more pensioners as the revenues of the hospital would allow (leaving a sufficient surplus for repairs and incidental expenses): and the trustees [31] were, under the directions of the Duke, to pay the pensioners *such fixed stipends as they should think fit* (having regard to the revenues of the hospital), *and to lessen or increase, vary, change, and alter such weekly stipends, as they should find requisite, so that the stipends should at no time be reduced below 3s. 6d. a week.* The revising barrister having held that the inmates had no legal or equitable interest in the funds* of the hospital to a sufficient amount to entitle them to be registered, assuming that they had no absolute right to more than 3s. 6d. per week,—the court affirmed his decision. In *Simpson, App., Wilkinson, Resp.*, there were no trustees: the recipients of the charity were letting part of the premises, and receiving and dividing the proceeds among themselves. [Byles, J. The ground stated for that decision in the judgment in *Heartley, App., Banks, Resp.*, was not the real ground on which it proceeded.] It was not. In *Freeman, App., Gainsford, Resp.*, Earl, C. J., says: "I do not accede to the suggestion that the court is put to its election between the case of *Simpson, App., Wilkinson, Resp.*, and that of *Heartley, App., Banks, Resp.* The question submitted for the opinion of the court in the former case was, not whether the claimants had an equitable freehold in the rooms allotted to them, but whether the revising-barrister was right in holding that a legal foundation might be presumed, not necessarily investing the claimants with a corporate character. And the judgment of the court was confined to that." *Simpson, App., Wilkinson, Resp.*, therefore, can have no application here. In *Heath, App., Haynes, Resp.*, 3 C. B. (N. S.) 389, K. & G. 99, the inmates of the Earl of Leicester's Hospital,—a charity regulated by a private act of parliament,—each had allotted to him by the master rooms therein of more than the yearly value of 10l., of which he had the exclusive use. The appointment [32] was for life, subject to removal for breach of any of the rules. The court held that they did not occupy "as owners or tenants" within the 27th section of the Reform Act, and therefore were not entitled to be registered. There, as here, the legal and equitable interest was in the trustees.

Mellish, in reply. This charity appears to have been founded in or about the year 1692, under what circumstances is not now known. In 1762, when the deed referred to in the case was made, some additional lands were probably given to the hospital: but there is no resulting trust in the Duke, nor any reservation enabling him to deal with the funds at all. The whole profits of the land are to be devoted to the objects of the Duke's bounty: and the case finds that since the year 1778 the entire rents

* Lands.

have been so distributed: and the presumption is that that was done in conformity with the deed. The general nature of deeds of this kind was considered in *The Attorney General v. The Drapers' Company*, 2 Beavan, 508. Lord Langdale, M. R., there says that, "in every case where the general purpose of a gift or conveyance is declared to be a charity, and the particular payments do not exhaust the whole fund, any surplus will belong to the charity, unless there are other circumstances from which a contrary intention of the testator can be collected." In *Ashmore, App., Lees, Resp.*, there was an express provision that the trustees were to apply the surplus revenues in a particular way, viz. by increasing the number of pensioners. The decision in that case, therefore, is strictly in accordance with that of *Davis, App., Waddington, Resp.* [Keating, J. Do you find any case where a gift of land to trustees upon trust to receive the rents and profits and pay 10l. a year to A. B., has been held to give an equitable estate in fee to A. B.?] No.

[33] ERLE, C. J. I am of opinion that the decision of the revising-barrister in this case was right. The qualification of the parties objected to was in respect of a freehold interest in land in the parish of Bottesford. It appears that a charity called Bottesford Hospital was founded by the Earl of Rutland in or about the year 1692; and that, in 1762, there was a re-conveyance of certain lands by the then Duke of Rutland to trustees therein named, who were to hold them in trust to permit and suffer the rectors for the time being of Bottesford and Harly to receive the rents and profits, and to appropriate the same in making certain payments to each of fourteen poor men who then were or thereafter should be admitted into and placed in the hospital,—10s. 8d. per month, 2s. a year for pye-money, 10d. a year in lieu of capon-money, 1s. a year for salt, and 10d. a year for candles,—besides certain allowances for clothing, fuel, and attendance, and so on. The legal estate is in the trustees, upon trust to allow the rectors of the two parishes named to receive the rents and to appropriate them to the extent described and in the manner mentioned. The deed is silent as to the disposal of the surplus rents after satisfying those claims; and there is nothing to warrant the inference that they are to be appropriated to the inmates of the hospital. These fourteen persons insist that they have a freehold interest in the lands. Legal interest they clearly have not. Nor have they any equitable estate in the land. All they are entitled to is, to receive certain payments out of the profits of the land by the hands of the trustees. Looking to the deed as set out in the case, I see no sign of an equitable interest in the land in these persons: and to qualify them to vote they must at least have that. In *Freeman, App., Gainsford, Resp.*, 11 C. B. (N. S.) 68, K. & G. 448, the parties also claimed to have equitable [34] freeholds in the chambers which they occupied: but the court held otherwise. I am reported to have said on that occasion,—“It seems to me that the inmate is elected as a mere object of charity; and that, when the governor assigns him rooms for his residence, he does not confer upon him any estate which he could enforce by bill in equity.” And my Brother Williams said: “The language of the constitutions simply is, that the accommodation for the recipients of the charity shall be regulated in a certain way. They are to take for their lives, subject to removal for any of the offences specified. But it does not therefore follow that the particular rooms are to be assigned to each of them as owner for his life. It seems to me to be clear that he has not the right of an equitable owner at all. If he had, although the purposes of the charity might require him to be removed to another set of rooms, he might set the governor at defiance. It is quite manifest that no such state of things as that could have been intended.” So here, I take it to be clear that all that these poor men have is a right to ask for certain money payments and allowances from the trustees; and that they cannot be said to have any equitable estate in the lands.

BYLES, J. I am of the same opinion. To entitle the party to have his name retained upon the list of voters, he must shew that he is seised of an estate of freehold. It is not necessary that it should be a legal interest: it is enough if he has an equitable estate of freehold. This is not the case of a simple trust to receive the rents and profits for the cestui que trust, or to permit and suffer them to receive them: but the trustees are to receive the rents and profits, and to expend and allot a portion of them in a particular manner among the inmates of the hospital. That alone is [35] enough to prevent those persons taking an equitable interest in the land. But the case goes further. Mr. Mellish concedes that he must avail himself of the surplus rents, in order to constitute a sufficient value. But, without deciding that the trustees

take the surplus rents in trust (as to which I express no opinion), it is clear that no power is conferred upon them by the deed to dispose of them to any prescribed person or in any prescribed manner. All they could do would be, to dispose of them to and among such persons and in such manner as the court of Chancery might sanction or direct. For these reasons, although I at one period entertained some doubt, I entertain no doubt now that these persons have not such an interest in the lands in question as to entitle them to the franchise. Upon the authority of *Freeman, App., Gainsford, Resp.*, and particularly of the judgments of my Lord and my Brother Williams in that case, I think the revising-barrister rightly held that these persons were not entitled to be upon the register.

KEATING, J. I am of the same opinion. It is, I think, clear from the statements in this case that the claimants are only entitled to claim certain money payments from the trustees who take the interest in the lands, and that they (the claimants) have no equitable estate in the land, and therefore no estate of freehold such as is necessary to give them the franchise.

Decision affirmed, with costs.

[36] NORTHAMPTONSHIRE.—NORTHERN DIVISION.

THOMAS NICOLLS ROBERTS, *Appellant*: ANDREW PERCIVAL, *Respondent*.
Nov. 19th, 1864.

[S. C. H. & P. 121: 34 L. J. C. P. 84: 11 L. T. 603: 11 Jur. N. S. 40: 13 W. R. 265. Followed, *Fraser v. Boultonham*, 1869, L. R. 4 C. P. 529. Discussed, *Durant v. Kenneth*, 1869, L. R. 5 C. P. 272. Referred to, *Hadfield's case*, 1873, L. R. 8 C. P. 311.]

1. Although the decisions of the court of Common Pleas upon cases stated by revising barristers under the 6 & 7 Viet. c. 18, are by the 66th section of that statute declared to be "final and conclusive in the case upon the point of law adjudicated upon," it is nevertheless competent to the revising-barrister upon a future occasion, and between other parties, again to raise the question, even in relation to the same property qualification. — 2. Burleigh Hospital, a charitable foundation for a certain number of poor men called bedesmen, was endowed prior to the statute 29 Eliz. c. 5 (an act for the incorporation of public charities), and was governed by certain rules or ordinances which referred to "the feoffees and their heirs," who by lapse of time had been altogether lost sight of. The bedesmen were appointed for life, each on his appointment having a room in the hospital specially assigned to him, and which was found to be of the annual value of 4l. The bedesmen were by the ordinances declared to be subject to expulsion for certain offences: but no instance of expulsion had ever been known. There was a warden, who with the bedesmen managed the property belonging to the hospital, letting a portion of it and dividing the rent between them: and, on the occasion of a railway company requiring a portion of the land, the warden and bedesmen executed the conveyance, and received the purchase-money, which they expended in improving the hospital premises for their mutual benefit.—Held, upon the authority of *Simpson, App., Wilkinson, Resp.*, 7 M. & G. 50, 8 Scott, N. R. 814, 1 Lutw. Reg. Cas. 168, and distinguishing it from *Heartley, App., Banks, Resp.*, 5 C. B. (N. S.) 40, K. & G. 219, and *Freeman, App., Gainsford, Resp.*, 11 C. B. (N. S.) 68, K. & G. 448, that each of the bedesmen had an equitable estate of freehold in the room occupied by him, in respect of which he was entitled to be registered for the county.

1. Thomas Waddington, of Kettering, in the county of Northampton, on the register of voters for the parish of Kettering, in the northern division of the said county, duly objected to the vote of Abraham Bell. The name and description of the voter on the register was as follows:

Bell, Abraham.	Lord Burghley's Hospital, Saint Martin's, Stamford Baron.	Freehold tenement or room.	Abraham Bell, occupier.
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2. He also objected to the names of twelve other persons whose qualifications on the list were described in like manner, and depended on the like facts : and the appeals were therefore consolidated.

3. The facts as to the appointment of the several claimants, and the nature and mode of enjoyment of the qualifying property, are similar to the facts as [37] stated in the case of *Simpson, App., Wilkinson, Resp.*, 7 M. & G. 50, 8 Scott, N. R. 814, 1 Lutw. Reg. Cas 168 : and the facts of that case are admitted and are to be taken, *mutatis mutandis*, as if stated as part of this case : as is also the copy of the ordinances printed in such reports.

4. Upon the objections being called on, it was contended on the behalf of the respondent that the revising-barrister had no power to enter upon the inquiry, according to the 66th section of the 6 & 7 Vict. c. 18, the judgment of this court, having been given upon facts similar to those which are the foundation of the present claim.

5. The whole of the claimants in the present case had been appointed since the above judgment was delivered.

6. The revising-barrister decided to go into the case, and to hear the evidence ; being of opinion that the words "the case" in the 66th section referred only to the current register, or at any rate to the particular individual affected.

7. If the court should be of opinion that this contention should have prevailed, the names were to be retained, without reference to the remainder of the case.

8. The following additional facts were then proved : That, in the year 1846, part of the hospital premises not separately used by the then occupiers was sold to the Midland Railway Company for the purposes of a railway : that the sale was conducted by the then warden and bedesmen, as owners, without the intervention of any other person : that the warden and each of the bedesmen signed the conveyance to the company : and that the money was paid to the warden and bedesmen, and expended by them in erecting buildings upon part of the garden attached to the hos-[38]-pital, which buildings are now used for a washhouse by the warden and bedesmen, as they have occasion.

9. It was then contended by the objector,—that, assuming the legal origin of the foundation, if the claimants had any estate, it was only as members of a corporation aggregate, and that the additional facts above stated led to this conclusion ; that they had no freehold estate ; that, if they had, it was only a joint-tenancy in the whole hospital, and not an exclusive and separate one in each of the rooms, and that this also appeared from the new facts : that they were in the receipt of alms ; and that, looking at the recent decisions, and especially at *Freeman, App., Gainsford, Resp.*, 11 C. B. (N. S.) 68, K & G. 448, the claims were bad.

10. The revising-barrister overruled these objections, and retained the several names on the list of voters ; being of opinion that the facts were substantially unaltered, and that therefore there was nothing to disentitle the claimants to the benefit of the judgment already given by this court upon the same foundation, whatever were the reasons of such decision : and also that they did not receive alms, within the meaning of the 36th section of the 2 W. 4, c. 45.

Hannen (with whom was Underdown), for the appellant. The first question is, whether the revising-barrister had any power to go into the case, after the decision of this court in *Simpson, App., Wilkinson, Resp.* The contention that he had not rests upon the 66th section of the 6 & 7 Vict. c. 18, which enacts that "every judgment or decision of the said court [of Common Pleas] shall be final and conclusive in the case upon the point of law adjudicated upon, and shall be binding upon every committee of the House of Commons appointed for the trial of any petition [39] complaining of an undue election or return of any member or members to serve in parliament." That clearly means that the decision shall be conclusive only in the case in which it is pronounced. [The Court here intimated their acquiescence in this argument.]

The first question then is, whether these claimants have a freehold interest for life, within the 18th section of the Reform Act. The claim put forward here is that the inmates of this hospital have an equitable estate of freehold in the rooms they occupy. The point is not concluded by the decision of the court in *Simpson, App., Wilkinson, Resp.* The court upon that occasion felt itself to be hampered by the way in which the case was stated by the revising-barrister : and, when the counsel for the appellant came to consider what was the effect of the eleemosynary character of the

gift, he was stopped by the court, because the point had not been raised before the revising-barrister. And, in giving judgment, Tindal, C. J., says: "It appears to me that the only question open to us in this case is, whether the revising barrister was wrong in law, in presuming a legal commencement to the estate of these bedesmen. I think his decision was right, and that the facts fairly warranted him to presume, — which was all that was necessary, — that the estate existed by virtue of the Queen's licence before the passing of the 29 Eliz. c. 5." The question here is, whether the circumstances do not prevent these persons being equitable owners. Dealing with that case in *Freeman, App., Gainsford, Resp.*, 11 C. B. (N. S.) 68, 91, K. & G. 448, Erle, C. J., says: "The question submitted for the opinion of the court in that case was, not whether the claimants had an equitable freehold in the rooms allotted to them, but whether the revising-barrister was right in holding that a legal foundation might be presumed, not necessarily investing the claimants with a corporate character. And the judgment of the court is confined to that. That which is represented to have been said by Maule, J., if correctly reported, was clearly extra-judicial. But, be that as it may, the adjudication was upon the other point only." The character of the holding in *Freeman, App., Gainsford, Resp.*, where the parties were held to have no estate, is not substantially different from that in the present case. In the case of the military knights of Windsor, *Heartley, App., Banks, Resp.*, 5 C. B. (N. S.) 40, 57, K. & G. 219, — Cockburn, C. J., delivering the judgment of the court, says: "It appears to us that, if we were to hold that the occupation of a residence as part of the benefits of such a charity was an occupation as owner, we must say that any occupation of a separate residence in an almshouse, where the appointment by the grant of the founder is during good behaviour, would be a freehold occupation as owner, and, consequently, if of sufficient value, would give a right to vote, — a conclusion to which we are certainly not prepared to come." Speaking of *Simpson, App., Wilkinson, Resp.*, he adds: "That is a very different case from the present. In that case, no trustees were to be found. The recipients of the charity had the direct and uncontrolled management of the property in their own hands: and the only question raised in the case was, whether the revising-barrister was right in presuming a legal commencement of the estate of the bedesmen by the royal licence, prior to the passing of the 39 Eliz. c. 5. There is nothing in the authority of that case which precludes us from fully considering in this whether the occupation of their houses by the military knights is an occupation as owners." The result of the decisions seems to be this, that in order to judge what is the [41] character of the holding, and see whether or not it amounts to an ownership, regard must be had to the general character of the institution of which the inmates are permitted to receive the benefits. Upon reference to the ordinances set out in the report of the case of *Simpson, App., Wilkinson, Resp.*, it is manifest that these parties have no legal estate, but that their holding is altogether of an eleemosynary character. Reliance will probably be placed on the 21st of these ordinances, which provides that, "as these poor men shall have at the first their several rooms allowed them in the almshouse, so shall they during their lives or their continuance in their places continue their lodging, and every one as he shall succeed to the void places, so shall he succeed in the lodgings without any change," as giving a somewhat more permanent character to the holding than in some of the other cases: but it is to be observed that that is to be found amongst the rules for the internal government of the institution. The observations of Williams, J., in *Freeman, App., Gainsford, Resp.*, would have been equally applicable in the case of *Simpson, App., Wilkinson, Resp.* [Erle, C. J. In *Freeman, App., Gainsford, Resp.*, the surplus revenues of the hospital were vested in the trustees for the purpose of enlarging the charity and adding to the number of the inmates. The trustees were clothed with active trusts, and had a general control over the funds of the hospital, the inmates merely occupying the rooms as recipients of the benefits of the charity. That is a very different thing from having an equitable estate in the lands. In *Simpson, App., Wilkinson, Resp.*, the warden and bedesmen act as absolute owners, letting a portion of the building, and dividing the rent amongst them.] That arose from the circumstance of the heirs of the feoffees being unknown. [Erle, C. J. In the case of a lost deed, user [42] is evidence of its contents.] We have here the ordinances, which shew the precise position of the inmates, which does not differ from that of the parties in *Heartley, App., Banks, Resp.*, and *Freeman, App., Gainsford, Resp.* The circumstances of the inmates receiving the rent for the granary, and disposing of the proceeds of the sale of a

portion of the hospital to the railway company, are fully accounted for by the fact of the feoffees and their heirs being lost sight of. In order to entitle these persons to vote, they must have a freehold interest, legal or equitable, in the rooms they occupy. Looking at the general character of the ordinances by which this charity is regulated, it is clear that the occupation of the rooms by these parties is only as objects of the bounty of the founder, without any scintilla of ownership.

Field, Q. C., *contra*, was not called upon.

ERLE, C. J. I am of opinion that the decision of the revising-barrister was right. I was a party to the judgment in *Simpson, App., Wilkinson, Resp.*, 7 M. & G. 50, 8 Scott, N. R. 814, 1 Lutw. Reg. Cas. 168. This court were then of opinion that the inmates of Burleigh Hospital had a freehold interest in the rooms assigned to them: and I now entertain the same opinion. The origin of the hospital was unknown, and we held that the revising-barrister was warranted in inferring from the ordinances and the statute 39 Eliz. c. 5 (referring to a former statute of 35 Eliz. c. 7), that it had been founded by Lord Burleigh under licence from the Crown, and endowed with a grant of lands to trustees or feoffees in trust for the use of the bedesmen. It seems to me that the interest of the inmates under such an endowment, if it stood there, would have been, an equitable freehold in the property, the legal estate being in [43] the trustees, just as, if incorporated under the 39 Eliz. c. 5, the legal estate would be vested in the corporation, — except that in that case the members of the corporation would acquire no right to vote. The difference consists in this. Members of a corporation aggregate are not qualified to vote, because the interest in the property is vested in the corporation: and that is the way in which by far the larger portion of these hospitals are endowed. But, if the lands are conveyed to feoffees in trust for the members, the legal estate would be in the feoffees, and the equitable interest would be in the members of the institution according to the terms of the deed. Where the deed is lost, the terms of it would be to be presumed from the manner in which the property had been enjoyed. Now, the property belonging to Burleigh Hospital has been dealt with in a way that is consistent with the supposition which I have put forward. Each member when elected was placed in a certain room for life. The property of the hospital was managed by the warden and bedesmen as the legal owners, without interference by any one. There had been feoffees, but they were unknown. The warden and bedesmen let a portion of the hospital which was not required for their own use, acting in every way as persons having the equitable freehold and beneficial interest in the premises. And then we have here the additional fact that, when a portion of the hospital premises was sold to the Midland Railway Company, the warden and bedesmen executed the conveyance, and received the purchase-money and applied it to their own use. There is, therefore, ground for inferring that the legal estate was originally in the feoffees: but there was abundant evidence from the mode of user to authorize the court in holding that each of the bedesmen took a separate equitable freehold in the room assigned to him, the rest of the bene-[44]-ficial interest in the property of the hospital being in the warden and bedesmen in the way I have already pointed out.

There is, no doubt, much in the language of the ordinances set out in the reports to imply a supervision and control interfering in some degree with the rights of property I have assumed. But there is not anything very distinct. For instance, the 11th article provides that the bedesmen shall for certain irregularities of conduct be “displaced by them by whose authority they were placed.” But, little reliance can be placed on that, seeing that it seems never to have been acted upon; and, if any attempt were now made to act upon it, there would probably be found abundant difficulty in so doing. I do not, upon the whole, think that the existence of that power of amotion shews that the court were wrong in holding in *Simpson, App., Wilkinson, Resp.*, that the inmates of this hospital took each an equitable freehold interest in his room, and so were qualified to be registered.

The strength of Mr. Hammen’s argument was, that this court in *Heartley, App., Banks, Resp.*, 5 C. B. (N. S.) 40, K. & G. 219, held that “the poor knights of Windsor,” and in *Freeman, App., Gainsford, Resp.*, 11 C. B. (N. S.) 68, K. & G. 448, that the inmates of Shrewsbury Hospital, had no such estate or interest in the houses or rooms occupied by them as to entitle them to be registered, though they were entitled to a share in the revenues of the respective charities. But the broad and marked distinction in my mind between those cases and the present is this that, in each of those cases, there was a governing body, in whom the legal estate was vested, and in whom it

necessarily continued vested for the performance of active trusts, and the property did not belong absolutely and beneficially to the persons who claimed to be registered in [45] respect of it. In *Hearlley, App., Banks, Resp.*, the trustees, the dean and canons of Windsor, received the rents and profits, and the poor knights received each a given portion of money out of the fund, and were allowed to occupy a house. So, in the case of Shrewsbury Hospital (*Freeman, App., Gainsford, Resp.*), the inmates were entitled to a certain portion of money out of the general fund, without having any estate, though the trustees were bound to find them a lodging. In the case of the Burleigh Hospital, the inmates were by the 21st article of the Ordinances to continue in their rooms for life. In *Freeman, App., Gainsford, Resp.*, they took no estate in their respective rooms: and the court assumed that the governing body had power to shift them from time to time as they pleased, and would perform their duty by assigning them *any* room in the hospital for a residence, —which was altogether irreconcilable with a freehold interest, as in the case of Lord Burleigh's Hospital. In this case, the legal estate is in the feoffees, who would have been a corporation if created after the 39 Eliz. c. 5, and the equitable interest was in the warden and bedesmen. In *Hearlley, App., Banks, Resp.*, and in *Freeman, App., Gainsford, Resp.*, the trustees took the whole legal and equitable estate, subject to the disposal of the proceeds in the way already mentioned.

A degree of unnecessary ambiguity has been introduced into these cases by assuming that the parties, though taking a freehold interest, legal or equitable, would be disqualified from voting if the occupation were of an eleemosynary character. I have a great desire to avoid introducing as a ground of decision that which to my mind is altogether a mistaken notion. In deciding whether or not a party has an equitable title, it may be material to look at the mode in which the proceeds of the property are applied, to [46] see whether the trustees are doling out the bounty of the grantor to those who are the objects of his charity. But, if a man has a freehold estate, legal or equitable, it matters not that the motives of the grantor were of a charitable or benevolent nature, or that the feelings of the grantee should be those of gratitude for an eleemosynary gift. The motives and feelings of neither grantor nor grantee can be permitted to weigh when we are deciding whether or not the grantee took an estate. They are absolutely irrelevant, except to the extent I have already intimated. All we have to look at is, what the trustees have to do. If they hold the legal estate in trust to receive the profits and pay certain allowances to the inmates, and the latter take nothing but an interest in those allowances, no qualification is created. There is nothing in the Reform Act to shew that the acquisition of an estate through the benevolence of the grantor interferes with the right to vote.

BYLES, J., was engaged in the Central Criminal Court.

KEATING, J. I concur with my Lord in thinking that the decision of the revising-barrister was right. Mr. Hannen asks us to reconsider the decision which the court came to in *Simpson, App., Wilkinson, Resp.*, on the ground that the court has in the subsequent cases of *Hearlley, App., Banks, Resp.*, and *Freeman, App., Gainsford, Resp.*, laid down principles which, though they do not absolutely conflict with those upon which the former case rests, might have induced the court to come to a different conclusion. He has, however, failed in shewing identity of circumstances between the case of *Simpson, App., Wilkinson, Resp.*, and the two later cases. One important distinction [47] has been adverted to by the Chief Justice, viz. that, in *Hearlley, App., Banks, Resp.*, and *Freeman, App., Gainsford, Resp.*, the property was vested in trustees, who had active trusts to perform, and the donees or recipients of the charity took nothing which amounted to an equitable estate in any particular land; whereas, in *Simpson, App., Wilkinson, Resp.*, there is no such intervening body, but the management of the property has from the beginning been vested in the claimants themselves. They have let a portion of the property, dividing the proceeds amongst them as joint-tenants. They deal with their respective rooms as their separate and exclusive property. And, when a portion of the hospital property is wanted by a railway company, they all join in the conveyance, and they expend the purchase-money in improvements in the building for their mutual conveyance,—no trustee or feoffee or other person interfering in any way with their proceedings. Under these circumstances, it seems to me that the inmates in the two cases relied on had no equitable estate at all in respect of which they could claim to be registered, but that, in *Simpson, App., Wilkinson, Resp.*, they had.

Decision affirmed, with costs.

[48] COUNTY OF OXFORD.

THOMAS NICOLLS ROBERTS, *Appellant*; RICHARD DREWITT, *Respondent*.
Nov. 19th, 1864.

[S. C. H. & P. 132.]

1. The appointment of a parish clerk need not be by deed.—2. A parish-clerk by virtue of his appointment was entitled to a twelfth share of twenty-six acres of freehold land in the parish (of sufficient value to confer a vote for the county) so long as he continued clerk, and his predecessors in the office had always enjoyed the same: Held, that the clerk had a freehold interest in his share, in respect of which he was entitled to be registered.

1. The respondent's name was inserted in the list of voters of the parish of Marston, in the county of Oxford, as follows,—

Christian and surname.	Place of abode.	Nature of qualification.	Street, lane, &c., where situate, &c.
Drewitt, Richard.	Marston, Oxon.	Freehold office of parish-clerk.	Marston.

2. At the court held to revise the lists of voters for the said county of Oxford, the name of the said Richard Drewitt was duly objected to.

3. It was proved that he was duly appointed parish-clerk of the parish of Marston by the vicar thereof: and that he had held and performed the duties of such office of parish-clerk for thirty years: but there was no proof of appointment by deed.

4. By virtue of his said office of parish clerk, he was entitled to one twelfth part or share in twenty-six acres of freehold land situate in the said parish, and known by the name of Bushy Land, so long as he continued parish-clerk. The yearly value of the said one twelfth part or share was 40s.: and it was let by him for that sum.

5. It was further proved that his predecessors in the said office of parish-clerk had always been entitled to and had received and enjoyed the said one-twelfth part or share: and that he had received and enjoyed the same ever since his appointment: and that the [49] right thereto of the parish-clerk of Marston for the time being was fixed and certain.

6. The only other evidence which could be furnished as to the original title of the parish clerk of Marston to the above mentioned one-twelfth share in the said land was, an extract from the report of the charity commissioners relating to the said parish, bearing date the 9th of July, 1824, as follows,—“There is in this parish a piece of bushy land, containing about twenty-six acres, on which twelve of the poor men have a right of common for a cow. We could not discover the origin of this right: and it is doubtful whether it can be referred to any charitable foundation. These twelve cow-commons are however always enjoyed by twelve poor persons, of whom the parish clerk is one.” There was no evidence of any election of the said Richard Drewitt as one of such twelve poor men.

7. It was contended by the appellant, upon this state of facts, that the said Richard Drewitt took no freehold interest in his one-twelfth part or share in the said twenty-six acres of land, and that, the same was eleemosynary: and that, even if his interest therein were freehold, yet the same was not of sufficient yearly value to entitle him to be registered, as the calling of “parish-clerk” is not an *office* within the meaning of the exception in the 18th section of the 2 W. 4, c. 45: and, consequently, that, to entitle him to be registered on the said list, his one-twelfth part or share in the said twenty-six acres of land must be of the annual value of 10l.: and, further, that the appointment of parish-clerk must be by deed.

8. The revising-barrister decided that, on these facts, the said Richard Drewitt did take a freehold interest in his one-twelfth part or share in the said land, and that “parish clerk” was an “office” within [50] the said 18th section: and accordingly he retained his name in the said list of voters, and amended the third column of the said

list to "Freehold land, in right of office," and the fourth column to "Parish-clerk of Marston. Bushy land."

9. The questions for the opinion of the court were, first,—whether the said Richard Drewitt had a freehold interest in his said one-twelfth part or share of the said land,—secondly, whether the calling of "parish-clerk" was an *office* within the meaning of the exception in the said 18th section of the said act,—and thirdly, whether a person can be appointed to such office otherwise than by deed.

10. If the court should be of opinion that the respondent took a freehold interest in respect of his said share, and that "parish-clerk" is an *office* within the meaning of the said 18th section, and also that the appointment thereto need not be by deed, the list was to stand without amendment. But, if the court should be of a contrary opinion on either of these points, the said list was to be amended by expunging therefrom the name of the said respondent.

Hannen, for the appellant. The question in this case arises upon the 18th section of the Reform Act, which enacts that "no person shall be entitled to vote in the election of a knight of the shire to serve in any future parliament, or in the election of a member or members to serve in any future parliament for any city or town being a county of itself, in respect of any freehold lands or tenements whereof such person may be seised for his own life or for the life of another, or for any lives whatsoever, except such person shall be in the actual and bonâ fide occupation of such lands and tenements, or except the same shall have come to such person by marriage, marriage-settlement, devise, or promotion to any benefice or to any *office*, or except [51] the same shall be of the clear yearly value of not less than 10l. above all rents and charges payable out of or in respect of the same," &c. It cannot be contended that the appointment to the office of parish-clerk need be by deed: and, as to its being an appointment to an "office," the subject underwent consideration in *Bushell, App., Eastes, Resp.*, 11 C. B. (N. S.) 106. There, A. was in 1826 appointed parish-clerk of St. James, Dover; and by licence under the seal of the Archbishop of Canterbury, dated in 1832, he was confirmed in his office, "together with all and singular the fees, salaries, and profits either by law or antient custom belonging to the same." Part of the emoluments attached to the office consisted of the clerk's share of an antient due payable to the clerk and sexton upon the opening of every grave in the churchyard of the parish; and this exceeded 40s. a year. The parish-clerk had not himself to perform any of the work of or incident to the opening of the graves, this being done by the sexton. The revising-barrister held that the antient fee was in the nature of a remuneration for services rendered in conducting the funeral rites, and not a payment or emolument issuing out of or charged upon any land, and therefore that the parish-clerk was not entitled to be registered. The court held that his decision was right. The real question here is, whether this person has a freehold interest in land within the statute. [Byles, J. We cannot enter into a question of title.] If the revising-barrister meant to find that Mr. Drewitt had title to the land, there is nothing to argue. [Byles, J. He finds that he is entitled to it so long as he holds the office of parish-clerk, that his predecessors in the office have always enjoyed it, and that nobody has ever interfered with them.]

Rew, for the respondent, was not called upon.

[52] ERLE, C. J. We must presume that what has been done has been rightly done. If it was impossible for this person to have a freehold in the land, no doubt Mr. Hannen's argument must prevail. But there is nothing in the case to warrant us in coming to that conclusion.

The rest of the court concurring,

Decision affirmed, with costs.

BOROUGH OF TAUNTON.

GEORGE BAKER, *Appellant*; THOMAS LOCKE, *Respondent*. Nov. 19th, 1864.

[S. C. H. & P. 137; 34 L. J. C. P. 49; 11 L. T. 567; 11 Jur. N. S. 65;
13 W. R. 258.]

1. *Quære*, whether a poor-rate, one of the persons necessarily constituting the majority in the making of which was an *assistant-overseer*, is valid?—2. In the parish of T.

there were two churchwardens and four overseers, and an assistant-overseer who was appointed "to assist the overseers of the poor of the said parish in the performance of all the duties incident to the office of overseer of the said parish, except the collection of rates." A rate was made by the two churchwardens, one overseer, and the assistant-overseer, and was allowed by two justices, and duly published, and not appealed against:—Held, that the rate being apparently good upon the face of it, the non-payment of it disqualified a party from being placed upon the borough list of voters.

1. At the court held to revise the list of voters for the borough of Taunton, Thomas Locke duly objected to the name of George Baker and those of nine other persons. The names of the parties objected to appeared in the list, as follows:—

Christian name and surname of each voter	Place of abode.	Nature of qualification.	Street, &c., where property situate, &c.
Baker, George.	Bridge Street.	House and shops.	Bridge Street.
Baker, James.	Obridge.	House.	Obridge.
Baxter, John.	Black Horse Lane.	House and shop.	Black Horse Lane.
Biss, William.	Bridge Street.	House.	Bridge Street.
Burford, James.	Bridge Street.	House.	Bridge Street.
Kallend, James.	Yarde Street.	House.	Yarde Street.
Warren, William.	Bridge Street.	House.	Bridge Street.
Warren, William.	Northtown.	House and garden.	Northtown.
Whiterham, F. D. S.	No. 5 Harmony Row.	House.	5 Harmony Row.
Woodland, William.	Yarde Estate, Bridge St.	House and premises.	Yarde Estate, Bridge St.

[53] 2. The facts in the case of George Baker proved before the revising-barrister were as follows:—George Baker occupied as tenant premises within the said borough, in the parish of Taunton St. James, of sufficient value and for a sufficient time to entitle him to a vote for the said borough under the 2 W. 4, c. 45, s. 27, subject to the following question as to his non-payment of rates,—

3. During the period of his occupation required by law to entitle him to a vote, a poor-rate for the said parish was made and signed by an overseer of the said parish, and also by the two churchwardens, and by the assistant-overseer thereof. The rate was allowed and confirmed at Taunton by two magistrates for the county of Somerset, who in the usual form appended their joint signatures to a certificate of allowance immediately following in the rate-book the signatures of the overseer, assistant-overseer, and churchwardens; but, in point of fact, the signatures of the two magistrates to the allowance were obtained on the same day in Taunton, and separately.

4. The rate was duly published the day after it was allowed: and in the said rate George Baker was rated in respect of the premises he occupied; and, on its being demanded, he did not pay and has not paid the said rate. The rate was not appealed against, and the time for appeal has now expired: and the rate has been generally paid.

5. There are four overseers appointed for the said parish. The assistant-overseer is appointed under the 59 G. 3, c. 12, s. 7, and his appointment in its material parts is as follows:—

"Poor Law. Assistant-Overseer. Appointment.

"59 G. 3, c. 12, s. 7; 7 & 8 Vict. c. 101, s. 61.

"County of Somerset. Whereas, the inhabitants of the parish of Taunton St. James, in the said county of [54] Somerset, in vestry assembled in the said parish on the 8th day of April last, elected and nominated Walter Chorley Brannan, of Taunton St. James aforesaid, accomptant, to be assistant-overseer of the poor of the said parish of Taunton St. James, and did determine that the duties to be by him executed and performed should be, to assist the overseers of the poor of the said parish in the performance of all the duties incident to the office of overseers of the said parish (except the collection of rates), and that his salary for the execution of the said office should be 10l. yearly, to be paid quarterly. Now, we do appoint the said

Walker Chorley Brannan to be assistant-overseer of the poor of the said parish of Taunton St. James, to execute and perform the duties above referred to, and at the salary fixed as aforesaid.

"Given under the hands and seals," &c.

6. The assistant-overseer was also duly appointed collector of rates by the board of guardians.

7. It was contended on behalf of George Baker, that the said rate was void, on the ground that it was not signed by a majority of the parish officers, and that consequently its non-payment by George Baker did not invalidate his right to be retained on the list of voters for the said borough.

8. The revising-barrister was of opinion that the rate had been signed by a majority of the parish officers; but that, at all events, having been signed as above described, allowed, and published, it was while unappealed against a rate which must have been paid by George Baker to entitle him to a vote under the 27th section of the Reform Act; and he accordingly expunged his name from the list of voters.

9. He also expunged from the said list the other nine names above written; and, as the facts in each of those cases were the same as those above stated in reference [55] to George Baker, and raised the same point of law, he declared that they should be all consolidated with the principal case.

10. If his decision in the case of George Baker was right, the list as revised by him was to remain unaltered: but, if it was wrong, then the name of George Baker and the other nine names above written were to be reinstated in the list.

Hannen (with whom was Underdown), for the appellant. A voter is not disqualified by non-payment of a void rate, which, it is submitted, the rate in question is, it not having been made by "the greater number" of the churchwardens and overseers of the poor of the parish, as required by the 43 Eliz. c. 2, s. 3. It appears that, in the parish of Taunton St. James, there are two churchwardens and four overseers, and that there is also an assistant-overseer; and that the rate in question was signed by the two churchwardens and one overseer, and by the *assistant-overseer*. It is submitted that the assistant-overseer has no authority to make a rate. The statute authorizing the appointment of an assistant-overseer is the 59 G. 3, c. 12, s. 7, which provides, amongst other things, that, "every person to be so appointed assistant-overseer shall be and he is hereby authorized and empowered to execute all such of the duties of the office of overseer of the poor as shall in the warrant for his appointment be expressed, in like manner and as fully to all intents and purposes as the same may be executed by any ordinary overseer of the poor." That obviously means that he shall act as the deputy or servant of the overseers: and that is borne out by the 61st section of the 7 & 8 Vict. c. 101, which enacts that "every assistant-overseer appointed or hereafter to be appointed in pursuance of the said act of 59 G. 3, c. 12, shall, subject to [56] the rules of the poor-law commissioners, *obey, in all matters relating to the duties of overseer, all directions of the majority of the overseers of the parish for which he acts.*" How is it consistent with this enactment that his vote should override the judgment of three of the four overseers. [Byles, J. He relies upon the express words of the 59 G. 3, c. 12, "in like manner and as fully to all intents and purposes as the same may be executed by any ordinary overseer of the poor."] That is the case with every agent: but it never could have been intended to enable the assistant-overseer to control the overseers, or to enlarge his own powers in this way. In the note appended to the form of a poor-rate order, in Glen's Poor Law Board Orders, p. 393, it is said that, "under the 43 Eliz. c. 2, it is necessary that an actual majority of the churchwardens and overseers should sign the rate; and the necessity of their doing so is in no way lessened by there being an assistant-overseer appointed to discharge all the duties of an overseer. There is, however, nothing to prevent the assistant-overseer signing it; *but his signature will have no legal effect.*" *Bennett v. Edwards*, 8 B. & C. 702, 1 M. & R. 482 (a), is a distinct authority to shew that an assistant overseer is not an overseer *for all purposes*. If this objection be a valid one, the rate is void: and the non-payment of a void rate does not disqualify a party from being placed upon the register: *For, App., Davies, Resp.*, 6 C. B. 11, 2 Lutw. Reg. Cas. 97.

Prideaux, for the respondent. The rate in question is valid. If the 7 & 8 Vict.

(a) In error, 3 Y. & J. 458, 6 Bing. 230, 3 M. & P. 749.

c. 101 had not been passed, the case would have been free from doubt. By the 59 G. 3, c. 12, s. 7, the duties to be performed by the assistant-overseer are to be specified in the warrant under which he is appointed; and the person so ap-[57]-pointed is authorized and empowered to execute all such of the duties of the office of overseer, "in like manner and as fully to all intents and purposes as the same may be executed by any ordinary overseer of the poor." Here, Brannan was by the terms of the warrant under which he was appointed "to assist the overseers of the poor of the said parish in the performance of all the duties incident to the office of overseers of the said parish, except the collection of rates:" and he was afterwards appointed to perform that duty also. He clearly, therefore, was competent to perform the duty of making a rate. In *The Queen v. Watts*, 7 Ad. & E. 461, 2 N. & P. 367, where the question was whether an appeal lay against the accounts of an assistant-overseer, Lord Denman says: "We see no reason to doubt that an assistant-overseer's account may be the subject of an appeal. He is not the servant of the churchwardens and overseers of the parish, but of the vestry, from whom he directly receives his authority; an authority which may indeed be limited by the warrant of appointment, but which does not appear to have been limited in the present case." It is clear, therefore, that, before the 7 & 8 Vict. c. 101, the assistant-overseer was an independent officer, deriving none of his authority from the churchwardens and overseers. [Byles, J. Could he be displaced without a vote of the vestry?] No: that is expressly provided by the 59 G. 3, c. 12, s. 7. In *Points, App., Attwood, Resp.*, 6 C. B. 38, 2 Lutw. Reg. Cas. 117, the service of a notice of objection upon an assistant-overseer was held to be a good service within the 6 & 7 Vict. c. 18, s. 17. Coltman, J., in delivering the judgment of the court there says: "On the facts stated in this case it must be understood that Cooper had been appointed pursuant to the statute 59 G. 3, c. 12; and, as there is no limitation of the duties which he is to [58] perform, but the appointment is general in its terms, he must be taken to have been appointed to perform all the duties of an overseer: for which the case of *Skingley v. Surridge*, 11 M. & W. 503, is an authority. Now, such an officer, as was stated by Lord Denman, in delivering the judgment of the court in *The Queen v. Watts*, is not the servant of the churchwardens and overseers, but of the vestry, from whom he directly receives his authority. The acts done by him are not, therefore, to be considered as done by him as the agent of the other overseers, but as done by virtue of his own authority derived from the appointment of the vestry." All the arguments urged here would have been equally applicable there. Parke, B., in his judgment in *Skingley v. Surridge*, assumes that a general appointment would give the party appointed "all the powers and duties of a principal overseer." In *Counter, App., Addams, Resp.*, 15 C. B. (N. S.) 512, 1 Hopw. & Ph. 60, service of a notice of claim upon an assistant-overseer was held a good service under the 30th section of the Reform Act. These authorities clearly shew that, before the passing of the 7 & 8 Vict. c. 101, an assistant-overseer was a party deriving independent authority by virtue of his appointment by the vestry and the confirmation thereof by the justices, and was not the servant or agent of the overseers. Then, is the character of that officer in any degree altered by the words of the 7 & 8 Vict. c. 101, s. 61, which require him to obey, in all matters relating to the duties of overseer, all directions of the majority of the overseers? It is submitted that it is not. So material an alteration of his status would not have been made by the legislature except by plain and express words.

Hannen, in reply. The only authority which at all presses, is the case of *Points, App., Attwood, Resp.*, 6 [59] C. B. 38, 2 Lutw. Reg. Cas. 117, where it was held that an assistant-overseer was competent to receive a notice which the statute required to be served upon the overseers: but there the difficulty was removed by the provision in the 101st section of the 6 & 7 Vict. 18, that the words "overseers" or "overseers of the poor" shall extend to and mean all persons who by virtue of any office or appointment shall execute the duties of overseers of the poor, by whatever name or title such persons may be called, and in whatsoever manner they may be appointed; and that, wherever any notice is by the act required to be given or sent to the overseers of any parish or township, it shall be sufficient if such notice shall be delivered to any one of such overseers, &c.

ERLE, C. J. I am of opinion that the decision of the revising-barrister in this case, that the claimant was disqualified by reason of the non-payment of the rate in question, was correct. The legislature has thought fit to make the right to be regis-

tered as a voter for a borough to depend upon the party's having paid certain dues,—amongst others, the poor-rates,—up to a certain date. It is found as a fact in this case that a poor-rate was made, allowed, and confirmed, and duly published,—but was not paid by the voter. Apparently, therefore, he is unqualified. The rate so left unpaid was upon the face of it a valid rate: and it was not appealed against. It purports to be signed by four persons, viz. two churchwardens, one overseer, and an assistant-overseer. The parish has two churchwardens, four overseers, and an assistant-overseer: four, therefore, would constitute a majority, as required by the 43 Eliz. c. 2, s. 3. The voter's excuse for non-payment of the rate is, that one of the persons who signed the rate, and without whose signature there would not be the required majority, was not qualified to join [60] in the making of a rate. I do not intend to express any binding opinion as to whether or not a rate so made is a valid rate. It is laid down by Mr. Glen, in his edition of the Poor Law Board Orders, that an assistant-overseer cannot legally join in making a rate. But here the assistant-overseer has in point of fact joined: and I must say that there is presumably an authority in him so to do under the 59 G. 3, c. 12, s. 7, which enacts that every person appointed assistant-overseer under that act “shall be and he is thereby authorized and empowered to execute all such of the duties of the office of overseer of the poor as should in the warrant for his appointment be expressed, in like manner and as fully to all intents and purposes as the same might be executed by any ordinary overseer of the poor.” We have before us the warrant under which this person was appointed assistant-overseer: and that defines the duties to be performed by him to be “all the duties incident to the office of overseers of the said parish, except the collection of rates.” Now, the making and signing a rate is one of the duties incident to the office of overseer. It has been contended by Mr. Hamen that the assistant-overseer is but the servant of the overseers, bound (under the 7 & 8 Vict. c. 101, s. 61) to obey, in all matters relating to the duties of overseer, all directions of the majority of the overseers of the parish for which he acts, and that he cannot act in the place or in opposition to the will of his masters. I do not, however, think the learned counsel is well justified in that contention. Under the 59 G. 3, c. 12, s. 7, he is appointed, and removable by the vestry: and the court of Queen's Bench in *The Queen v. Watts*, 7 Ad. & E. 461, 2 N. & P. 367, distinctly say that “he is not the servant of the churchwardens and overseers of the parish, but of the vestry, from whom he directly derives his authority.” [61] There are numerous instances where an assistant-overseer is held to be an overseer, and where the acts of the former are held to be the acts of the latter. In many corporations there is a deputy-recorder, but he is not in truth the deputy of the recorder, but an independent officer. The statute 7 & 8 Vict. c. 101, s. 61, no doubt, directs that the assistant-overseer shall, in all matters relating to the duties of overseer, obey all directions of the majority of the overseers of the parish for which he acts. Still his appointment remains as before. That being so, here is a rate which is apparently valid upon the face of it, and which has been allowed by two justices, and duly published. The observations of Maule, J., in giving judgment in *For, App., Ducos, Resp.*, 6 C. B. 11, 2 Lutw. Reg. Cas. 97, are very much to the purpose. “In allowing a rate,” he remarks, “the justices are said to act ministerially: *The Queen v. The Earl of Yarborough*, 12 Ad. & E. 416, 3 P. & D. 491. And probably that is so, in the sense in which the word is used in some of the cases. But it is quite clear that they may so far act judicially that they may exercise a discretion in judging whether the persons who profess to have made the rate are the proper persons to make it. This was the view taken by the court of King's Bench in *Re v. Folio*, 1 Bott's P. L. 86 (6th edit., by Pratt, p. 62). ‘On a mandamus to the justices of W. B. to allow a rate, they returned that, ever since the 43 Eliz. c. 2, the justices had appointed four, three, or two overseers within that part of the parish which lies within the borough, and that they had always made rates within their jurisdiction: then they say that the rate was offered to them, made by overseers appointed by justices of the county, and not of the borough. Per Curiam: The return must be confirmed.’ The justices there did exercise a discretion in determining whether the rate had been made by [62] competent officers: and to that extent their jurisdiction was upheld.” Presumably the rate here is a valid one: and I am clearly of opinion that, if the claimant wished to try the validity of it, he might have done so by appeal; and if he had chosen to pay the rate in the meantime, he would have sustained no detriment, because, if it had turned out that the rate was invalid, he

would have been allowed that payment on account of the next valid rate. I therefore think the claimant has kept in his pocket money which parliament required him to pay as a condition of his obtaining a right to be upon the register. And, without deciding whether or not his objection was a sound one, it is enough to say that this rate was presumably a good one and ought to have been paid. I think we should be holding out a very bad precedent if we held a party entitled to be registered who has thus withheld payment of a rate which has not been properly questioned, upon a ground that appears to me to be perfectly indifferent. The poor must be maintained at the expense of those who occupy rateable property in the parish: and we ought not to hold out any encouragement to those who seek to relieve themselves from a burthen which the law has cast upon them, by taking advantage of an objection of mere form. I think, upon the whole, that the revising-barrister was right in expunging the names of these persons from the list of voters.

BYLES, J. I am of the same opinion. The rate in question appears to be perfectly good upon the face of it. It professes to be signed by the proper persons, and to have been allowed by two magistrates, and duly published. The 59 G. 3, c. 12, s. 7, which creates the office of assistant-overseer, makes him appointable and removable by the vestry, but says nothing about his [63] obedience to his fellow overseers. It gives him power and authority in the largest terms "to execute all such of the duties of the office of overseer of the poor as shall in the warrant for his appointment be expressed, in like manner and as fully to all intents and purposes as the same may be executed by any ordinary overseer of the poor." Now, the warrant under which this person was appointed declares that the duties to be by him executed and performed shall be, "to assist the overseers of the poor of the said parish in the performance of *all the duties incident to the office of overseers of the said parish, except the collection of rates,*" a reasonable exception, seeing that the appointment of collector of the rates did not rest with the vestry. Looking, therefore, at the 59 G. 3, c. 12, and at the warrant, this person seems to have been invested with the full powers of an overseer. Mr. Hannen says he stands in the relation of a servant to the overseers. There is nothing in the language of the statute to warrant that. I should say he rather stands in the position of a co-adjutor or fellow-officer. The court of Queen's Bench in *The Queen v. Watts*, and this court in *Points, App., Attwood, Resp.*, seem to have so held: at least, that appears to me to be the fair result of those two decisions. If the matter had stood there, —without pronouncing any final opinion upon the point,—I must confess I should feel great difficulty in holding this to be a bad rate. I certainly had always understood that the allowance of the rate by the justices was simply a ministerial act. But, looking at the case of *The King v. Folly*, to which my Lord has referred, and to the observations of Maule, J. (whose judgments are entitled to the profoundest respect), in *Fox, App., Davies, Resp.*, there seems to be good reason for thinking that it is something more. Strangers might not know who are the persons author-[64]-ized to make a rate: but the statement of the magistrates authenticating the transaction might well satisfy all persons concerned that the rate was made by persons duly qualified to make it, and to be avoided only on appeal. A man cannot be excused from paying a rate merely because it may be voidable. Almost every rate that is made is voidable. For these reasons, I am unable to say that the revising-barrister has come to a wrong conclusion.

KEATING, J. I entirely agree in the reasons which have been given by my Lord and my Brother Byles. Mr. Hannen has relied very much upon the terms of the 7 & 8 Vict. c. 101, s. 61, requiring the assistant-overseer to obey in all matters relating to the duties of overseer all directions of the majority of the overseers of the parish for which he acts. But I do not know why we should intend that in signing this rate Braman did not act in obedience to the directions of the majority of the overseers. Under these circumstances, it is impossible to say that the revising-barrister has come to a wrong conclusion.

Prideaux asked for costs on behalf of the respondent.

Hannen, contra, submitted that the case was one which was fairly arguable, and therefore not a case for costs; more especially as the magistrates had considered the rate of so doubtful validity that they had declined to enforce it.

ERLE, C. J. I see no reason why the rate should not be paid. There is nothing to take the case out of the general rule, that the respondent succeeding has his costs.

Decision affirmed, with costs.

[65] BOROUGH OF KIDDERMINSTER.

RICHARD POWELL, *Appellant*; FREDERICK BRADLEY, *Respondent*. Nov. 22nd, 1864.

[S. C. H. & P. 159; 34 L. J. C. P. 67; 11 L. T. 602; 10 Jur. N. S. 1241; 13 W. R. 272. Referred to, *Mohwin v. Specter*, 1869, L. R. 4 C. P. 496; *Rendlesham v. Howard*, 1873, L. R. 9 C. P. 256. Distinguished, *Harrop v. Hopper*, 1875, 1 C. P. D. 199.]

To entitle a party to be registered under the 2 W. 4, c. 45, s. 27, in respect of the occupation of a house, &c., it is not necessary that he should have been of "full age" during the whole of the prescribed period of occupation.

1. At a court held for the revision of the lists of voters for the borough of Kidderminster, Frederick Bradley duly claimed to have his name inserted on the list of persons entitled to vote in the election of a member for the borough of Kidderminster, in respect of the joint occupation of a foundry and premises at Clensmore, in the parish of Kidderminster Borough.

2. The said Richard Powell duly objected to the name of the said Frederick Bradley being inserted in such list of voters.

3. The said foundry and premises were in the joint occupation of Frederick Bradley and his brother Samuel Bradley, for twelve calendar months next previous to the last day of July in the present year.

4. The said Frederick Bradley attained the age of twenty-one years in the month of March in the present year.

5. At the said foundry, the trade or business of iron-founders was carried on under the firm of John Bradley & Co.

6. It was objected, on behalf of the said Richard Powell, that the said Frederick Bradley's name ought not to be inserted in the list of voters for the parish of Kidderminster Borough, inasmuch.—first, that, as the said Frederick Bradley was only twenty-one years of age in March in the present year, he could not have occupied as owner or tenant the said foundry and premises for twelve calendar months previous to the last day of July in the present year. secondly, that the said Frederick Bradley was not of full age during the [66] whole of the twelve calendar months previous to the last day of July in the present year.

7. The revising-barrister held that the said Frederick Bradley's having attained the age of twenty-one years in March last did not preclude him from occupying the said foundry and premises for twelve calendar months previous to the last day of July in the present year: and he also held that the minority of the said Frederick Bradley during a portion of the twelve calendar months previous to the last day of July in the present year did not of itself constitute a disqualification to his name being retained on the list of voters, and he therefore retained his name on the list of voters.

8. If the court should be of opinion that the said Frederick Bradley's having attained the age of twenty-one years in March last did preclude him from occupying the said foundry and premises for twelve calendar months previous to the last day of July in the present year, or that the minority of the said Frederick Bradley during a portion of the twelve months previous to the last day of July in the present year was a disqualification, then the name of the said Frederick Bradley was to be expunged from the list of voters, and the register of voters was to be altered accordingly. But, if the court should be of opinion that the said Frederick Bradley's having attained the age of twenty-one years in March last did not preclude him from occupying the said foundry and premises for the time and in manner aforesaid, and that the minority of the said Frederick Bradley during a portion of the said twelve months previous to the last day of July in the present year was not a disqualification, the register of voters was to remain unaltered.

Keane, Q. C., for the appellant. The first point [67] urged before the revising-barrister must be conceded not to be tenable. The second, however, is a point of some importance. At the time of the passing of the Reform Act, the 7 & 8 W. 3, c. 25, the 8th section of which precluded a minor from voting in the election of a member of parliament, was in force, and is still unrepealed. The words "person of full age" in the 27th section of the Reform Act must be assumed to have been introduced for another purpose. That section enacts that, in every city or borough, &c., every male person of full age who shall occupy as owner or tenant any house, &c.

of the clear yearly value of not less than 10l., shall, if duly registered, be entitled to vote: provided always that no *such person* shall be so registered in any year, unless he shall have *occupied such premises as aforesaid for twelve calendar months* next previous to the last day of July in such year, &c. Three things must concur to entitle the party to be registered: he must be a *male*, and of *full age*, and "*such person*" must have occupied the particular tenement for *twelve months*. This section bears a strong analogy to the provision of the Municipal Corporation Reform Act, 5 & 6 W. 4, c. 76, which prohibits an infant from qualifying himself to be a burgess. [Erle, C. J. The prohibition is against an infant voting.]

Kinglake, Serjt. (with whom was the Hon. R. Bourke), for the respondent. At the time the Reform Act passed, any person who had the requisite qualification, and had then attained the age of twenty-one years, was entitled to vote. If the construction now sought to be put upon the 27th section of that act be the correct one, it would operate as a disqualifying section in many cases, and defer the acquisition of the franchise until the party had attained the age of twenty-two. This would be a manifest absurdity. It [68] never could have been intended that the party should not acquire a vote in respect of occupation unless he was of full age during the whole twelve months. [Keating, J. There is nothing in the 27th section of the Reform Act to disable an infant from being registered.] Nothing. The qualification spoken of in the 40th section of the 6 & 7 Vict. c. 18, means the estate or interest in respect of which the party is or claims to be registered.

Keane, Q. C., was heard in reply.

ERLE, C. J. I am of opinion that the decision of the revising-barrister in this case was right. The qualification given by the 2 W. 4, c. 45, s. 27, is given in these words,—"In every city or borough which shall return a member or members to serve in any future parliament, every male person of full age, and not subject to any legal incapacity, who shall occupy, within such city or borough, or within any place sharing in the election for such city or borough, as owner or tenant, any house, warehouse, counting-house, shop, or other building, being either separately or jointly with any land within such city, borough, or place, occupied therewith by him as owner, or occupied therewith by him as tenant under the same landlord, of the clear yearly value of not less than 10l., shall, if duly registered according to the provisions hereinafter contained, be entitled to vote in the election of a member or members to serve in any future parliament for such city or borough." And that is followed by a proviso that "no such person shall be so registered in any year, unless he shall have occupied such premises as aforesaid for twelve calendar months next previous to the last day of July in such year," &c. Under that section, the person claiming to vote must be of full age [69] when he appears to vote. Under the Registration Act, he must equally be of full age at the time he claims to be placed upon the register. The meaning of the 27th section appears to me to be this, that every male person of full age shall be entitled to vote, provided such person has occupied the qualifying property for twelve calendar months. "Such person" does not mean of full age at the time when the occupation began: he must be under no legal incapacity when he comes to claim the franchise. The 27th section of the Reform Act and the 40th section of the Registration Act are to be read together; and this latter section makes it clear that the question for the revising-barrister is, whether at the time the party claims to be put upon the register he would be qualified to vote if that were the day of the election. The discussion before the revising-barrister is substituted for the old contention at the polling-booth. That section enacts that the revising-barrister "shall expunge the name of every person whose qualification as stated in any list shall be insufficient in law to entitle such person to vote;" and, further, in cases of objection, he "shall require it to be proved that the person so objected to was entitled on the last day of July then next preceding to have his name inserted in the list of voters in respect of the qualification described in such list." This latter part applies to the sufficiency of the qualifying property, not to the age of the party. The section then goes on,—“and, in case the same shall not be proved to the satisfaction of such barrister, or in case it shall be proved that such person was *then* incapacitated by any law or statute from voting in the election of members to serve in parliament, such barrister shall expunge the name of every such person from the said lists.” Imagine that an election is going on at the time of the revision, and the party comes and [70] claims to vote, and the barrister asks him "Are you of full age?" If the answer is in the negative, the name is to be expunged. If in the affirmative, the sufficiency of the

occupation or other qualification (if objected to) is to be inquired into. It seems to me, therefore, that no person is to be put upon the register unless he be qualified to vote if an election were then going on. If the construction contended for by Mr. Keane were to prevail, viz. that the party must be of full age at the time the twelve months' occupation commences, it would have the effect of disqualifying very many persons from voting until they had attained the age of twenty-two; whereas, every man by the law of England acquires the full rights of citizenship on attaining twenty-one.

BYLES, J. I am of the same opinion. The 8th section of the 7 & 8 W. 3, c. 25, enacted that "no person whatsoever, being under the age of one and twenty years, shall at any time hereafter be admitted to give his voice for election of any member or members to serve in this present or any future parliament," and imposed serious penalties on infants who might be elected. We ought not, therefore, unless obliged, to extend the legal incapacity beyond the age of twenty-one at the time of voting. But we are obliged to do so to a certain extent, by holding that the party claiming the franchise must be twenty-one at the time of registration, because now (by 6 & 7 Vict. c. 18, s. 81) only two questions can be put at the time of voting, viz. as to the identity of the voter, and whether he has already voted. We are here asked to strain the words of the Reform Act, and to hold that the party must be of full age at the time of the commencement of the twelve months' occupation upon which his qualification rests. If the legislature had intended that the [71] party should have been of full age during the whole of the twelve months preceding the last day of July, they would have employed appropriate language to express that intention. The proper construction appears to me to be that the party must have occupied for twelve months, and must be of full age at the time he claims to be registered. By adopting the construction contended for on the part of the appellant, we should in effect be extending the period of nonage to twenty-two.

KEATING, J. I am of the same opinion. The only difficulty I have felt during the discussion has been as to how an infant could be kept off the register, if he had been for the requisite period the occupier of premises of the required value. But the remarks of my Lord upon the 40th section of the 6 & 7 Vict. c. 18, have removed that difficulty. I think the revising-barrister was right in overruling the objection.

Kinglake, Serjt., asked for costs.

Keane, Q. C., opposed the application, suggesting that there had been contradictory decisions of revising-barristers on the point.

ERLE, C. J. Our general rule is, to grant the respondent costs where the decision of the revising-barrister is affirmed (*a*): still reserving to ourselves the exercise of a discretion under extraordinary circumstances.

The rest of the court concurring,

Decision affirmed, with costs.

[72] BOROUGH OF KIDDERMINSTER.

RICHARD POWELL, *Appellant*; THOMAS GUEST, JUN., *Respondent*. Nov. 22nd. 1864.

[S. C. H. & P. 149; 34 L. J. C. P. 69; 11 L. T. 599; 10 Jur. N. S. 1238; 13 W. R. 274. Applied, *Ford v. Pyp*, 1873, L. R. 9 C. P. 272; *Ford v. Hart*, 1873, L. R. 9 C. P. 275. Commented on, *Ford v. Drew*, 1879, 5 C. P. D. 63. Discussed, *Donnelly v. Graham*, 1888, 24 L. R. Ir. 132.]

A man has not "resided" in the borough "for six calendar months next previous to the last day of July," within the 27th section of the 2 W. 4, c. 45, when he has for a portion of that time been detained in a gaol situate more than seven miles distant therefrom, under a sentence of imprisonment for an assault, without the option of paying a fine.

1. At a court held for the revision of the lists of voters for the borough of Kidderminster, Richard Powell duly objected to the name of Thomas Guest, jun., being retained on the list of persons entitled to vote in the election of a member for the borough of Kidderminster in respect of the occupation of a house in Stourbridge Street,

(*a*) And is in affirmance of the franchise? See *Clarke, App., The Overseers of Bury St. Edmunds, Resp.*, 1 C. B. (N. S.) 23, 33.

in the parish of Kidderminster Borough, on the ground that the said Thomas Guest, jun., had not resided for six calendar months next previous to the last day of July in the present year within the said borough or within seven miles thereof.

2. The qualification of the said Thomas Guest, jun., was duly proved in all other respects.

3. On the 27th of February in the present year, the said Thomas Guest, jun., was convicted of an assault, and committed by the magistrates of the borough of Kidderminster to Worcester gaol for six months' imprisonment, without the option of paying a fine. He duly served the said term of imprisonment, and returned to Kidderminster on the 25th of August in the present year.

4. Worcester gaol is situate more than seven miles from the borough of Kidderminster or any part thereof.

5. At the time of his conviction, the said Thomas Guest, jun., resided at the above-mentioned house, and carried on there the businesses of a butcher and beer-seller; and after his conviction, but before leaving Kidderminster, he made arrangements by which the said businesses were carried on and the said house was occupied by his servant on his behalf during his ab-[73]-sence, to whom he gave the key of the house, and paid him 15s. per week to conduct the said businesses. His furniture remained undisturbed in the house during his imprisonment; and immediately on the termination thereof he returned to his said house, and has continued to reside there ever since.

6. The said Thomas Guest, jun., is a widower, and has no family.

7. It was contended, on behalf of the said Richard Powell that, under the circumstances stated, the said Thomas Guest, jun., had not resided for six calendar months next previous to the last day of July in the present year within the said parish of Kidderminster Borough, or within seven statute miles thereof, or of any part thereof.

8. The revising-barrister held that, under the circumstances stated, the said Thomas Guest, jun., had resided for six calendar months previous to the said last day of July in the present year within the said parish of Kidderminster Borough; and he therefore retained his name on the list of voters.

9. If the court should be of opinion that, under the circumstances stated, the said Thomas Guest, jun., had not resided for six calendar months previous to the last day of July in the present year within the said parish of Kidderminster Borough, then the name of the said Thomas Guest, jun., was to be expunged from the list of voters, and the register of voters was to be altered accordingly. But, if the court should be of opinion that the said Thomas Guest, jun., had resided during the time and in manner aforesaid within the said parish of Kidderminster Borough, the register of voters was to remain unaltered.

Keane, Q. C., for the appellant. The 27th section of the Reform Act requires six months' residence in the [74] borough as one of the qualifications to entitle a party to be registered as a voter. Here, the greater portion of that period had been passed by the respondent in compulsory residence in a gaol distant more than seven miles from the borough. The residence required by the statute, is an actual occupation by the party himself, or by his family or servants: *Withorn, App., Thomas, Resp.*, 7 M. & G. 1, 8 Scott, N. R. 783, 1 Lutw. Reg. Cas. 125. The residence must continue down to the time of voting: 6 & 7 Vict. c. 18, s. 79. In settlement cases, the effect of imprisonment was saved by the proviso in the 9 & 10 Vict. c. 66, s. 1, "that the time during which such person shall be a prisoner in a prison shall for all purposes be excluded in the computation of time:" *The Queen v. The Inhabitants of Harrow-on-the-Hill*, 17 Law J., M. C. 148; *The Queen v. The Inhabitants of Salford*, 12 Q. B. 106, 17 Law J., M. C. 170; *The Queen v. The Overseers of Hartfield*, 21 Law J., M. C. 65 (nom. *Hartfield v. Rotherheld*, 17 Q. B. 746); *The Queen v. The Inhabitants of Potterhanworth*, 28 Law J., M. C. 56. To have that effect, it required the express words of the statute. In *The Queen v. The Inhabitants of Halifax*, 12 Q. B. 111, 17 Law J., M. C. 158, it was held that a pauper is not irremovable from a parish on the ground of residence, under the statute 9 & 10 Vict. c. 66, s. 1, if, at any time during the five years (a) next before application for an order to remove him he has been removed from the parish under a prior order; for, such removal is a break in the residence: and it makes no difference that the pauper so removed leaves behind furniture in a house rented and occupied

(a) Three years, by stat. 24 & 25 Vict. c. 55, s. 4. See the cases collected in Archbold's Poor Law, 11th edit. 701 et seq.

by him at the time of his removal, and retains the key of the house, and that he has always the animus revertendi, and actually returns and resumes [75] occupation of his house after an absence of a few days. [Byles, J. How does this case differ from that of a person illegally detained, or of a person imprisoned under a ca. sa. ?] In the former case, there is in law no detention : and, in the latter, the party has the option of getting his discharge by paying the debt. Here, the respondent has by his own wilful misconduct deprived himself of the right to reside within the borough. In the case of *In re Jones*, 2 Ad. & E. 436, an unsuccessful attempt was made to obtain a habeas corpus to enable a prisoner in custody upon a conviction for a misdemeanor to vote at an election.

Kinglake, Serjt. (with whom was the Hon. R. Bourke), for the respondent. The revising-barrister finds the fact of residence, unless the imprisonment precludes it. Decisions on settlement cases are altogether inapplicable to appeals under the Registration Act : per Maule, J., in *Dechurst, App., Fobben, Resp.*, 7 M. & G. 182, 8 Scott, N. R. 1013, 1 Lutw. Reg. Cas. 274. The word "residence" has different meanings according to the occasion upon which and the intention with which it is used. The residence in *Withorn, App., Thomas, Resp.*, was clearly insufficient. In Rogers on Elections, 7th edit. 176, it is said : "The following cases were decided by the Ipswich committee. *Pissey's case*, F. & F. 271. The voter at Midsummer (before the election) had removed a waggon-load of goods to another house at some distance from Ipswich : the house at Ipswich was shut up till Michaelmas (the election being in July), to which time he paid the rent and kept the key : he had never given notice to quit, but, on the contrary, had not abandoned all intention of returning. It did not appear whether all his furniture had been removed in the waggon, or whether any had been left. In *Proctor's case*, F. & F. 273, it was [76] proved that the voter having removed in June from his house to one opposite, a placard of 'House to let' was put on the former house, which was returned 'empty' by the rate-collector, and the words 'Removed opposite' placed on the shutters : a few articles were left in the house till within a few days before Michaelmas, but he kept the key till Michaelmas, and held himself out as entitled to let the house. The election took place in July. The committee decided in *Pissey's case* that the voter had not lost his qualification : in *Proctor's case* they decided that he had. It is difficult to see any feature of legal distinction between the two cases : a distinction was, however, taken in argument, that there was an animus revertendi in one case, and not in the other : but surely that can make no difference. In cases of inhabitancy, where it is required to be inferred that a man, though personally absent, still continues to 'inhabit,' it is important to shew that the absence is not permanent : but, unless personal residence by a man or his family be necessary to constitute occupation, it is immaterial, supposing actual occupation to be otherwise shewn, whether his personal absence is permanent or only temporary." Could this man be said to be *residing* in Winchester gaol ? In *Nas v. Davis*, 4 C. B. 444, a prisoner in execution under a ca. sa. in the common gaol of the county of Radnor, but having a permanent lodging in London, where his wife and family resided, and to which it was his intention to return, was held to have a sufficient residence in London to petition the court of bankruptcy under the 5 & 6 Vict. c. 116, and 7 & 8 Vict. c. 96. In *Dunston v. Paterson*, 5 C. B. (N. S.) 267, it was held that a compulsory residence at the time of the commencement of the action in a gaol, did not constitute the place of detention the "dwelling" of the party, within the 128th section of the 9 & 10 [77] Vict. c. 95, s. 128. "We are of opinion," says Willes, J., in delivering the judgment of the court, "that the gaol was not a dwelling within the meaning of the act. The residence there was compulsory and temporary, without any intention on the plaintiff's part of remaining ; but, on the contrary, with an intention, shewn by the facts, of leaving it when she could, and returning to her former place of residence, whenever she was discharged out of custody. The statute refers to the place in which the party dwells, as affecting the question of convenience to suitors in attending the county-court, and therefore must mean by the word 'dwelling' the ordinary dwelling of the party, and not a place like a gaol, where a person is temporarily detained, it may be for a single day or night, in custody." *The King v. Mitchell*, 10 East, 511, is a very strong authority. There, freemen of Norwich, substitutes in the militia, quartered at Colchester, but having dwelling-houses in Norwich, in which their families resided, and to which they at times resorted on furlough (in some instances within the preceding six months only for the purpose of voting at elections), were held to be *inhabitants* within the charter of Norwich and a

local act (3 G. 2, c. 8), requiring them to have been inhabitants for six calendar months previous to certain elections of corporate officers, in order to qualify them to vote. Lord Ellenborough there said: "The act in question requires and ought to receive a reasonable construction, according to the subject-matter of it and the manifest object of the legislature. The act meant to secure the right of voting for corporate offices to the freemen bona fide inhabitants of the city for a certain period before the election, and is therefore satisfied by a bona fide inhabitancy. Now, of what other place but of Norwich could these men be said to be inhabitants at the time? They had [78] their own dwelling-houses or homes there, in which they left their families dwelling, and to which they returned from time to time when they received leave of absence from their regiment. They had no other abiding place than this; for, the place where the regiment happened to be quartered could not be considered as such: and, though they could not perform watch and ward at Norwich, yet they were liable there to all public burthens in respect of their houses there in which their families dwelt." The respondent in this case answers every one of the conditions mentioned in that judgment. [Byles, J. Suppose the qualification here had been one of the old reserved ones, to inhabitants paying scot and lot, would this person have been an inhabitant?] Clearly so, upon the authority of *The King v. Mitchell*. In *The Queen v. The Overseers of Holbeck*, 16 Q. B. 404, it was held that, under the 9 & 10 Vict. c. 66, s. 1, an imprisonment out of the parish, in default of paying a fine, upon a summary conviction, does not break the residence in the parish; and that, if there be on the whole a five years' residence, without reckoning the time of imprisonment, and the residence be continuous, with the exception of that time, the resident is irremovable. [Byles, J. Suppose the party had been confined in the county lunatic asylum, beyond the limits of the borough, or in a hospital, with a broken leg, would he lose his vote?] It is submitted that he would not. [Byles, J. In the cases I put, he is in no way accessory to his own confinement. Here, however, he is.] True: but, in the case of the militiamen, there was a compulsory absence. Would a man lose his right to vote whose absence was occasioned by his seizure by a press gang? Or a man imprisoned on suspicion of felony, and on his trial acquitted?

Keane, Q. C., in reply. In *The King v. Mitchell*, 10 [79] East, 511, the parties were in the habit of coming back to Norwich from time to time on furlough, and were only absent on duty: and in *The Queen v. The Overseers of Holbeck*, 16 Q. B. 404, the pauper had the option of relieving himself from the imprisonment by paying the fine. So, in the cases put, of the lunatic and the man with a broken leg, both might come back, the one when cured of his mental infirmity, the other on recovering his bodily health and strength. All that *Dunston v. Paterson*, 5 C. B. (N. S.) 267, amounts to is, that the word "dwelling" does not apply to a temporary detention in a gaol for debt: but, how can a man be said to "dwell" or "reside" in a place where he neither is nor can be? To entitle a person to the franchise in respect of the occupation of premises in a borough, he must have a lawful right to be present there during the statutory period. The decision in *Nias v. Davis*, 4 C. B. 444, turned upon the meaning of the word "reside" in the Bankrupt Acts.

ERLE, C. J. I am of opinion that the decision of the revising-barrister in this case was wrong, and that Guest, the respondent, had not a right to have his name retained upon the list of voters for the borough of Kidderminster. The 27th section of the Reform Act contains a proviso "that no such person," as before mentioned, "shall be so registered in any year, unless he shall have *resided* for six calendar months next previous to the last day of July in such year within the city or borough, or within the place sharing in the election for the city or borough, in respect of which city, borough, or place respectively he shall be entitled to vote, or within seven statute miles thereof or of any part thereof:" and this person was for a considerable portion [80] seven statute miles from the borough. The legislature has imposed residence as one of the conditions of qualification. Did this man reside in the borough during the specified time? I will assume that he had a house there, and a wife and family, and that he had animus revertendi: but, during the time he was in prison, he was not sui juris: he was not at liberty to return home: he had forfeited his right to do so by his own criminal act. I entirely subscribe to the doctrine so clearly laid down in *Elliott on Registration*, 2nd edit 204, where the learned author says that, "in order to constitute residence, a party must possess at the least a sleeping apartment,

but that an uninterrupted abiding at such dwelling is not requisite." "Absence," he continues, "no matter how long, if there be the liberty of returning at any time, and no abandonment of the intention to return whenever it may suit the party's pleasure or convenience so to do, will not prevent a constructive legal residence. But, if he has debarred himself of the liberty of returning to such dwelling, by letting it for a period, however short, or has abandoned his intention of returning, he cannot any longer be said to have even a legal residence there." The learned author says he loses his character of resident "if he has debarred himself of the liberty of returning to such dwelling," and he gives two examples, viz. letting the house, or abandoning the intention of returning. I think we may add to these a third case: I think this man has debarred himself of the liberty of returning, when he has been guilty of a criminal act, by reason of which the laws of his country have taken away from him the power of returning. Judges who have from time to time had to decide upon the meaning of "residence" in different statutes, have been obliged to resort to various shifting meanings of the word, according to the object and intention of the [81] legislature in the particular statute in which it is used. In *Nias v. Davis*, 4 C. B. 444, for the purpose of the administration of the bankrupt law, the party, though temporarily confined for debt in a distant county, was held to be resident in the place where his family was, and where probably also his creditors dwelt and his debts were contracted. I should say also that that statute was passed altogether *alio intuitu* from the statute now under consideration. Further, I should say that a man who is imprisoned for debt has not absolutely lost the liberty of returning to his place of residence: by paying the debt, he becomes free to return. So, the case of the militiamen (*The King v. Mitchell*, 10 East, 511), is in some degree consistent with the power to return to their residences. But a person who stands convicted and sentenced to an absolute term of imprisonment for a misdemeanor, without the option of purging his offence by payment of a fine, is under an utter disability to return to his home. I think all the cases cited are distinguishable, and that the intention of the legislature will be carried out by holding that this respondent has not complied with the condition of residence which the statute imposes. If his imprisonment for five months were held not to deprive him of his right to be registered, I do not see why an imprisonment for two years should prevent him from being qualified. I think the decision was wrong, and must be reversed.

BYLES, J. I am of the same opinion. It is not necessary or convenient to lay down any universal rule on the subject: but I think the fair result of the authorities is, that legal inability caused by the criminal and voluntary act of the party, and not from misfortune, breaks the residence, and destroys the qualification. The case of a man who is kept away from his [82] residence by bodily or mental infirmity is distinguishable: as also is that of a militiaman absent for a time on duty, or of an innocent man accused and remanded, or committed for trial and acquitted. These are purely cases of misfortune. It is distinguishable also from that of a man imprisoned under a writ of *ex. sa.*, or for non-payment of a fine: he may relieve himself from impediment to his return by paying the debt or the fine. Extreme cases may be suggested in support of either view. On the one side, it may be asked, would an imprisonment for twenty-four hours disqualify? On the other it might be asked, would twenty years' imprisonment disqualify? It is not easy at first sight to say where the line is to be drawn: but, upon the whole, I agree with my Lord that the decision of the revising-barrister here was wrong.

KEATING, J. I am of the same opinion. Cases which approach the line are always very difficult to decide. But I am of opinion that, where a man has by his own wrongful and criminal act deprived himself of the power of complying with the condition of residence in the statute in question, he cannot be said to have continuously resided in the borough.

Decision reversed.

[83] BOROUGH OF KIDDERMINSTER.

RICHARD POWELL, *Appellant*; WILLIAM JONES, *Respondent*. Nov. 22nd, 1864.

[S. C. H. & P. 165; 11 L. T. 600; 11 Jur. N. S. 17; 13 W. R. 273.]

A. was possessed of three houses (one of which he himself occupied), each being under the yearly value of 10l. Under a local act, he compounded for the rates upon all

the premises for one year. At the expiration of the year no new composition was entered into, but the overseers continued to assess the premises as before, though A. had improved those in his own occupation so as to increase their yearly value to upwards of 10l. He then claimed to be rated to the full rate in respect of the premises in his own occupation, but he did not at that time pay or tender the arrears of rates then due. No alteration was made in the rating. A. afterwards, and before the 20th of July, paid to the overseers a sum which was more than sufficient to satisfy all rates due in respect of the last-mentioned premises to the 5th of January, but made no specific appropriation of the money at the time of the payment; and the overseers placed the amount against *all* the rates due:—The revising barrister having found that A. was sufficiently rated, and that he had paid his rates so as to entitle him to be registered,—the Court refused to interfere with his decision.

1. At a court held for the revision of the lists of voters for the borough of Kidderminster, Richard Powell objected to the name of William Jones being retained on the list of persons entitled to vote in the election of a member for the borough of Kidderminster in respect of property occupied within the parish of Kidderminster Borough.

2. The said William Jones occupied in St. John Street, within the parish of Kidderminster Borough, for twelve calendar months previous to the last day of July in the present year, a house and garden of upwards of the clear yearly value of 10l.

3. The said William Jones was the owner of the said house and garden in his occupation, and also of the two adjoining houses.

4. The said William Jones some years since, under the provisions of an act of 4 & 5 Viet. c. lxxiii. intituled "An Act for better assessing and collecting the poor-rates in the borough of Kidderminster, in the county of Worcester," compounded with the overseers for the said borough for the poor-rates of the above houses for the term of one year; and by entering into such composition only one half the amount was assessed on the said house and garden for poor-rates that would have been assessed thereon if the said [84] William Jones had not entered into such composition. At the expiration of the year for which such composition was entered into, and down to the month of July last inclusive, the July rate being made and allowed on the 22nd of that month, the overseers continued to assess the said house and garden on composition, although the said William Jones did not enter into any composition agreement with them other than as above stated, neither did he attend any meeting of the overseers for the purpose of entering into any other composition agreement; but the demand made by the overseer, and the receipt given by the collector, stated that the rates were composition poor-rates.

4. Subsequently to the said William Jones entering into such composition as aforesaid, and previously to the 31st of July, 1863, he made improvements to the said house and garden, by which the clear yearly value thereof was raised to upwards of 10l.

5. The case contained an extract of the poor-rate made and allowed the 15th of October, 1863, so far as was material to this case (being the first rate made after the 31st of July preceding), shewing the names of the occupiers of two of the tenements (the third being void), and also the name of the owner (the respondent), the description of the property, the gross estimated rental, the rateable value, and the amount of the rate assessed upon the owner pursuant to the statute.

6. The said William Jones, in October, 1863 (but he could not state the precise day), claimed to be rated separately for the said two other houses, and to the full rate for and in respect of the house and garden in his own occupation, for the purpose, as he then stated to the overseer, of "getting his vote;" but he did not at the same time pay or tender the arrears of rates then due.

[85] 7. The overseer did not alter the rating in respect of the said house and garden in the occupation of the said William Jones.

8. The compound rate laid in October, 1863, amounted for all three houses and garden to 4s. 9d., and there were arrears of former rates brought forward of 1l. 3s. 9d., making the total rates then due in respect of the three houses, 1l. 8s. 6d.

9. The said William Jones, subsequently to his claiming to be separately rated as aforesaid, and previously to the 20th of July in the present year, paid to the overseers of the said borough the sums of 10s. and 12s. 6d., making together 1l. 2s. 6d., which was more than sufficient to pay all rates due previously to the 5th of January

last in respect of the house and garden in his own occupation: but, at the time of making such payment, he did not state or specify to what rate or in respect of which houses he paid the said amounts: and the collector placed the amount against all the rates due, namely 11. 8s. 6.

10. It was objected, on behalf of the said Richard Powell, that the name of the said William Jones should be expunged from the list of persons entitled to vote in the election of a member for the borough of Kidderminster in respect of property occupied within the said parish of Kidderminster Borough, inasmuch,—first, as he had not been rated in respect of such house and garden to all rates for the relief of the poor in such parish of Kidderminster Borough made during the time of such his occupation as aforesaid,—secondly, that the said William Jones had not paid the poor-rates payable from him previously to the 5th of January, on or before the 20th of July in the present year.

11. The revising-barrister held that the said William Jones was rated in respect of such house and [86] garden to all rates for the relief of the poor in such parish of Kidderminster Borough made during the time of his occupation, and that he had paid the poor-rates payable from him previously to the 5th day of January, on or before the 20th day of July in the present year: and accordingly retained his name on the list of voters.

12. If the court should be of opinion that, under the circumstances stated, the said William Jones was not rated in respect of such house and garden to all rates for the relief of the poor during the time aforesaid, or that he had not paid the poor-rates payable from him previously to the 5th day of January, on or before the 20th day of July in the present year, then the name of the said William Jones was to be expunged from the list of voters, and the register of voters was to be altered accordingly. But, if the court should be of opinion that, under the circumstances stated, the said William Jones was rated in respect of such house and garden, and had paid all rates payable from him previously to the 5th day of January, on or before the 20th day of July in the present year, the register of voters was to remain unaltered.

Keane, Q. C., for the appellant. The revising-barrister was wrong in holding that, under the circumstances, Jones was rated in respect of the premises occupied by him, and had paid the rates due. By the 1st section of the local act, 4 & 5 Vict. c. lxxii., it is provided that the owners of dwelling-houses of a yearly rent of less than 10l. shall be rated instead of the occupiers. Compositions for rates are regulated by s. 2, which enacts that, “if the owner of any dwelling-house within the said borough, the yearly rent or value whereof shall not amount to 10l., shall be de-[87]-sirous of paying a reduced rate for a year for the same, whether occupied or not, the overseers of the poor of the said borough, or any two of them, shall compound with such owner for the payment of the rates charged or chargeable thereon, in manner following, that is to say,—where the annual rent or value of the dwelling-house rated shall not amount to the sum of 7l., at any sum not less than one-third of the amount of each rate, and at any sum not less than one-half of the amount of each rate where the annual rent or value of the dwelling-house shall amount to the sum of 7l. and shall not amount to the sum of 10l.: and all such compositions and reduced rates shall be entered in the rate-book of the said overseers, and shall be recoverable in like manner as poor-rates are now by law recoverable.” And s. 3 enacts that “the overseers of the poor of the said borough shall yearly hold a meeting for the purpose of entering into any such composition with such owners as last aforesaid, and the said overseers shall give seven days’ notice of the time and place of every such meeting, in the same manner as notices of vestry meetings are now required to be given; the first yearly meeting for such purpose to be held within ten days after the publication of the first rate to be made for the relief of the poor of the said borough after the passing of this act.” By the 2 W. 4, c. 45, s. 30, an occupier may demand to be rated: but a parishioner has no right to appeal (under the 17 G. 3, c. 38, s. 4) against a rate, on the ground that he is not rated therein: *The King v. George*, 6 Ad. & E. 305, 1 N. & P. 451. The respondent was the owner of the three houses and the occupier of one. It never was the intention of the statute that a person so situated should have the benefit of the reduced rate. No new composition was entered into after the first year; consequently, there was no authority for continuing the [88] reduced payment. Besides, the improvements made therein during the year, as found by the revising-barrister, altogether took the premises in the respondent’s own occupation out of the

operation of the 4 & 5 Vict. c. lxxii., if they ever were applicable. To entitle a party to be registered in respect of a qualification as occupant, he must be legally rated. Non-payment of an illegal rate operates no disqualification: *For, App., Davies, Resp.*, 6 C. B. 11, 2 Lutw. Reg. Cas. 97. This man was not legally rated. Then, assuming that he was well rated, had he paid all the rates due? This depends upon the doctrine of appropriation, as to which the rule is thus laid down in Roscoe on Evidence, 9th edit. 417 (10th edit. 479), "In general, the party who pays money has a right to direct the application of it: but, where money is paid to a creditor generally without any specific appropriation by the party paying, and the creditor has several demands against the party paying, he may apply the money paid to whichever of those demands he pleases: *Hull v. Wood*, 14 East, 243, n.; *Clayton's case*, 1 Meriv. 572." [Byles, J. There may be appropriation by conduct, as well as by words.] No doubt. But there must be something more specific than is found in this case. The proper time for appropriation is the time of payment (a).

[89] Kinglake, Serjt., for the respondent, was not called upon.

ERLE, C. J. I am of opinion that the decision of the revising-barrister ought not to be interfered with. It seems that Jones was rated. Any objection such as that alluded to by Mr. Keane might have been set right by appeal. Then, has he paid all the poor-rates which were payable from him in respect of the premises previously to the 6th day of April next preceding the day of revision? There is much weight in the argument as to the mode of appropriation. Actual express words are not essential to constitute an appropriation. Conduct and course of business will be enough. Although the statement of the case is somewhat meagre, I think enough appears to warrant the conclusion that Jones was rated, and that he paid enough to satisfy the rate payable from him in respect of the premises in his occupation, though he did not at the time make any specific appropriation of the money. As a question of fact, there is much in what has been urged by Mr. Keane: but it was all before the revising-barrister. He has found that the money was so paid as to constitute a sufficient payment by the respondent; and I do not feel warranted in saying that there was no evidence to justify his decision.

BYLES, J. I am of the same opinion. The rate is *primâ facie* good. At all events, it was only reversible on appeal. As to the appropriation, I think we may assume that the receiver knew the intention of the payer when he made the payment.

KEATING, J. I am of the same opinion. Mr. Keane frankly admitted that, if what passed when Jones claimed to be rated had passed at the time he paid the [90] rate, there would have been a complete appropriation of the payment to the discharge of his own rate. It does not appear from the case as stated by the revising-barrister what time elapsed between the two transactions. I think the revising-barrister's decision ought to be held conclusive.

Decision affirmed, with costs.

LANCASHIRE.—SOUTHERN DIVISION.

ARTHUR HEELIS, *Appellant*; THOMAS GOAD BLAIN, *Respondent*. Nov. 23rd, 1864.

[S. C. H. & P. 189; 34 L. J. C. P. 88; 11 L. T. 480; 11 Jur. N. S. 18; 13 W. R. 262. Distinguished, *Orme's case*, 1872, L. R. 8 C. P. 281. Followed, *Hawfield's case*, 1872, L. R. 8 C. P. 306; *Lowcock v. Broughton Overseers*, 1883, 12 Q. B. D. 369.]

1. Where a rent-charge is created by means of a conveyance to uses, the grantee immediately acquires "actual seisin," by the words of the statute 27 H. 8, c. 10, s. 1, and is entitled to be registered in respect thereof, notwithstanding he may not have actually received any part of the rent.—2. *Aliter*, where the rent-charge is

(a) "The intention of the debtor," says Mr. Roscoe, p. 448, "ought to be notified at [or before] the time of payment: per Abbott, C. J., and Bayley, J., in *Mayfield v. Wadshon*, 3 B. & C. 357, 362, 363, 5 D. & R. 224. But the creditor need not apply it to any particular demand at the moment of payment; he has a right to make the application at any subsequent period: nor will an entry in his private books applying it to a particular demand, but not communicated to the party paying, preclude him from applying it afterwards to another demand: *Simson v. Ingham*, 2 B. & C. 65, 3 D. & R. 249. See also *Grigg v. Cocks*, 4 Simons, 438."

created by an ordinary grant at common law, as in *Murray, App., Thornley, Resp.*, 2 C. B. 217, 1 Lutw. Reg. Cas. 496, and *Hayden App., The Overseers of Twerbon, Resp.*, 4 C. B. 1, 1 Lutw. Reg. Cas. 510.

1. At a court held for the revision of the lists of voters for the southern division of the county of Lancaster, Frederick Clayton objected to the name of Arthur Heelis being retained on the list of voters for the township of Pendleton, in respect of the qualification following:—

Christian and surname of the claimant at full length.	Place of abode.	Nature of qualification.	Street, lane, &c., where the property is situate, &c., or if the qualification consist of a rent-charge, then the names of the owners of the property out of which such rent is issuing or some of them, and the situation of the property.
Heelis, Arthur.	Halton Bank, Eccles. Old Road, Pendleton.	An undivided sixth part or share of a perpetual chief or fee-farm rent of 50l. per annum.	Issuing out of land and a house and other buildings known as Hopefield Weaste Lane, in Pendleton, belonging to and occupied by W. T. Blacklock.

[91] 2. The said rent-charge of 50l. was created by indentures of lease and release dated respectively the 9th and 10th of June, 1839, whereby certain land in Pendleton was granted, bargained, sold, and released by John Robinson and Stephen Heelis to John Spencer and his heirs, to the use, intent, and purpose that the said John Robinson and his assigns, during his life, and, after the determination of that estate by any means in his life-time, then that the said Stephen Heelis and his heirs during the natural life of and in trust for the said John Robinson, and, subject to the aforesaid limitations, then that John Robinson, his heirs and assigns, should and might yearly and every year for ever thereafter have, receive, and take, from and out of the land thereby released, and the buildings to be erected thereon, one clear yearly rent or sum of 50l., by half-yearly payments, on the 24th of June and 25th of December, and to further uses limiting to John Robinson, his heirs and assigns, or to Stephen Heelis and his heirs, as the case might be, powers of distress and of entry and perception of profits for securing the said yearly rent: and, subject to the said yearly rent of 50l. and powers and remedies for the recovery thereof, to uses to bar dower: remainder to the use of John Spencer, his heirs and assigns, for ever.

3. All the estate and interest in the said land so vested in John Spencer became prior to the year 1862, and still is, vested in William Thomas Blacklock, and his heirs, in fee.

4. By an indenture made and dated the 3rd of November, 1862, the said John Robinson granted and released the said rent-charge of 50l., and all his estate therein, with the said powers and remedies for recovering the same, unto and to the use of the said Stephen Heelis, his heirs and assigns, for ever.

[92] 5. By indenture duly executed and dated the 27th of January, 1864, and made between the said Stephen Heelis of the first part, John Heelis (a son of the said Stephen Heelis) of the second part, and the said Stephen Heelis and John Heelis, and Thomas Heelis, Arthur Heelis, James Heelis, and Edward Heelis, four other sons of the said Stephen Heelis, of the third part,—the said Stephen Heelis, in consideration of the natural love and affection which he had and bore for his sons, the other parties to the deed, and for a nominal pecuniary consideration, granted and assured unto the said John Heelis and his heirs the said rent of 50l., with the powers and remedies for the recovery thereof: and all his estate and interest therein: to hold unto the said John Heelis and his heirs, to the use of the said Stephen Heelis, John Heelis, Thomas Heelis, Arthur Heelis, James Heelis, and Edward Heelis, respectively, and their respective heirs and assigns, equally, in undivided sixth shares, as tenants in common, and not as joint-tenants.

6. The said rent-charge has always been duly paid to the parties entitled.

7. The half-year's rent which became due on the 24th of June, 1861, being the first which became due after the execution of the said indenture of the 27th of

January, 1864, was on the 8th day of July following paid by the said William Thomas Blacklock to the said John Heelis, for and on behalf of himself and the five other parties entitled thereto under the last-mentioned deed; to whom he paid over their respective shares at various times between the 8th and 30th days of July. No portion of the said rent-charge was paid after the execution of the said indenture of the 27th of January, 1864, until the 24th of June, 1864, when the half-year's payment was made as aforesaid.

8. The land so conveyed in 1839, together with a [93] house and other buildings subsequently erected thereon, are the premises described in the fourth column of the said list of persons claiming to be entitled to vote.

9. The said Arthur Heelis named in the said indenture of the 27th of January, 1864, is the claimant Arthur Heelis named in the said list.

10. When the claim of Arthur Heelis came before the revising-barrister, it was objected that he had not been in actual possession or in receipt of the rent for his own use for six calendar months next previous to the last day of July, 1864. On the other hand, the claimant contended that the said rent-charge having been originally created, *not by grant, but by a conveyance to uses*, he (the claimant) having on the 27th of January, 1864, become, by virtue of the indenture of that date, an assign of the said John Robinson, he was by the 4th and 5th sections of the Statute of Uses (a) [94] to be adjudged and deemed to be in possession and seisin of the share of the said rent-charge in such like estate as he had in the use of the same; and that, so being in such possession and seisin, he was in the actual possession and receipt thereof for six calendar months next previous to the last day of July, 1864, within the meaning of the 2 W. 4, c. 45, s. 26.

11. The revising-barrister considered that the seisin and possession mentioned in the said sections of the Statute of Uses, as explained and qualified by the subsequent words in the latter section, viz. "as if a grant or other lawful conveyance had been made and executed to them by such as were or should be seised to the use or intent of any such rent," and that the statutable seisin and possession was to the same extent and of the same effect only as if a grant of the said share of the said rent had on the said 27th of January, 1864, been made by William Thomas Blacklock to the claimant; and that, if such grant had then been made, nevertheless, until the actual receipt of part of his said share of the said rent, the claimant would not have been in the actual possession or receipt thereof within the meaning of the 2 W. 4, c. 45, s. 26. He therefore disallowed the claim of the said Arthur Heelis, and erased his name from the list of voters.

(a) 27 H. 8, c. 10. The 4th and 5th sections are as follows:—

S. 4. "And where also divers persons stand and be seised of and in any lands, tenements, or hereditaments, in fee simple or otherwise, to the use and intent that some other person or persons shall have and perceive yearly to them and to his or their heirs one annual rent of *xli*, or more or less, out of the same lands and tenements, and some other person one other annual rent to him and his assigns for term of life or years, or for some other special time, according to such intent and use as hath been heretofore declared, limited, and made thereof,"—

S. 5. Be it therefore enacted, "that, in every such case, the same persons, their heirs and assigns, that have such use and interest, to have and perceive any such annual rents out of any lands, tenements, or hereditaments, that they and every of them, their heirs and assigns, be adjudged and deemed to be in possession and seisin of the same rent of and in such like estate as they had in the title, interest, or use of the said rent or profit, and as if a sufficient grant or other lawful conveyance had been made and executed to them by such as were or shall be seised to the use or intent of any such rent to be had, made, or paid, according to the very trust and intent thereof; and that all such and every such person and persons as have, or hereafter shall have, any title, use, and interest in or to any such rent or profit, shall lawfully distrain for non-payment of the said rent, and in their own names make avowries, or by their bailiffs or servants make cognizances and justifications, and have all other suits, entries, and remedies for such rents as if the same rents had been actually and really granted to them with sufficient clauses of distress, re-entry, or otherwise, according to such conditions, pains, or other things limited and appointed upon the trust and intent for payment or surety of such rent."

[95] 12. If the court should be of opinion that, upon the facts stated, the claimant was by virtue of the said seisin to uses of the said William Thomas Blacklock, or otherwise, to be deemed in point of law to have been in the actual possession or receipt of the said share of the said rent for six calendar months next previous to the last day of July, 1864, then his name was to be restored to the list of voters. But, if the said court should, upon the said facts, be of opinion that the claimant was not in point of law to be so deemed in the actual possession or receipt of the said share of the said rent, then his name was not to be restored to the said list.

13. The like claims were made by James Heelis, John Heelis, and Thomas Heelis, whose names appeared in the same list of claimants. The same objection was made to each of these claimants, and their names were erased from the list for the same reasons, and their cases consolidated with the principal case.

Joshua Williams, for the appellant. The rent-charge in question was created by indentures of lease and release of the 9th and 10th of June 1839, and was conveyed to the claimant and the other five persons named by indenture of the 27th of January, 1864. On the part of the claimant it was urged before the revising-barrister that, the rent-charge having been originally created, not by grant, but by conveyance to uses, he having become by virtue of the indenture of January 1864, an assign of the grantee, he was *by the 4th and 5th sections of the Statute of Uses* to be adjudged and deemed to be in possession and seisin of the share of the said rent-charge in such like estate as he had in the use of the same, and that, so being in such possession and seisin, he was *in the actual possession and receipt thereof* for six calendar months next [96] previous to the last day of July, 1864, within the meaning of the 2 W. 4, c. 45, s. 26. The revising-barrister considered that the seisin and possession mentioned in the sections of the Statute of Uses referred to, was explained and qualified by the subsequent words in s. 5, viz. "as if a grant or other lawful conveyance had been made and executed to them by such as were or should be seised to the use or intent of any such rent," and that the statutable seisin and possession was to the same extent and of the same effect only as if a grant of the said share of the said rent had on the 27th of January, 1864 been made by Blacklock, the assignor, to the claimant; and that, if such grant had then been made, nevertheless, until the actual receipt of part of his said share of the said rent, the claimant would not have been in the actual possession or receipt thereof within the 26th section of the Reform Act. The sections of the statute 27 H. 8, c. 10, upon which the decision proceeded are, it is submitted, altogether irrelevant. They apply to the creation of the rent-charge, and not to its alienation, which is regulated by the 1st section (*a*). No rent [97] can be reserved

(*a*) That section recites, that "Where by the common laws of this realm, lands, tenements, and hereditaments be not devisable by testament, nor ought to be transferred from one to another but by solemn livery and seisin, matter of record, writing sufficient made bona fide, without covin or fraud: yet, nevertheless, divers and sundry imaginations, subtle inventions, and practices have been used, whereby the hereditaments of this realm have been conveyed from one to another by fraudulent feoffments, fines, recoveries, and other assurances craftily made to secret uses, intents, and trusts, and also by wills and testaments, sometime made by nude parol and words, sometime by signs and tokens, and sometime by writing, and for the most part made by such persons as be visited with sickness, in their extreme agonies and pains, or at such time as they have scanty had any good memory or remembrance, at which times they being provoked by greedy and covetous persons lying in wait about them, do many times dispose indiscreetly and unadvisedly their lands and inheritances; by reason whereof, and by occasion of which fraudulent feoffments, fines, recoveries, and other like assurances to uses, confidences, and trusts, divers and many heirs have been unjustly at sundry times disherited, the lords have lost their wards, marriages, reliefs, heriots, escheats, aids pur fair fitz chivalier, and pur file marier, and scanty any person can be certainly assured of any lands by them purchased, nor know surely against whom they shall use their actions or executions for their rights, titles, and duties; also men married have lost their tenancies by the curtesy, women their dowers, manifest perjuries by trial of such secret wills and uses have been committed, the King's Highness hath lost the profits and advantages of the lands of persons attainted, and of the lands craftily put in feoffments to the uses of aliens born, and also the profits of waste for a year and a day of lands of felons attainted, and the lords of their escheats thereof,

out of a rent-charge. The words of the 26th section of the Reform Act are, that no person shall be registered in any year in respect of his estate or interest in any lands or tenements as a freeholder, &c., unless he shall have been in the actual possession [98] thereof, or in the receipt of the rents and profits thereof, for his own use, for six calendar months at least next previous to the last day of July, &c. The words, "in the receipt of the rents and profits thereof," can have no application to the subject: the only words applicable are, "unless he shall have been in the actual possession thereof." Now, here, the claimant by virtue of the Statute of Uses, the 1st section of which gave him actual seisin *in fact*, and not a mere seisin *in law*, was in "actual possession" of his share of the rent charge on the 27th of January, under the indenture of that date. The words of the Statute of Uses are sufficient to put the assignees of this rent charge in the same situation as if they had been actual tenants of the estate in fee simple. That [99] this is so is clear from all the authorities. In Bacon's Reading on the Statute of Uses, p. 48 (edit. 1806), it is said: "The third material words are, *lawful seisin, estate, and possession*, not a possession in law only, but a seisin in fact; not a title to enter into the land, but an actual estate. The fourth words are, 'of and in such estates as they had in the use:' that is to say, like estates, fee-simple, fee-tail, for life, for years, at will, in possession, and reversion; which are the substantial differences of estates, as was said before. But both these latter clauses are more fully perfected and expounded by the branch of the fiction of the statute which follows. This branch of the fiction hath three material words or clauses. The first material clause is, that the estate, right, title, and possession that was in such person, &c., shall be in cestui que use: for that the matter and substance of the estate of cestui que use is the estate of the feoffee, and more he cannot have. So as, if the use were limited to cestui que use and his heirs, and the estate out of which it was limited was but an estate for life, cestui que use can have no inheritance: so if, when the statute came, the heir of the feoffee had not entered after the death of his ancestor, but had only a possession in law, cestui que use in that case should not bring an assize before entry, because the heir of the feoffee could not. So that the matter whereupon the use must work is the feoffee's estate" (a). In Comyns's Digest, *Uses* (I.), it is said that, "By

and many other inconveniences have happened and daily do increase among the King's subjects, to their great trouble and inquietness, and to the utter subversion of the antient common laws of this realm:" and, "for the extirping and extinguishment of all such subtle practised feoffments, fines, recoveries, abuses, and errors heretofore used and accustomed in this realm, to the subversion of the good and antient laws of the same, and to the intent that the King's highness or any other his subjects of this realm shall not in any wise hereafter by any means or invention be deceived, damaged, or hurt by reason of such trusts, uses, or confidences," enacts, "that, where any person or persons stand or be seised, or at any time hereafter shall happen to be seised, of and in any honours, castles, manors, lands, tenements, rents, services, reversions, remainders, or other hereditaments, to the use, confidence, or trust of any other person or persons, or of any body politic, by reason of any bargain, sale, feoffment, fine, recovery, covenant, contract, agreement, will, or otherwise, by any means whatsoever it be that, in every such case all and every such person and persons and bodies politic that have or hereafter shall have any such use, confidence, or trust, in fee-simple, fee-tail, for term of life, or for years, or otherwise, or any use, confidence, or trust in remainder or reverter, shall from thenceforth stand and be seised, deemed and adjudged in lawful seisin, estate, and possession of and in the same honours, castles, manors, lands, tenements, rents, services, reversions, remainders, and hereditaments, with their appurtenances, to all intents, constructions, and purposes in the law, of and in such like estates as they had or shall have in use, trust, or confidence of or in the same: and that the estate, title, right, and possession that was in such person or persons that were or hereafter shall be seised of any lands, tenements, or hereditaments, to the use, confidence, or trust of any such person or persons, or of any body politic, be from henceforth clearly deemed and adjudged to be in him or them that have or hereafter shall have such use, confidence, or trust, after such quality, manner, form, and condition as they had before in or to the use, confidence, or trust that was in them."

(a) See Bacon's Works, by Basil Montagu, vol. 13, p. 342; and the edit. by Spedding, Ellis, and Heath, vol. 7, p. 427.

the statute 27 H. 8, c. 10, *cestui que use* is immediately seised and in *actual possession*, and therefore shall have assize or trespass against a stranger before entry,"—citing *Anonymous*, Cro. Eliz. 46. In Cruise's Digest, vol. 3, p. 274, s. 15, it is said: "With respect to the mode of acquiring seisin of a [100] rent, in the case of a *rent-service* the person entitled cannot acquire a seisin in deed before the rent becomes due: for, nothing but the actual receipt of it will have that effect. As to a *rent-charge*, the only mode of acquiring a seisin in deed of it, when created by grant is, by the actual receipt of the whole or of some part of it: and, formerly, it was usual, where a freehold estate in a rent-charge was created, to pay the grantee a penny in the name of seisin of the rent. But, *where a grant is created by means of a conveyance to uses, the grantee immediately acquires a seisin, by the words of the statute.*" That is what is contended for on the part of the appellant here. Lord Coke, commenting upon § 565 of Littleton, says, —Co. Litt. 315 a.,—"Hereupon is to be observed a diversitie betwene money given by way of attornment, and where it is given as parcel of the rent by way of seisin of the rent. For, albeit the rent be not due before the day, yet a payment of parcel of the rent beforehand is an actual seisin of the rent to have an assize. And so it is if he give an ox, a horse, a sheepe, a knife, or any other valuable thing in name of seisin of the rent beforehand, this is good. And therefore a payment in name of seisin is more beneficiall for the grantee, because that is both an actual seisin and an attornment in law: and yet, being given before the day in which the rent is due, it shall not be abated out of the rent. So as to give seisin of the rent, it is taken for part of the rent: but, as to the payment of the rent, it is accounted as no part of the rent; and the reason of the diversitie is, for that remedies to come to rights or duties are ever taken favorably. Here also appeareth that there is an actual seisin or a seisin in deed of a rent, whereof (as Littleton here speaketh) an assize doth lie; and a seisin in law which the grantee hath by attornment before actual possession." To this [101] Mr. Butler adds a note,—"This is only to be understood of a rent at common law: but, if the rent is limited as an use under the statute,—as, if lands are conveyed by lease and release to A. and his heirs, to the use that B. may receive out of them an annual rent, the statute immediately executes the use of the rent in B." In Burton's Real Property, § 1115, it is said that, "according to the rule that there cannot be a use upon a use, it is evident that, upon a conveyance of land to A., to the intent that B. may receive thereout a rent to the use of or in trust for C., only an equitable interest will be vested in C. But (§ 1116), if A., being the owner of the land, were to grant a rent out of it to B., to the use of C., here, by the first section of the statute, C. would take the legal estate. It may be objected, indeed, that B. is not, strictly speaking, *seised* of the rent, until he has received some part of it: for, by the old law, he could not bring an assize for it previously to such receipt: but there seems to be no doubt that the *seisin in law* which is conferred at once by the grant, is sufficient to put the statute in operation." *Murray, App., Thornhill, Resp.*, 2 C. B. 217, 1 Lutw. Reg. Cas. 496, will be relied on for the respondent. The court is there said to have decided that the words "actual possession," in the 2 W. 4, c. 45, s. 26, mean a possession *in fact*, as contradistinguished from a possession *in law*: and therefore that a grantee of a rent-charge is not entitled to be registered, unless he has been in the *actual* receipt of it for six months before the last day of July. That, however, is not an accurate statement of the ground upon which that case was decided. Tindal, C. J., in a judgment full of excellent law, lays it down that, "*the actual possession* of rent being a well-known legal phrase or expression, the legislature cannot be taken to have used it in any other than such well-[102]-known sense, that is, as contradistinguished from such possession in law, or right to the rent-charge, as the bare delivery of the deed of grant would confer." Not a word was said there about the Statute of Uses: it was a grant at common law: and the case, as Maule, J., observes, in *Hayden, App., The Overseers of Twerton, Resp.*, 4 C. B. 1, 1 Lutw. Reg. Cas. 510, "proceeded on the ground that the seisin requisite to entitle a party to be registered in respect of a rent-charge, is such as would have been necessary to enable the grantee to maintain an assize." This is a grant operating by the Statute of Uses. It is the seisin of John Heelis which serves the uses, and not the seisin of the person out of whose land the rent-charge issues: and therefore the claimants fulfil the requisitions of the Reform Act.

Keane, Q. C., for the respondent. The legislature did not by the 26th section of the Reform Act intend to draw the distinction suggested between a grant of a rent-charge at common law and a grant operating by virtue of the Statute of Uses. There

is no authority, strictly so called, for saying that the effect of the statute is to put the grantee or assignee of the rent-charge into actual possession thereof. The names of Bacon, Cruise, Butler, and Burton, however high sounding, are not authority. [Erle, C. J. They are all great luminaries. Lord Eldon, in *Smith v. Doe d. Jersey*, 2 Brod & B. 599, gives great weight to the opinions of conveyancers (a).] The only semblance of authority is [103] the *Anonymous case* in Cro. Eliz. 46, and that is extra viam. [Keating, J. Lord Chief Baron Comyns adopts it.] That shews that it is entitled to great respect, but does not make it an authority. "Possession" at that time meant something very different from "actual possession:" see *Berill's case*, 4 Co. Rep. 10 a. In Gilbert on Uses, 3rd edit., by Sugden, p. 192, it is said that, "Before the statute, a rent newly created might be bargained and sold; because, when the money, as an equivalent, was given, and ceremonies or words of law were wanting, the chancery supplied them: therefore this was good to pass the estate, without any words of granting. But, since the statute, a rent newly created cannot be bargained and sold, because there ought to be a freehold in some other person to be executed in cestui que use: but there can be no seisin of this rent in the bargainor, because no man can be seised of a rent in his own land: and consequently there can be no estate to be executed in the bargainee." To this the learned editor adds in a note, p. 193,

"The statute has two provisions for the execution of rents,—the first, for rents in esse limited to uses, which are executed in the same manner as uses of corporeal hereditaments,—the other, for rents limited in use out of the seisin of the land of some other person, e.g. where any person stands seised of any lands to the use that some other person may receive a rent thereout, which the statute executes in the same manner as if a sufficient grant had been made to him by the person seised to the use, and gives the cestui [104] que use a power of distress:" referring to *Bascawin and Horle v. Cook*, 1 Mod. 223, *Cook v. Horle*, 2 Mod. 138. All that the claimant here had was a title in law to a rent-charge: no actual possession, no permanency of profits: and the statute only puts him in the same condition as if he had a common-law conveyance. The cases of *Murray, App., Thorniley, Resp.*, 2 C. B. 217, 1 Lutw. Reg. Cas. 496, and *Haydon, App., The Overseers of Twerton, Resp.*, 4 C. B. 1, 1 Lutw. Reg. Cas. 510, shew that, if this had been a rent-charge created by a common-law deed, the grantee would have had no right to be put upon the register unless he had been actually in receipt of the rent for six months previously to the last day of July. The judgment of Tindal, C. J., in the first of these cases is clear and decisive. "The question," he says, "undoubtedly turns upon the meaning of the words 'actual possession;' and we think these words mean a possession in fact, as contradistinguished from a possession in law; and that, as the possession in fact of a rent-charge must be the actual manual receipt of the rent itself or some part of it, or of something in lieu of it, so there could be no such possession in fact in this case, where the first payment of the rent did not become due until after the expiration of the month of July, and where nothing whatever took place but the mere execution of the deed. There is a long course of authorities fully establishing the distinction between a possession or seisin in fact of a rent-charge, and a possession or seisin in law. Littleton, § 235, is an authority in point: 'And so it is, if a man grant by his deed a yearly rent issuing out of his land to another, &c., if the grantor thereafter pay to the grantee a penny or a half-penny in name of seisin of the rent, then, if the next day of payment the rent be denied, the grantee may have an assise, or else not,' &c.: and Lord Coke, in his commentary on this passage, Co. [105] Litt. 160 a., is equally decisive: 'By this, &c., is implied that the grant and delivery of the deed is no seisin of the rent: and that a seisin in law, which the grantee hath by the grant, is not sufficient to maintain an assise, or any other real action, but there must be an

(a) "My Lords," he says, "between the year 1772 (it is a long while to look back to) and a period approaching the year 1780, I spent many of the most profitable years of my life in the office of a conveyancer: and I was led at that time to a knowledge, not only of the practice there, but of what were the sentiments of the great conveyancers of those days: and I am as sure, I think, as I can be of my existence, that it never would have occurred to any one of them, if there was a leasing power in any marriage settlement, requiring such a power as this, that to give the time of fifteen or twenty days would be an invalid execution of the power. I am sure all practice was the other way: and practice, my Lords, in this respect is evidence of what is reasonable.

actual seisin.' And in Comyns's Digest, *Seisin* (C.) and (D.), the older authorities are brought together, establishing the distinction in this respect between a seisin in law and a seisin in fact, or, as it is called, an actual seisin. And this appears more distinctly in the commentary of Lord Coke on the 8th section of Littleton, which relates to the doctrine of *possessio fratris*, where Lord Coke says.—Co. Litt. 15 b.,—'What, then, is the law of a rent, advowson, or such things that lie in grant? If a rent or an advowson do descend to the elder son, and he dieth before he hath seisin of the rent, or present to the church, the rent or advowson shall descend to the youngest son [that is, by the other venter], for that he must make himself heir to his father.' And, although Lord Coke there distinguishes the law as to the case of tenant by the curtesy, where, in favour of that estate, the husband shall have the rent although his wife dies before the rent-day, it makes no difference as to the present argument. The actual possession of rent being, therefore, a well-known legal phrase or expression, the legislature cannot be taken to have used it in any other than such well-known sense, that is, *as contradistinguished from such possession in law, or right to the rent-charge, as the bare delivery of the deed of grant would confer.*' The mere interposition of an use is obviously an evasion of the statute. The decision of the revising-barrister, therefore, in this case is plainly in conformity with the intention of the legislature as expressed in s. 26 of the Reform Act.

Joshua Williams, in reply. Actual legal decisions [106] are not to be expected upon every point which arises: but the works referred to have always been esteemed works of authority on the subjects of which they treat. [Erle, C. J. The dicta of learned men certainly have much weight with me: but, where it is to be had, the point for adjudication has more. I do not think we need trouble you further.]

ERLE, C. J. I am of opinion that the revising-barrister is wrong, and that the claimant is entitled to be registered. He claimed to have been in the actual possession of a share of a rent-charge for six calendar months before the 31st of July: and it appears that more than six months before that day a rent-charge of 50l. which had been created by the owners in fee-simple of certain land in Pendleton in 1839, was conveyed by Stephen Heelis, to whom it had come by various mesne assignments, to John Heelis and his heirs, to the use of the claimant and five other persons as tenants in common. No payment on account of the rent-charge was due or paid to the claimant and the other five persons until after the 24th of June, 1864: and, if it had been the case of a conveyance at common law, without the aid of the Statute of Uses, it is clear from *Hayden, App., The Overseers of Twerdon, Resp.*, 4 C. B. 1, 1 Lutw. Reg. Cas. 510, that there would have been no actual receipt of the rent-charge so as to entitle the claimant to be registered. But the conveyance under which the party claims here is a conveyance operating by the Statute of Uses: and the 1st section of that statute enacts that, where any person shall be seised of (amongst other things) any rent, &c., in trust for any other person, &c., the cestui que trust shall have lawful seisin and possession of the same. The statute 2 W. 4, c. 45, s. 26, enacts that no person shall be registered in any year in respect of his estate or [107] interest in any lands or tenements, &c., unless he shall have been in the actual possession thereof, or in the receipt of the rents and profits thereof, for his own use, for six calendar months, &c. The 27 H. 8, c. 10, s. 1, says that, where any person is seised of a rent to the use of any other person, the person who has the use shall stand seised in possession of such rent to all intents and purposes in the law. I am of opinion that the word "possession" has a technical meaning, and that the legislature in the time of Henry 8 and the legislature in the time of William 4 attached the same meaning to the words "actual possession," and that a conveyance under the 27 H. 8, c. 10, gives the cestui que use the actual possession which is required to constitute a qualification under the 2 W. 4, c. 45, s. 26. It is said that the merely interposing an use is an evasion of the statute. But I attach no weight to that argument, because the two cases which have held that actual receipt of the rent is essential to perfect the right to be registered, shew that the handing over anything in the name of the rent would afford less facility of proof than the production of a deed operating by virtue of the Statute of Uses, which has been put in practice thousands of times since the time of Henry 8. So far, therefore, as regards the statute. Then, as to the authorities, Mr. Williams has invited our attention to some which are entitled to the very highest respect. In *Anonymous, Cro. Eliz.* 46, is a resolution of divers justices that cestui que use at this day is immediately and actually seised and in possession of the land, so as he may have an assise or trespass

before entry against a stranger who enters without title; and this by the words of the 27 H. 8, c. 10, viz. "that cestui que use shall stand and be seised," &c. And, though the report is short, it is not the less valuable, for, often in the reports of that day the most important propositions [108] are laid down in four or five lines, and certainly lose no force by reason of their conciseness. Then, again, we have Bacon's Readings upon the Statute of Uses, which is also entitled to very great respect. So, Chief Baron Comyns, whose great work stands high in the estimation of every one in the profession, and who is the universal referee for almost every proposition, lays it down,—title *Uses* (I.),—that, "by the statute 27 H. 8, c. 10, cestui que use is immediately seised and in actual possession, and therefore shall have assise or trespass against a stranger before entry;" adopting the dictum in *Cro. Eliz.* 46. Then we have the authority of *Co. Litt.* 315 a., and Butler's note, which seems to me to involve the whole of the learning contained in the judgment of Tindal, C. J., in *Murray, App., Thorniley, Resp.*, 2 C. B. 217, 1 Lutw. Reg. Cas. 496. Butler's note points out the distinction between the conveyance of a rent at common law and the limitation of a rent as an use under the statute. Then, I take notice of that which is not strictly authority, viz. Cruise's Digest, vol. 3, p. 274, s. 15, and Barton's Compendium of the Law of Real Property, § 1116; and I think I am warranted in so doing, since it is a main ground of Lord Eldon's judgment in *The Britton Ferry case* (a) that the practice of conveyancers is to be taken notice of by those who administer the law,—a very wise and salutary principle; for, according to my experience, the persons entrusted with that branch of the law have ever been remarkable for ability and learning; and the argument which we have heard this day satisfies me that the mantle of those great men has not descended upon unworthy shoulders.

KEATING, J.(b). I also am of opinion that the deci-[109]-sion of the revising-barrister in this case was wrong; but I feel bound to add that, if I had been called upon to decide the point, unaided by the light of the able argument we have heard this day, I should have come to the same conclusion. Mr. Williams has satisfied me that there is a clear distinction between a grant of a rent-charge at common law and a grant operating by virtue of the Statute of Uses. The 26th section of the Reform Act enacts that no person shall be registered in any year in respect of his estate or interest in any lands or tenements, as a freeholder, &c., unless he shall have been in the actual possession thereof, or in the receipt of the rents and profits thereof for his own use, for six calendar months at least next previous to the last day of July in such year. In *Murray, App., Thorniley, Resp.*, 2 C. B. 217, 1 Lutw. Reg. Cas. 496, it was held that a grant of a rent-charge at common law did not give the grantee a right to be registered under that provision unless he had been in actual receipt of the rent for the prescribed period. The Chief Justice founds his judgment in that case upon the very authorities which have been brought before us to day. He cites the 235th section of Littleton,—"And so it is, if a man grant by his deed a yearly rent issuing out of his land to another, &c., if the grantor thereafter pay to the grantee a penny or a half-penny in name of seisin of the rent, then, if after the next day of payment the rent be denied, the grantee may have assise, or else not, &c." Lord Coke, exemplifying his own doctrine that there is often virtue in an etcetera, explains what that means thus,—"By this, &c., is implied that the grant and delivery of the deed is no seisin of the rent; and that a seisin in law, which the grantee hath by the grant, is not sufficient to maintain an assise or any other real action, but there must be an actual seisin." Mr. Williams admits that the [110] actual possession spoken of in the Reform Act must be such an actual possession as would have entitled the party to maintain an assise. Then we find from the *Anonymous case* in *Cro. Eliz.* 46,—which certainly derives additional authority from being cited by Chief Baron Comyns,—that, "by the statute 27 H. 8, c. 10, cestui que use is immediately seised and in actual possession, and therefore shall have assise or trespass against a stranger before entry." That therefore brings this case precisely within the ground upon which *Murray, App., Thorniley, Resp.*, was decided, and establishes the distinction between the grant of a rent-charge at common law, and a grant under the Statute of Uses. Upon these grounds, I am of opinion that the revising-barrister took an erroneous view of this case, and consequently that his decision must be reversed.

(a) *Smith v. Doe d. Lord Jersey*, 2 Brod. & B. 599.

(b) Byles, J., was engaged at the Central Criminal Court.

Williams asked for costs.

ERLE, C. J. Where the decision is in favour of the appellant, no costs are allowed. But, where the decision is in favour of the respondent, the *general* rule is to give him his costs,—the court reserving to itself the right to modify the rule as the circumstances of each case may seem to them to render it expedient.

Decision reversed.

[111] CITY OF LONDON.

MAURICE BENESH, *Appellant*; THOMAS WOODZELL BOOTH, *Respondent* (a).
Nov. 23rd, 1864.

[S. C. H. & P. 223; 34 L. J. C. P. 99; 11 L. T. 479; 13 W. R. 271.]

The duplicate notice of objection, stamped by the post-master pursuant to the 100th section of the 6 & 7 Vict. c. 18, produced before the revising-barrister, had written at the top of it the word "Copy":—Held, that (assuming that the word "Copy" was not on the notice transmitted by the post master to the person objected to) the notice was well served.

1. At a court held to revise the lists of parliamentary voters for the city of London, Thomas Woodzell Booth, on the list of voters of the livery of the company of distillers, objected to the name of Maurice Benesh being retained on the list of voters for the parish of St. Botolph-without, Aldersgate.

2. Upon calling upon the objector to prove that he had given the notices of objection respectively required by the Registration Act (6 & 7 Vict. c. 18), he duly proved the requisite notice given to the overseers, as to which therefore no question arises in the present case: and the party who posted the notice directed by the act to be served on the party objected to produced before the revising-barrister the notice, duly stamped with the stamp of the London post-office, of which an exact transcript follows,—

"Copy.

"To Mr. Maurice Benesh.

"I hereby give you notice that I object to your [112] name being retained on the list of persons entitled to vote in the election of members for the city of London.
Dated, &c.

"THOMAS WOODZELL BOOTH,
"12 Manor Place, Walworth, S.

"On the list of voters of the livery of the company of distillers."

3. It was admitted that the word "copy" on the notice produced before the revising-barrister was on the said notice before it was taken to and stamped at the post-office, and that the words "Thomas Woodzell Booth," subscribed thereto, were in the proper handwriting of the objector. An objection was thereupon duly made before the revising-barrister to the reception of any parol evidence to explain the state of the notice retained by the post-master to be forwarded to the address thereon: but he admitted the party posting the notice to supply such explanation: and he did prove on oath to his, the revising-barrister's satisfaction that the word "copy" was not on the notice retained by the post-office to be forwarded to its address.

4. Thereupon the revising-barrister held it to be duly proved that the objector had given the notices of objection required by the Registration Act, and called upon the party objected to to prove that he was entitled to have his name inserted in the list of voters in respect of the qualification described in the list; and, on his failure to do so, he expunged his name from the said list.

(a) When this case was called on upon a former day, it appeared that the appellant had delivered his paper-books, but the respondent had delivered none. As, however, the appellant had not, pursuant to the 7th rule of Hilary Term, 4 W. 4, supplied the respondent's omission on the day following that upon which the latter should have delivered his paper-books, he was not in a condition to ask for judgment. The court thereupon directed (the respondent being then prepared with his copies) that the case should stand in the paper for the next day, being desirous not to prejudice the voter's right by striking out the appeal.

See *Dorsett v. Aspdin*, 11 C. B. 651. But see *Shaddon, App., Butt, Resp.*, 11 C. B. 27.

5. It was contended by the appellant,—first, that parole testimony was inadmissible to prove the contents of the notice retained to be forwarded by the post-master, the same being a judicial instrument required by statute to be in writing, and which in this case by the express words of the 100th section of the Registration Act must explain and prove and be complete in itself,—secondly, that, while the registration [113] Act allows a certain latitude in the forms of notices for counties and for claims, and also of notices of objection to overseers in cities and boroughs, provided the words employed be “to the like effect” as the statutory form, it admits of no such deviation in the case of borough notices to be served on parties objected to, and therefore the notice now in question was not “according to the form numbered 11 in the schedule B.,” in which the word “copy” does not appear,—thirdly, that a statutory judicial written instrument must be held in law to be what on the face of it it purports to be; and that, inasmuch as the notice produced before the revising-barrister purported to be a “copy,” it could not be adduced by the author as the original notice required by the act: that the word “copy” was not surplusage, because it is a term which assigns a distinctive and specific negative character to the document to which it is affixed, amounting in fact to a protest on the part of its utterer that, as against him, such document is not to be allowed to have the effect and authority of an original,—not to have the effect, in short, in the present instance, of proving that the objector gave the notice required by the act, without evidence of which the party objected to would not be in foro or entitled to the costs of a groundless objection; that the notice was not the less a “copy” because the words “Thomas Woodzell Booth” were in the actual hand-writing of the objector, inasmuch as it was as competent for himself as for any armuensis to make copies of his own notices; and the case was likened to that of a transcript of a foreign bill of exchange (which requires no stamp) if it bears the word “copy” on it before it is issued, and which would not become an original in the hands of an indorsee merely because the transcription was made in the hand-writing of the acceptor,—fourthly, that, if the notice left with [114] the post-office to be forwarded to its address did not bear the word “copy,” it was not a duplicate of the notice produced before the revising-barrister, and could not therefore be the notice required by the act. fifthly, that the necessity imposed on the objector by the nature of his own argument, of contending that the notice produced by him as a duplicate was not in fact a duplicate was an inadmissible approbation and reprobation of the same instrument by the same party. sixthly, that, as the notice was produced before the revising-barrister as a duplicate original, it must be assumed that the duplicate forwarded to its address purported to be a “copy,” and that, as such, the person objected to was entitled to disregard it, as not being an original, and to reckon upon the stamped duplicate being rejected by the revising-barrister,—seventhly, that the objector’s own case being that the notices were not “alike in their address and their contents,” the authenticity of the service by the post-office was thereby destroyed, and that the production of the stamped notice ceased to be the proof of service desiderated by the statute,—eighthly, that, if the post-office had dispensed with identity in one respect, as not being essential, there was no security against its having dispensed with it in others as equally non-essential: and that, if it had certified that the word “copy” was on the notice forwarded to its address, when it was not, it might have certified the date, the address, the signature, as in duplicate, when in point of fact in the document served they might have been omitted,—ninthly, that there could be no safe reliance on service by the post-office, except on the assumption that the post master had rigidly followed the injunctions upon him prescribed by the act: that he was no reliable judge of what is or is not material and essential in a judicial instrument: and that, if any dis-[115]-cretion were left to him to determine what particulars therein are essential and what are immaterial or surplusage, his stamp might authenticate as duplicates the most material deviations from the requisites of essential identity.

6. On the part of the respondent it was contended,—first, that the word “copy” was not part of the “contents” of the notice, and might be treated as surplusage,—secondly, that the notice was constituted an original duplicate by having been signed by the objector *proprio manu*,—thirdly, that it was proved that the duplicates were essentially alike,—fourthly, that the duplicate forwarded to the party objected to not having the word “copy,” he could not be misled into treating it as not being an original instrument, and he was placed at no disadvantage by the deviation excepted

to,—fifthly, that being “alike” is not “commonly understood” as being *identical*,—sixthly, that no practical inconvenience could result from the construction put upon the statute by the revising-barrister.

7. The names of several other persons having been expunged from several lists of voters on objection by the said Thomas Woodzell Booth, whose cases depended and were decided upon the same points of law, and such parties having given notice of appeal, their cases were consolidated with the principal case.

8. If the court should be of opinion that due notice of objection was not given to the parties objected to, their names were to be re-inserted in the lists from which they had been expunged.

9. The stamped notice of objection produced before the revising barrister in the case of the appellant Maurice Benesh (which was in all things but the stamp identical with that above set out) was appended [116] to and was to be taken as part of the case. The notices in all the other cases were precisely similar.

Hannen (with whom was Underdown), for the appellant. The 17th section of the 6 & 7 Vict. c. 18 requires notice of objection to be given to or left at the place of abode of the person objected to. The ordinary way of proving that would be by calling the person who delivered the notice. No such proof was given here. The 100th section substitutes a delivery by post. It enacts that “it shall be sufficient, in every case of notice to any person objected to in any list of county, city, or borough voters, &c., if the notice so required to be given as aforesaid shall be sent by the post, free of postage, or the sum chargeable as postage for the same being first paid, directed to the person to whom the same shall be sent, at his place of abode as described in the said list of voters: and, whenever any person shall be desirous of sending any such notice of objection by the post, he shall deliver the same, duly directed, open and in duplicate, to the post-master, &c.; and the post-master shall compare the said notice and the duplicate, and, on being satisfied that they are alike in their address and in their contents, shall forward one of them to its address by the post, and shall return the other to the party bringing the same, duly stamped with the stamp of the said post-office: and the production by the party who posted such notice of such stamped duplicate shall be evidence of the notice having been given to the person at the place mentioned in such duplicate, on the day on which such notice would in the ordinary course of post have been delivered at such place.” The statute, if the statutory mode of service is resorted to, must be strictly complied with. The post-master has authority to do no more than compare the two documents word by word, [117] and to select one to forward and return the other. If the document forwarded to the party to whom it is addressed has the word “copy” on it, the party may well disregard it, inasmuch as the statute says that he shall be served with an original. And, if extrinsic evidence is to be admitted to shew that the word “copy” was not upon the other paper, then it will appear that they were not duplicates. In *Toms, App., Coming, Resp.*, 7 M. & G. 88, 8 Scott, N. R. 910, 1 Lutw. Reg. Cas. 200, it was held that the notice of objection, and also the duplicate notice, where notice of objection is sent by post, must both be *personally* signed by the objector. There, the notice had been signed by the objector, and the copy by another person at his request. “The very meaning of the term *duplicate*,” said Tindal, C. J., “is that one document resembles the other in all essentials. The instance put by my Brother Maule in the course of the argument, of bills drawn in duplicate, is an apt illustration. In this case, one of the documents was a notice; but the other was no notice at all.” Maule, J., says: “The term ‘duplicate’ means a document which is essentially the same as some other instrument. It is a very different thing from an examined copy; although an examined copy may, in effect, be a duplicate under certain circumstances. But, in the present case, the copy is essentially different from the original.” And Cresswell, J., says: “As to the duplicate, the objector is relieved from the proof of the ordinary service of the notice by adopting the course prescribed by the 100th section: but he must shew that the document sent by the post is identical with the one produced before the barrister.” The objection, no doubt, is a very fine one: but the same may also be said of cases arising upon the Statute of Frauds, which frequently excludes evidence of facts which are well known to exist. The objection was [118] quite as fine in *Birch, App., Edwards, Resp.*, 5 C. B. 45, 2 Lutw. Reg. Cas. 37. It was there held that a notice of objection sent by post was not proved by the production of a stamped copy similar in all respects to the notice left with the post-master, save that it had no

external address,—such copy not being a “stamped *duplicate*,” within the meaning of the act. [Keating, J. The two were not alike “in their address and in their contents.”] Yes they were: but the address was inside the one and outside the other. Wilde, C. J., there says: “One important point to be ascertained in such a case is, what was the direction given to the post-master with respect to the transmission of the notice. The matter that appears upon the face of the paper is not intended for any such object. When I find the legislature providing that the two papers shall be alike in their *address* and in their *contents*, I cannot conceive that, because it is possible so to fold the paper as to make the direction upon the face of it answer the purpose of an external address, the objection is obviated. I see much inconvenience that might result from a departure from so plain and simple a direction; but none can arise from a strict and literal adherence to the words of the act.” Coltman, J., says: “When the statute speaks of a document to be transmitted by the post ‘duly directed’ to the person to whom it is to be sent, it can only contemplate a direction in the ordinary way, written on the outside. And it appears that the copy retained by the post-master had such external address. The absence of such external address on the copy returned by the post-master to the person producing it was a variance, and not an immaterial one.” And Maule, J., says: “The notice left with the post-master was a notice having, in addition to the address on the face of it, a direction outside, to inform the post-master where and to whom it was to [119] be transmitted. This external address is a most essential part of the notice. It was material to shew what the post-master was required to do. The paper produced as evidence of the notice omits to state what direction was given at the post-office. It therefore seems to me to be defective in an essential particular.” The two documents must be brought in such a state that either will pass for an original: otherwise it makes the post-master the judge of whether or not they are duplicates. It will be unsafe to depart in any the slightest degree from the plain words of the statute.

Fawcitt, for the respondent, was not called upon.

ERLE, C. J. This is so fine an objection that I do not feel justified in yielding to it. The statute (s. 17) requires notice of objection to be served upon the person objected to; and it also (in s. 100) contains a provision for the transmission of the notice by post, where the objector chooses to avail himself of that mode of service. He is to deliver the notice, open and in duplicate, to the post-master; and the post-master is to compare the notice and the duplicate, and, on being satisfied that they are alike in their address and in their contents, shall forward one of them to its address by the post, and shall return the other to the party bringing the same, duly stamped with the stamp of the said post-office; and the production by the party who posted such notice of such stamped duplicate shall be evidence of the notice having been given to the person at the place mentioned in such duplicate, on the day on which such notice would in the ordinary course of post have been delivered at such place. One duplicate original is to be sent to the person objected to, and the other duplicate original is to be returned [120] to and kept by the objector. If one were headed “Duplicate,” and the other not, and the two were in all other respects alike in their address and in their contents, I am of opinion that that would be a sufficient compliance with the statute. In common parlance, the one would be called a copy of the other. All notices are in law originals: but it is by no means uncommon for the person who has served a notice, in the affidavit of service to state that he served “a copy.” I therefore think that the placing the word “copy” at the top of the duplicate notice in this case does not in the smallest degree affect the validity of the document.

BYLES, J., was engaged at the Central Criminal Court.

KEATING, J. I also am of opinion that the validity of this notice is not at all affected by the word “copy” being written on the document produced before the revising-barrister. In the case relied on by Mr. Hannen, of *Birch, App., Edwards, Resp.*, 5 C. B. 45, 2 Lutw. Reg. Cas. 37, the variance between the two documents was a very material one. The external address was an essential part of the notice: one had it, the other had not: and the court hold that the direction to the post-master with respect to the transmission of the notice was contained in the external address. The word superadded here is one which is altogether immaterial. That case, therefore, cannot govern this. The decision must be affirmed.

Decision affirmed, with costs.

[121] COUNTY OF SURREY—EASTERN DIVISION.

JABEZ TEPPER, *Appellant*: DAVID NICHOLS, *Respondent*. Nov. 24th, 1864.

[S. C. H. & P. 202; 34 L. J. C. P. 61; 11 L. T. 509; 11 Jur. N. S. 18; 13 W. R. 270. See *Smith v. James*, 1865, L. R. 1 C. P. 138. Followed, *Wadmore v. Dear*, 1871, L. R. 7 C. P. 212.]

By a local act, 12 G. 1, c. 36 (1724), and a subsequent act of 1 G. 2, c. 18 (1728), commissioners or trustees were incorporated and impowered to treat with the proprietors of an antient ferry between Fulham and Putney for the purchase of their rights, and to procure persons to subscribe capital for the building of a bridge between those two places, and to convey to those persons in perpetuity *the surplus tolls or income of the bridge and ferry after providing for the expenses of repairs, &c.* The commissioners having agreed with thirty individuals who each subscribed 1000l. for the building of the bridge, and having compensated the proprietors of the ferry, in 1729, by a deed, reciting several of the provisions of the two acts above mentioned, and that the thirty individuals had paid the sums subscribed by them, and built the bridge, assigned to trustees, in trust for those persons, their heirs and assigns for ever, the said bridge and all the materials whereof the same was erected and built, and all tolls, revenues, profits, and incomes of the said bridge, *with all such ground and soil adjacent and belonging to the ferries as had been, was, or should be vested in the said commissioners, &c.*: Held, that the commissioners had no authority under their acts of parliament to convey to or in trust for the subscribers or shareholders in the bridge any lands vested in them by those acts; that the latter, having notice of the powers which the commissioners had, took under the deed of 1729 nothing more than the commissioners could lawfully convey; and that consequently they had not such an interest in the land on either side of the bridge as to entitle them to be registered for the county.

1. At a court holden at Wandsworth, in the county of Surrey, to revise the list of voters for the eastern division of the county of Surrey, David Nichols, a person on the register of voters for the said eastern division, duly objected to the names of Jabez Tepper and twenty-four other persons being retained on the Putney list of voters for the said eastern division.

2. The claims of the persons so objected to appeared upon the register and upon the new claim list in respect of freehold shares or parts of shares in Fulham (or Putney) Bridge:—

3. In support of the right of the several parties to have their names retained and placed on the said lists, the following documents and facts were duly established in evidence before the revising-barrister:—

4. In or about the year 1724, the act 12 G. 1, c. 36, was passed, intituled “An Act for building a bridge across the river Thames, from the town of Fulham, in the county of Middlesex, to the town of Putney, in the county of Surrey.”

5. By s. 1 of that act certain persons were constituted and appointed commissioners and trustees for [122] designing, directing, ordering, and building such bridge, and for maintaining, preserving, and supporting the same when built: and they were impowered, at any time after the 24th of June, 1726, to design, assign, and lay out how and in what manner the said bridge should be made and built from the town of Fulham to the town of Putney aforesaid, *and the ways and passages to and from the same*, and to preserve and keep in repair such ways and passages from time to time, and to make contracts, and do all matters and things for carrying on and effecting the purposes aforesaid, and to cause the same to be done and perfected accordingly.

6. And to the intent that the navigation of the said river Thames might receive no prejudice, by s. 2, it was enacted “that, when the said bridge was built across the said river, there should remain free and open passage for the water to pass and re-pass through the arches or passages under the said bridge of 700 feet at the least within the then present banks of the said river.” By s. 5, bodies corporate and others who were seized of ground in Putney or Fulham which might be required for the purpose of making convenient approaches to the said bridge, were enabled to convey to the

said commissioners and trustees, or to any nine or more of them, or their successors, or as they should appoint, any such ground for the purposes of that act.

7. By s. 7, it was enacted "that it shall be lawful to and for His Majesty, his heirs and successors, by letters patent under the great seal of Great Britain, to incorporate all and every the commissioners and trustees appointed by this act, or who shall be appointed pursuant thereto to be commissioners and trustees for putting this act in execution, or such of them as shall be then living, and such others as His Majesty, his [123] heirs or successors, shall think fit, to be one body politic and corporate in deed and in name, &c. : and that they and their successors shall be able and capable in law to have, purchase, receive, and enjoy, possess, and retain to them and their successors, messuages, lands, rents, tenements, and hereditaments, of what kind, nature, or quality soever, and also to sell, grant, demise, alien, or dispose of the same or any part thereof at their free wills and pleasures, to sue and implead, be sued and impleaded, &c., and to choose their successors and officers from time to time, and to do and execute all and singular other matters and things that to them shall or may appertain to do, with such powers and clauses as shall be necessary or requisite for erecting, building, preserving, and supporting the said bridge, and the ways and passages thereto from time to time." The said commissioners and trustees were never incorporated in pursuance of this act.

8. By s. 8 it was enacted that it should not be lawful to or for the corporation or company which should or might be erected or established by virtue of or pursuant to that act, as such corporation or company, to borrow or take up or give security for any sum or sums of money payable in less than six months, or to discount any bills of exchange or other bills or notes whatsoever, or to keep any books or cash of or for any person or persons, bodies politic or corporate, whatsoever, other than and except only the proper books, moneys, and cash of the said company or corporation.

9. By s. 10 it was enacted that a certain pontage or toll should be paid before any passage over the said bridge should be permitted, and that the said pontage or toll should be vested in the said commissioners, to be by them applied, in accordance with the provisions of the said act, towards the expenses of making and [124] maintaining the said bridge, ways, and passages, and purchasing the necessary ground for the same.

10. By s. 13, the commissioners or any eleven or more of them were impowered when incorporated by indenture or writing under their common seal to convey and assure the toll by that act granted, or any part thereof, as a security for any sum or sums of money by them to be borrowed for the purposes of the act, and to grant any annuities for one, two, or three lives or for twenty-one years or a less term; such annuities to be chargeable upon and payable out of the tolls, estates, and revenues belonging to such corporation. By s. 14, it was enacted that such annuities should be personal estate. By s. 16, it was enacted that it should be lawful for the said commissioners and their successors, and for such intended company or corporation, and their agents, or officers, from time to time to remove any shelves in the said river Thames, and to make the same river deeper.

12. By s. 17, it was enacted that all stones, bricks, planks, piles, and other materials which should be made use of for or towards building or making the said bridge, or in or about the same, or for maintaining, repairing, or supporting the same, or for making the said river deeper as aforesaid, should always be deemed to belong and appertain to the commissioners and corporation aforesaid. And by the 18th section it was provided that, if the said bridge should at any time become damaged, it should be lawful for the said commissioners or corporation to set up ferries across the said river near to the said bridge, and to take certain rates and duties for passage by such ferries over the same.

13. By s. 19, it was enacted as follows:—"It shall not be lawful to erect or build the said bridge or any part thereof before or until full and ample satisfaction [125] be made for all such prejudice, loss, or damage as shall or may be sustained or suffered by any of the owners, proprietors, lessees, or others having any property or interest in the present horse or foot ferries between Putney and Fulham aforesaid."

14. By s. 22, it is enacted, "that nothing in this act contained shall extend or be construed to extend to prejudice or take away any right, property, or jurisdiction of the mayor, or of the mayor, commonalty, and citizens of the city of London, to, in, and upon the river of Thames aforesaid, other than and except to remove any shelf or

shelves, or to deepen or widen the said river where the said bridge shall be built, and to do every other matter and thing as shall or may be necessary for the erecting and maintaining the said bridge."

15. By the act 1 G. 2, c. 18, for explaining and amending the act above referred to, it is by s. 1 enacted as follows.—"The commissioners and trustees appointed by the said recited act, and those appointed by this act, or any nine or more of them, and the commissioners and trustees when incorporated in pursuance of the said former act, shall have and they have hereby full power and authority to contract and agree with any person or persons whatsoever, as well commissioners and trustees as others, to erect and build a bridge across the said river of Thames, from the said town of Fulham to the said town of Putney, and to repair, maintain, and support the same when built, in such manner as by the said commissioners and trustees or corporation aforesaid shall be judged proper; and the said commissioners and trustees or corporation aforesaid, or any nine or more of the said commissioners and trustees before such incorporation, have hereby power and authority to grant any annuity or annuities in fee out of the profits, incomes, revenues, or tolls of the said bridge, in such manner as [126] they may by the said former act grant any other annuity or annuities; all which annuities in fee to be granted pursuant to this act shall be registered, and shall be assignable and devisable as the said other annuities are by the said former act; *and such annuities in fee shall be deemed personal estates, and shall go as such.*"

16. And, for the more effectual enabling the said commissioners and trustees and corporation aforesaid as speedily as may be to complete and perfect the said work, by s. 3 it is enacted that "it shall and may be lawful to and for the said commissioners and trustees, or any nine or more of them, before incorporated, and also lawful for such corporation when created, at any time or times to convey and assign over in perpetuity, or otherwise, all or any tolls, revenues, profits, or incomes of or belonging to the said bridge or ferries, or which shall in anywise arise, accrue, or belong to the same, unto such person or persons as will undertake, contract, and agree to erect and build the said bridge, and to preserve and keep up the same in good and sufficient repair, and shall give sufficient security so to do to the satisfaction of the said commissioners and trustees and corporation aforesaid: anything herein or in the said former act to the contrary, notwithstanding."

17. By s. 5 it is enacted that "it shall not be lawful for the said commissioners and trustees or corporation to erect or build the said bridge, or any part thereof, before or until full and ample satisfaction be made for all such prejudice, loss, or damage as shall or may be sustained or suffered by any of the proprietors of the horse-ferries between the said towns of Putney and Fulham, unless the proprietors of the said ferries by writing under their respective hands and seals shall consent and agree with the said commissioners and [127] trustees, or any nine or more of them, or the said corporation, to permit the said commissioners and trustees or corporation to build the same before such satisfaction shall be made; and, in case such consent of the said proprietors shall be had and obtained in manner aforesaid, that then the said bridge, when built, and all tolls, revenues, profits, and incomes belonging or to belong to the same shall be and are hereby made chargeable and charged, in the first place, with all such sums of money as are by the said former act to be paid to the respective owners, proprietors, and persons interested in the present ferries between Fulham and Putney aforesaid; and that, upon payment thereof respectively, or tender and refusal, all ownerships, properties, and interests of, in, or to the horse and foot ferries between Fulham and Putney aforesaid shall be and are hereby extinguished and determined, and the said ferries and passage over the river of Thames there, *and the ground and soil adjacent and belonging to the said respective ferries*, shall be and are by the authority of this act transferred to and absolutely vested in the said commissioners and trustees and corporations aforesaid and their successors and assigns for ever." All such moneys and payments for the said horse-ferries have long since been duly paid and made.

18. Copies of both of the acts above referred to accompanied the case and were to be taken to be and form part of the same, for the purpose of reference or otherwise.

19. The ferries referred to in the said acts on the Putney side of the river were held and were parcel of the manor of Wimbledon, and on the Fulham side were held and were parcel of the manor of Fulham; and, previously to the 21st of March, 1728, Daniel Pettward and William Skelton had been respectively admitted to and each of them then held in fee by copy [128] of the court rolls of the respective manors, one

undivided moiety of the ferries on both the Putney and Fulham sides of the river; and on that day the commissioners paid to them the sum of 8000*l.* in full satisfaction for all damage which they or either of them should sustain by occasion of building the said bridge, the rights and interests of all other parties in the said ferries having been previously satisfied by the commissioners.

20. On the 19th of November, 1728, a contract was duly entered into by the commissioners with thirty persons who had subscribed 1000*l.* each for building the bridge and making the purchases and payments required by the said acts, by which those thirty persons contracted to build and maintain the bridge and the ways and passages thereto, and make the said purchases and payments: and, in pursuance thereof, the said thirty persons did build the said bridge and make the said payments and purchases.

21. By indenture of bargain and sale bearing date the 11th of November, 1729, duly inrolled in Chancery, made between the said commissioners of the first part, the said thirty persons therein named, and described as being all the contractors and subscribers for building the said bridge, of the second part, and certain other persons as trustees of the third part, after reciting the 1st, 2nd, 5th, 7th, 10th, 11th, 12th, 16th, 17th, 18th, and 19th sections of the act first above mentioned (12 G. 1, c. 36), and the 1st, 3rd, and 5th sections of the act secondly above-mentioned (1 G. 2, c. xviii.); and further reciting the said contract of the 19th of November, 1728, and that the said thirty persons had paid all moneys they had agreed to pay, and built the said bridge, the commissioners granted, bargained, sold, assigned, and set over unto the said persons parties thereto of the third part, their heirs and [129] assigns for ever, the said bridge, and all the materials wherewith the same was erected and built, and all tolls, revenues, profits, and incomes of or belonging to the said bridge so built from the town of Fulham to the town of Putney, or the ferries thereafter to be set up and erected as occasion might be, according to the provision in that behalf made by the said recited acts, or either of them, or which should in anywise arise, accrue, or belong to the same, *with all such ground and soil adjacent and belonging to the then late or then present horse ferries* and passage over the said river between Fulham and Putney as had been, was, or should be vested in the said commissioners, and all benefits, advantages, powers, privileges, and authorities, and every other matter and thing whatsoever vested in or granted to the said commissioners which they were impowered or capable to assign and convey over by virtue of the said acts or either of them: To hold the same unto and to the use of the said trustees, parties thereto of the third part, their heirs and assigns for ever, upon trust to permit and suffer the said thirty persons therein named of the second part, their heirs and assigns, to receive and take the said tolls, revenues, profits, and income, and to have the sole management and direction thereof, upon condition that they should thereout pay certain sums of money and expenses specified in the said deed (which condition has been performed), and, after payment of such sums of money, should every year thereafter divide all the then rest and residue of the moneys to be raised by the said tolls, revenues, profits, and income of the said bridge, ferries, and other the premises (if any), unto and amongst the said thirty subscribers and proprietors for the time being, and their respective heirs and assigns, rateably and proportionably, according to the several sums of money by them subscribed for the pur-[130]poses aforesaid, and to their several and respective rights, shares, and interests of, in, and to the same, to have, take, and enjoy the same as tenants in common, and not as joint-tenants. And, by the same deed, it was provided that, in case the tolls, revenues, profits, and incomes of the said bridge or ferries should at any time or times thereafter fall short and not be sufficient to answer and make good all such sums of money as should be requisite for putting and keeping the said bridge, together with the ways and passages to and from the same, in good repair within a reasonable time to be allowed for making such repairs, or should not be sufficient for the payment of all the matters and things thereinbefore particularly mentioned, and the charges of the trustees in the execution of the trusts, then all sums of money as should so fall short or be wanting for the said purposes should from time to time be paid and borne by the said thirty subscribers, the parties thereto of the second part, their heirs and assigns, rateably and proportionably, and according to the several sums of money subscribed by them respectively towards the purposes aforesaid, and to their several rights, shares, and interests therein.

22. On the 16th of June, 1730, by grant of that date, the Archbishop of Canterbury granted to the proprietors of Putney Bridge two hundred superficial feet of land, part of the churchyard of Putney, for the purpose of making the passage to and from the said bridge more commodious; and the same was used for that purpose, and now forms part of the approach to the said bridge.

23. There is no other land in the county of Surrey vested in, belonging to, or claimed by the said proprietors, except what is comprised in the before-stated deed of the 11th of November, 1829, and the last-mentioned grant: and no evidence was adduced before [131] the revising-barrister as to the annual value of the said land.

24. On the 26th of August, 1736, by deed of that date, the persons then equitably entitled to the tolls, revenues, profits, and income of the bridge under the indenture of the 11th of November, 1729, covenanted with each other that certain orders and directions given for the arrangement of the affairs of the bridge should stand good until altered at some quarterly general meeting of persons from time to time becoming so equitably entitled, by a majority of such persons present at such meeting.

25. The interest of the present shareholders in the bridge is identical with the interest vested in the said thirty persons or proprietors under the said deed of the 11th of November, 1729, and under the grant of the 16th of June, 1730, and has always been conveyed and transmitted as and dealt with as freehold estate: and the shareholders of the said bridge are about eighty in number.

26. The proprietors meet once a year, and select a committee of six out of their own body to manage their affairs.

27. The said persons objected to are respectively the holders of a share or part of a share of such interest as aforesaid: and the sufficiency of the annual money value of such share or part of a share is not now in dispute.

28. The bridge is built partly upon piles driven into the bed of the river, and at either end upon brick foundations which stand respectively upon that part of the banks between high and low-water mark whence formerly the ferries used to ply from side to side, and in part upon land which formerly was ground and soil adjacent and belonging to the said ferries.

29. There are toll-houses at each end of the bridge, [132] at which tolls are collected: and each of them is a structure of brick, and stands upon the brick foundations of the bridge referred to in the preceding paragraph.

30. For the said persons objected to, it was contended that they had respectively under or by virtue of the said acts of parliament and deeds of the 10th of November, 1729, and 16th of June, 1730, hereinbefore stated, such equitable freehold estates in the said bridge, tolls, and other property comprised in the said acts and deeds, as entitled them respectively to be on the list of voters for the said eastern division of the said county: and, for the said David Nichols, the objector, it was contended that they had not respectively such equitable freehold estates as would entitle them to vote for the said division of the said county: and also that the shareholders were a company, and that the individual shareholders, being only entitled to a share of the receipts and profits, were not entitled to be on the said list of voters.

The revising-barrister decided, in favour of the said David Nichols, that the said several persons objected to had not respectively such equitable freehold estates as entitled them respectively to be on the said list of voters, and he accordingly expunged their names from the said list.

If his decision was wrong, the names of the said persons objected to were to be restored and inserted on the register for the parish of Putney.

Karslake, Q. C. (with whom was Beresford), for the appellant. Under the acts of parliament referred to in the case,—12 G. 1, c. 36, and 1 G. 2, c. 18,—the commissioners for building Putney Bridge had an interest in the soil which belonged to the antient ferries, upon which the abutments of the bridge were built; and [133] they having, by the deed mentioned in the 21st paragraph of the case, assigned all their interest therein to trustees for the shareholders, the latter are entitled to vote. That the soil vested in the commissioners, is clear from the 5th section of the second act, which enacts that “all ownerships, properties, and interests of, in or, to the said ferries between Fulham and Putney shall be extinguished and determined, and the said ferries and passage over the river of Thames there, *and the ground and soil adjacent and belonging to the said respective ferries*, shall be and are by authority of this act transferred to and absolutely vested in the said commissioners and trustees and corporation afore-

said, and their successors and assigns for ever." Under the trusts of that deed the cestui que trusts took an equitable interest in the land, and not merely a right to a share of the profits arising from the tolls. The trustees have a mere naked trust, with no active duties to perform: and the case states (par. 25) that the interest of the shareholders has always been conveyed and transmitted as and dealt with as freehold estate. In *Foster's case*, 2 Peck. 105, these shares were held to confer a vote for Middlesex. In *Badger, App., Newman (or Brown), Resp.*, 8 Scott, N. R. 1019, 7 M. & G. 198, 1 Latw. Reg. Cas. 287, A., B., C., and D. joined in partnership to work a fulling-mill. Money was subscribed by all the partners; with part of which freehold land was bought, which was conveyed to A. and B. in fee; with other part a mill was built on the land, and machinery for the mill was purchased. By a partnership deed executed by A., B., C., and D., the trusts of the land, mill, &c., were declared to be (amongst other things) that A. and B. should stand seised and possessed of all the estates, property, goods, &c., upon trust for the benefit of themselves and their partners as part of their partnership joint stock in [134] trade: there was a provision in the deed that A. and B. might borrow money upon mortgage of the stock, property, estates, &c., belonging to the co partnership; and it was declared that the land, mill, &c., should be deemed and considered as or in nature of personal estate and not real estate, and be held in trust for the partners as part of their partnership stock in trade. And it was held that each partner had an interest in the realty corresponding with the amount of shares held by him in the partnership, and was entitled to be on the list of voters for the county. That case very much governs this. *Bennett, App., Blain, Resp.*, 15 C. B. (N. S.) 518, 1 Hopw. & Ph. 35, will probably be relied on for the respondent. But there the land was vested in trustees, who had active trusts to perform, and the shareholders in the company had only a right to a share of profits.

Raymond, for the respondent. The real question is, whether the persons who claim to be registered in respect of their shares in the tolls of this bridge have any freehold interest in any lands or tenements. The case does not find that the owners of the antient ferries had any land: nor was it necessary that they should have. The intention of the legislature in passing these acts was, to enable the commissioners to purchase the interest in the old ferry, and to build a bridge: it never intended to convey to them larger powers than were necessary for that purpose. No portion of the bed or soil of the river was vested in them; otherwise there would have been no necessity for the 17th section of the 12 G. 1, c. 36, which enacts "that all stones, bricks, planks, piles, and other materials which shall be made use of for or towards building or making the said bridge or in or about the same, or for maintaining, repairing, or supporting the same, or for [135] making the said river deeper as aforesaid, shall always be deemed to belong and appertain to the commissioners and corporation aforesaid." The cases are numerous to shew that the courts will not construe acts of parliament as conveying more than is necessary for the carrying out of works of this sort. This was clearly laid down in *Badger v. The South Yorkshire Railway and River Don Company*, 1 Ellis & Ellis, 347. Where a mere easement will suffice, nothing more passes: *Lancaster v. Eve*, 5 C. B. (N. S.) 717.

Then, supposing that there was some interest in land in the commissioners, it was not and could not be conveyed simpliciter to the claimants, the shareholders in this bridge. The 3rd section of the 1 G. 2, c. 18, enacts that "it shall and may be lawful to and for the said commissioners and trustees, or any nine or more of them, before incorporated, and also lawful for such corporation when created, at any time or times to convey and assign over in perpetuity or otherwise all or any tolls, revenues, profits, or incomes of or belonging to the said bridge or ferries, or which shall in anywise arise, accrue, or belong to the same, unto such person or persons as will undertake, contract, and agree to erect and build the said bridge, and to preserve and keep up the same in good and sufficient repair, and shall give sufficient security so to do, to the satisfaction of the said commissioners and trustees and corporation aforesaid." As we have here the origin of the title, we cannot assume anything from user. The way in which the power so conferred upon the commissioners is carried out appears from the deed set out in the 21st paragraph of the case, by which they convey to the trustees, their heirs and assigns for ever, "the said bridge, and all the materials wherewith the same was erected and built, and all tolls, revenues, profits, and incomes of or belonging to the said bridge [136] so built from the town of Fulham to the town of Putney, or the ferries thereafter to be set up and erected as occasion might be, according to the

provision in that behalf made by the said recited acts or either of them, or which should in anywise arise, accrue, or belong to the same, with all such ground and soil adjacent and belonging to the then late or then present horse-ferries and passage over the said river between Fulham and Putney, as had been, was, or should be vested in the said commissioners, and all benefits, advantages, powers, privileges and authorities, and every other matter and thing whatsoever vested in or granted to the said commissioners, which they were impowered or capable to assign and convey over by virtue of the said acts or either of them,"—to be held by them upon certain trusts. [Erle, C. J. The trustees have nothing to do. The shareholders are to keep up the bridge. If the land were vested in the parties of the third part as bare trustees, the shareholders would take equitable freeholds.]

Then, these persons form a company, and that brings the case within the principle of *Bennett, App., Blain, Resp.*, 15 C. B. (N. S.) 518. Erle, C., J., there says, p. 531,—"The deed shews how the land was to be held, the legal estate to be vested in trustees for ever. The committee of management was by means of rents and subscriptions to make profits out of the undertaking, and, after payment of expenses and out-goings, to divide the surplus amongst the shareholders. The effect of that deed in my opinion is, to give to each shareholder a right to his share of the profits, but not to confer upon him any right in the land which is vested in the trustees. It is clear that that was the intention of the deed. The declaration that the shares are to be deemed personal estate only, the mode of transfer, which is inconsistent with the rules of law as [137] to the transfer of real estate, and the whole tenor of the deed seems to constitute a sort of interest which is well known and has frequently been the subject of consideration in dealing with joint-stock companies." [Keating, J. All the right the shareholder there had was to a place in the exchange, which might be varied by the committee. The only absolute interest he had was in a share of the profits. Besides, the trustees had active trusts to perform.] The nature of rights of this description was very much discussed in *Bligh v. Brent*, 2 Y. & C. Eq. Exch. 268. In delivering the judgment of the court there, Alderson, B., says, p. 295,—“It is of the greatest importance to look carefully at the nature of the property originally entrusted, and that of the body to whose management it is entrusted, the powers that body has over it, and the purposes for which these powers are given. The property is money, the subscriptions of individual corporators. In order to make that profitable, it is entrusted to a corporation who have an unlimited power of converting part of it into land, part into goods, and of changing and disposing of each from time to time: and the purpose of all this is, the obtaining a clear surplus profit from the use and disposal of this capital for the individual contributors. It is this surplus profit alone which is divisible among the individual corporators. The land or the chattels are only the instruments (and those varying and temporary instruments,) whereby the joint-stock of money is made to produce profit. Suppose the subscription had not been by the individual corporators, but that strangers, having collected the money, had put it into the management of a corporate body having particular privileges, and had, after giving them power to vest the money at their pleasure, stipulated to receive these profits, could it be contended that the nature of the property of the subscribers de-[138]-pended on the mode of management by the independent body? And yet that is, in truth, this case: for, the individual members of a corporation are quite as distinct from the metaphysical body called ‘the corporation’ as any others of His Majesty’s subjects are.” So here the only right which each subscriber or shareholder has, is a right to receive a share of the profits arising from the tolls: there is nothing in which each can claim a share as tenants in common. [Erle, C. J. If they are owners in fee-simple of the bridge, their obligation to the public to repair it makes no difference (a).] It is submitted that they have no such interest in any lands or tenements as to confer upon them a right of voting.

Karslake, Q. C., in reply. *Bennett, App., Blain, Resp.*, 15 C. B. (N. S.) 518, 1 Hopw. & Ph. 35, has no application to a case of this sort. *Bastor, App., Newman (or Brown), Resp.*, 8 Scott, N. R. 1019, 7 M. & G. 198, 1 Lutw. Reg. Cas. 287, is more to the purpose, and shews that the cestui que trusts, the shareholders, took an equitable freehold interest in the land conveyed to the trustees. *Bligh v. Brent*, 2 Y. & C.

(a) His Lordship referred to *The King v. The Mayor, &c., of Stratford-upon-Avon*, 14 East, 348.

Eq. Exch. 268, shews that the circumstance of the shares being declared to be personal property will not alter their legal character, or affect the rights of the shareholders. The annuities and other securities to be granted are in both acts (s. 14 of 12 G. 1, c. 36, and s. 1 of 1 G. 2, c. 18) declared to be personal property. But for those provisions, both acts assume that they would be real estate. The provision in s. 5 of the first act, for the purchase of houses and land for making the necessary approaches to the bridge, and the provision in s. 7 enabling the commissioners to acquire, hold, and con-[139]vey lands, clearly shew that they took something more than a mere easement. [Erle, C. J. Generally speaking, a ferryman has no freehold, but only an easement, in the approaches to his franchise.] The provisions last referred to would have been wholly unnecessary if these commissioners took an easement only. There has, besides, been complete and uninterrupted possession here ever since the date of the conveyance in 1729. That of itself is abundant evidence of title. The case of *Launceston v. Erle*, 5 C. B. (N. S.) 717, turned upon whether the pile which was the subject of the action had been put into the bed of the river under circumstances which deprived the person placing it there of the ownership of the chattel: looking at all the facts, the court held that it had not. But this bridge can hardly be considered to be a chattel. Then, as to the equitable interest. As the cestuis que trust must necessarily be a fluctuating body, it was found convenient to have a body of trustees in whom the legal interest would vest. But the trust was the lowest that could well be conceived: the trustees had no duties to perform, and incurred no liability; the whole affairs of the bridge were under the management of a committee. The shareholders took all the interest in the profits, and therefore have an equitable interest in the land, in respect of which they were entitled to be registered for the county in which the land is situate.

Cur. adv. vult.

ERLE, C. J., now delivered the judgment of the court:—

This was a claim on the part of the shareholders of a bridge which crosses the river Thames between Fulham and Putney to be placed upon the register for the eastern division of the county of Surrey, in respect of a [140] freehold interest in shares in the bridge: and the main question is whether they have an equitable freehold therein. It appears that the statute which authorized the building of the bridge, 12 G. 1, c. 36, appointed certain commissioners, and empowered them to purchase and hold lands for the purpose of carrying out the work: and that the commissioners, acting in the supposed pursuance of the act, by indenture of bargain and sale of the 11th of November, 1729, conveyed to trustees in trust for thirty persons who had subscribed the capital for acquiring the rights and building the bridge, all the materials of the bridge, and all tolls, revenues, profits, and income belonging thereto, with all such ground and soil adjacent and belonging to the ferries between Fulham and Putney (which they had acquired under the powers of the act), as were or should be vested in the commissioners, and all benefits, &c., and every other matter and thing whatsoever vested in or granted to the said commissioners which they were empowered or capable to assign or convey over by virtue of the acts of parliament. If the commissioners had power to part with any land vested in them by the acts or either of them, no doubt the shareholders would take an equitable interest under that conveyance. But I take it to be perfectly clear law that, where an act of parliament vests land in commissioners for public purposes, unless there be some special authority to that effect in the act they have no power to part with the land. I see nothing here to warrant the commissioners in conveying away any land. The 3rd section of the 1 G. 2, c. 18, confirms this view. It authorizes the commissioners and trustees (a) at any time or times "to convey and assign over in perpetuity or otherwise all or any tolls, [141] revenues, profits, or incomes of or belonging to the said bridge or ferries, or which shall in anywise arise, accrue, or belong to the same, unto such person or persons as will undertake, contract, and agree to erect and build the said bridge, and to preserve and keep up the same in good and sufficient repair," &c. That is a power to the commissioners to assign the tolls and profits of the bridge as distinguished from the fee-simple of the land. I therefore think the commissioners had no power to convey any interest in any land to the shareholders, or to any trustees for them. Although they professed to convey it by the deed of 1729, yet, if the law has prohibited

(a) I.e. the commissioners and trustees named in the 12 G. 1, c. 36, s. 1.

it, the shareholders, taking the conveyance with knowledge of the limited powers of the commissioners, would take no more, and the commissioners would part with no more, than the law entitled the latter to convey. The result is that, in our judgment, no interest in the land passed by that conveyance, but a mere right to take the tolls; and consequently we hold that the decision of the revising-barrister was right.

As, however, the case was one of some doubt, we think the decision should be affirmed without costs.

Decision affirmed.

MEMORANDUM.

The days appointed for hearing the registration appeals for Michaelmas Term, 1864, being found insufficient, and there remaining on the last day but two of the term three cases to be argued, and two standing for judgment, besides a rule pending for striking out one, the court were pressed by counsel to dispose of the list during the two remaining days, — it being suggested that otherwise, in one event, parties might be [142] improperly disfranchised. The Lord Chief Justice, however, after referring to the several clauses of the 6 & 7 Vict. c. 18 by which the hearing of these cases is regulated, thought there was no reason why other pressing business of the term should be postponed on that account.

There seems to be no foundation for the suggestion that any serious inconvenience could result from the postponement of these appeals until a subsequent term.

By s. 62, the appellant is required, within the first four days of Michaelmas Term to transmit the case to the Masters of the court of Common Pleas with notice of his intention to prosecute the appeal: and he is to give a similar notice to the respondent. The court is then (by s. 63), *as early as conveniently may be*, either in term time or in vacation, to appoint days for hearing and deciding such appeals. There is no other limit of time.

The formation of the register is provided for by ss. 47-49. By s. 47, the list of voters for the county, signed by the barrister as directed by s. 41, is to be *forthwith* transmitted by him to the clerk of the peace of the county; and, in like manner, by s. 48, the lists of voters for each city or borough, signed as aforesaid, are to be *forthwith* transmitted to the town-clerk; and the clerk of the peace, or the town-clerk, is *forthwith* to cause the lists to be copied and printed in a book; which books, signed respectively by the clerk of the peace and the town-clerk, are to be delivered to the sheriff of the county, or the returning officer of the city or borough, *on or before the last day of November*, and are (by s. 49) to be the register of voters until the 1st of December in the succeeding year.

Any alterations which may be rendered necessary by the decisions of the court of Common Pleas can [143] only be made *after the printed register has been sent to the sheriff or the returning-officer*.

The 67th section enacts that, "whenever by any judgment or order of the said court any decision or order of any revising barrister shall be reversed or altered, so as to require any alteration or correction of the register of voters for any county, or for any city or borough, notice of the said judgment or order of the said court shall be forthwith given by the said court to the sheriff or returning-officer, as the case may be, having the custody of such register: and the said notice shall be in writing under the hand of one of the Masters of the said court, and shall specify exactly every alteration or correction to be made in pursuance of the said judgment or order in the said register; and such sheriff or returning officer respectively shall, upon the receipt of the said notice, alter or correct the said register accordingly, and shall sign his name against every such alteration or correction in the said register, and shall safely keep and hand over to his successors every such notice received by him from the said court as aforesaid, together with the said register."

And by s. 69 it is provided that "no right of voting at any election of a member or members to serve in parliament shall be affected by any appeal pending in the said court at the time of the issuing of the writ for such election: but it shall be lawful for every person to exercise the right of voting at such election as effectually, and every vote tendered thereat shall be as good, as if no such appeal were pending: and that the subsequent decision of any appeal which shall be pending in the said court at the time of the issuing of the writ for any such election, shall not in any way whatsoever alter or affect the poll taken at such election, nor the return made thereat by the returning-officer."

[144] HILARY TERM.

KENT.—EASTERN DIVISION.

HENRY SMITH, *Appellant*: FREDERICK FOREMAN, *Respondent*. Jan. 12th, 1865.[S. C. H. & P. 231; 34 L. J. C. P. 93; 11 L. T. 673; 11 Jur. N. S. 42;
13 W. R. 291.]

A. occupied solely as tenant a house and land at a yearly rent of 40l. He also jointly with his father rented and occupied other lands at a yearly rent of 64l. Both occupations were under the same landlord:—Held, that A.'s proportion of the joint rent could not be added to his separate rent, so as to constitute a qualification to vote for the county under the 2 W. 4, c. 45, s. 20.

1. At a court held at Ashford, in the eastern division of the county of Kent, for the revision of the list of voters for the parish of West Brabourne, Henry George Allen duly objected to the name of John Rolfe being retained on the list of voters for the said parish.

2. The facts of the case are these:—The name of John Rolfe appeared on the copy of the register of persons entitled to vote, as follows,—“John Rolfe, West Brabourne, Occupation of house and land, West Brabourne:” and his name had stood on the register thus for several previous years. John Rolfe had during the qualifying period, and for several previous years, occupied solely, as tenant, a house and land at West Brabourne, for which he was *bonâ fide* liable to a yearly rent of 40l. He had also occupied during the qualifying period, and for several previous years, as tenant, jointly with his father, under the same landlord, other land three fourths of which were also in West Brabourne and about one fourth in a neighbouring parish, also within the said eastern division, for which he and his father were *bonâ fide* jointly liable to a rent of 64l. per annum. The hiring of these latter named lands was at a different and subsequent period from the hiring of the first-mentioned house and land, of which John Rolfe was sole tenant.

[145] The revising-barrister decided that, inasmuch as the occupation and holding of the joint tenant is *per tout*, as well as *per mi*, and that John Rolfe was actually *bonâ fide* liable to pay to one landlord a yearly sum as rent exceeding 50l. (that is to say, 40l. for his sole occupation, and 32l. at least as his *bonâ fide* share of the rent for the joint-occupation) for the lands and other tenements holden and occupied by him as aforesaid, he was entitled to be retained on the list of voters, by virtue of the 20th section of the 2 W. 4, c. 45, which enacts “that every male person of full age, who shall occupy as tenant any lands or tenements for which he shall be *bonâ fide* liable to a yearly rent of not less than 50l., shall be entitled to vote:” and he retained his name on the list of voters accordingly.

If the court should be of a contrary opinion, the name of John Rolfe was to be expunged from the register of voters for the eastern division of the county of Kent.

The Hon. R. Bourke (with whom was Hayes, Serjt.), for the appellant. This person claims to be entitled to the franchise, partly in respect of the occupation as tenant of premises of the yearly value of 40l. (under the 20th section of the Reform Act), and partly in respect of the occupation jointly with his father of other premises under the same landlord, of the yearly value of 64l. (under the 73rd section of the Registration Act). It is submitted that these two occupations cannot be joined together, so as to constitute one qualification as tenant of premises of the yearly value of 50l. The 20th section of the 2 W. 4, c. 45, enacts that “every male person of full age, and not subject to any legal incapacity,” “who shall occupy as tenant any lands or tenements for which he shall be *bonâ fide* [146] liable to a yearly rent of not less than 50l., shall be entitled to vote,” &c. Rolfe clearly acquired no franchise under that section. Then, the 73rd section of the 6 & 7 Vict. c. 18, after reciting the last-mentioned provision, enacts that, “where any such lands and tenements shall be jointly rented and occupied by more persons than one, each of such joint-occupiers shall be entitled to be registered and vote in such election as last aforesaid in respect of the lands and tenements so jointly rented and occupied, in case the yearly rent for which they shall be *bonâ fide* liable in respect of such lands and tenements shall be of an amount which, when divided by the number of such occupiers, shall give a *bonâ*

fide rent of not less than 50l. for each and every such occupier, but not otherwise" Rolfe acquired no franchise under that section: for, his share of the rent was only 32l. The question is, whether two separate and distinct tenancies can be joined for the purpose of making up the necessary qualification. The matter is virtually disposed of by the judgment of Tindal, C. J., in *Gadshap, App., Barrow, Resp.*, 8 Scott, N. R. 799, 7 M. & G. 21, 1 Lutw. Reg. Cas. 142. Commenting on the words "a yearly rent of not less than 50l.," in the 20th section of the Reform Act, he says: "These words, as it appears to me, not only in their grammatical construction, but also in their legal sense, import a liability to a *single* yearly rent of not less than 50l. If the legislature had intended a qualification that might be compounded of divers rents, it was easy for them to say 'a yearly rent or rents amounting in the whole to not less than 50l.' In furtherance of this construction of the act, observe to whom the same section has given the right to vote in the two other instances referred to. First, it gives a right to vote to 'every male person of full age, and not subject to any legal incapacity, who shall be entitled, [147] either as lessee or assignee, to any lands or tenements, whether of freehold or of any other tenure whatever, for the unexpired residue, whatever it may be, of *any term* originally created for a period of not less than sixty years (whether determinable on a life or lives or not), of the clear yearly value of not less than 10l. over and above all rents and charges payable out of or in respect of the same.' There can be no doubt but that that right can only be acquired in respect of a *single term* of the required value: and that a person entitled to an unexpired residue of two or more terms of smaller annual value, but amounting in the aggregate to a greater yearly value than 10l., would not thereby gain a vote. So, in the second branch of the clause, a right of voting is given to persons in like manner entitled 'for the unexpired residue, whatever it may be, of *any term* originally created for a period of not less than twenty years (whether determinable on a life or lives or not), of the clear yearly value of not less than 50l. over and above all rents and charges payable out of or in respect of the same: ' there again we have a description of a person entitled to vote in respect of a *single term*. Now, there can be no reason why the legislature should in the third instance have intended to confer the franchise in respect of several lettings, when in the two former they clearly contemplated a single term, for there could be no ground for allowing a tenant under a parol demise to *make up his qualification of different rents*, and to withhold the same advantage from one claiming in respect of different terms. Looking, therefore, at this section alone, I have no hesitation in saying that, as well in grammatical as in legal construction, it confers the right to vote only in respect of the liability to a *single yearly rent* of not less than 50l." This is not a single rent. [Williams, J. The 73rd section speaks of premises jointly rented [148] and occupied by more persons than one, at a rent of not less than 50l.: it does not say, in conjunction with any other land.] No. You cannot tack a joint-tenancy to a sole tenancy, for the purpose of ekeing out a qualification.

Hannen (with whom was Underdown), for the respondent. There can be no objection to a qualification made up of two holdings under the same landlord. In *Gadshap, App., Warburton, Resp.*, the building and the land were held under different landlords: and the language of Tindal, C. J., must be understood with reference to the facts of the particular case before him. [Keating, J. Has it ever been decided that two separate buildings held under the same landlord may be joined for the purpose of constituting a qualification?] No. The subject has been considered: see Elliott on Registration, 2nd edit. p. 174 (a). [Williams, J. But for the 73rd section

(a) See *Powell, App., Prior, Resp.*, 4 C. B. 195, 1 Lutw. Reg. Cas. 586. There, A. occupied a shop, which, together with a house and other premises also occupied by him constituted a sufficient qualification in point of value, but neither being sufficient alone. The shop was separated from the rest of the premises by a yard in the exclusive occupation of A., but there was no complete curtilage or fence surrounding the whole; the yard being approached by a passage at the side of the shop, open to the street, which was also the property of A., but used by the tenant of the adjoining house in common with him. And it was held that the shop could not be joined with the other premises so as to constitute one entire qualification under the 2 W. 4, c. 45, s. 27.

of the 6 & 7 Vict. c. 18, it is clear that this person could not be registered.] That is conceded. The 26th section of the 1 & 2 W. 4, c. 60, for the better regulation of vestries, enacts that the vestry elected under the act in any parish not within the metropolitan police district, or the city of London, shall [149] consist of resident householders rated or assessed to the relief of the poor upon a rental of not less than 10l.; and that no person shall be capable of acting as one of the said vestry unless he shall be the occupier of a house, lands, tenements, or hereditaments rated or assessed upon the afore-mentioned amount of rental within the parish for which he is to serve: provided always that, if the parish adopting this act should be within the metropolitan police district, or the city of London, or if the resident householders therein should amount to more than 300, then and in that case the vestry elected under this act shall consist of resident householders rated or assessed to the relief of the poor of such parish upon a rental of not less than 40l. per annum. In *The King v. The Churchwardens, &c., of St. Pancras*, 1 Ad. & E. 80, 3 N. & M. 425, it was held that the rental might be made up of tenements separately held, and not in the occupation of the vestrymen. There can be no reason why the rental, if it is to be a test of responsibility, should be a *single rental*: nor can there be any good reason why a joint occupation should stand in a different position in this respect from a separate occupation. The question turns entirely upon the plain words of the act: there is no authority to be found which reflects any light upon it.

Bourke was not called upon to reply.

ERLE, C. J. I am of opinion that the decision of the revising-barrister in this case was wrong. The qualification under s. 20 of the Reform Act for one occupying lands or tenements as tenant is, a yearly rent of not less than 50l. It appears that the claimant occupies solely as tenant a house and land at a yearly rent of 40l. He cannot, therefore, qualify without the aid of the 73rd section of the Registration Act, which pro-[150] vides for the qualification of persons occupying jointly. The words giving that qualification are peculiarly limited. They are that, "where any such lands and tenements shall be jointly rented and occupied by more persons than one, each of such joint-occupiers shall be entitled to be registered and vote in such election as last aforesaid in respect of the lands and tenements so jointly rented and occupied, in case the yearly rent for which they shall be bonâ fide liable in respect of such lands and tenements shall be of an amount which, when divided by the number of such occupiers, shall give a bonâ fide rent of not less than 50l. for each and every such occupier, but not otherwise." I do not feel myself at liberty to say that a qualification exists which is not to be found in the very plain words of that enactment. Here, the claimant rents jointly with his father lands in respect of which they are jointly liable to a yearly rent of 64l., and he claims to have his proportion of that rent, viz. 32l., added to his separate rent of 40l. to make up the 50l. qualification. But I am of opinion that the words of the section do not authorize the junction of these two rents. If the party claims in respect of his qualification as one of several joint-occupiers, he must shew a joint-occupation at an amount which will give a bonâ fide rent of not less than 50l. for each of the joint-occupants. If he fails to do so, he gains no qualification under the Registration Act. I do not profess to fathom the depths of the intention of the legislature beyond the guide afforded by the clear language of the enactment. The 2 W. 4, c. 45, s. 20, in effect says that a person who occupies premises for which he is bonâ fide liable to a yearly rent of not less than 50l. shall be entitled to vote. Then comes the 73rd section of the 6 & 7 Vict. c. 18, which says that, if two or more shall jointly occupy, each shall be entitled to be registered in respect [151] of such joint-occupation, provided the rent be sufficient in amount to give 50l. a year for each, but not otherwise. Possibly the legislature may have thought it would be inconvenient to allow a qualification to be made up of the separate rent and an apportionment of the joint rent. But, be that as it may, it seems to me that this person is not qualified under either statute, and consequently that his name must be expunged from the register.

WILLIAMS, J. I am entirely of the same opinion. Giving to the language of the 73rd section of the 6 & 7 Vict. c. 18 its ordinary construction, I think it is impossible to come to any other conclusion.

KEATING, J. I am of the same opinion. But for the 73rd section of the 6 & 7 Vict. c. 18, a joint occupation could not have given a qualification. I see nothing in the words of that section to warrant us in holding that a joint-occupation

which is of itself insufficient to give the right of voting, may be added to an imperfect qualification in respect of a separate occupation under the Reform Act.

Decision reversed.

[152] BOROUGH OF CHELTENHAM.

JOHN FLATCHER, *Appellant*: WILLIAM BOODLE, *Respondent*. Jan. 14th, 1865.

[S. C. H. & P. 238; 34 L. J. C. P. 77; 11 L. T. 630; 11 Jur. N. S. 67;
13 W. R. 340.]

A. came into occupation of the qualifying premises in August. A poor-rate had been made in the preceding April, and another was made in September following. A. had paid the last-mentioned rate: but no demand had been made upon him for (nor had he paid or tendered) his proportion of the April rate, under the 17 G. 2, c. 38, s. 12, although it had not been paid by the outgoing tenant, whose name appeared upon that rate:—Held, by Erle, C. J., Willes, J., and Keating, J.,—dissentiente Williams, J.,—that A. had paid “all the poor-rates *which had become payable from him* in respect of the premises,” within the meaning of the 2 W. 4, c. 45, s. 27,—the liability to pay the proportion of the April rate being only a liability subject to the contingency of the outgoing tenant having made default, and of the overseers demanding his proportion of the rate from A.

1. At the revision court of the borough of Cheltenham, in the county of Gloucester, held on the 15th of September, 1864, to revise the parliamentary lists of voters for the said borough, which consists of only one parish, John Fletcher duly objected to the name of James Burrington being retained on the list of voters for the said borough, upon the ground that a portion of the poor-rate for the qualifying year had not been paid.

2. It was proved before the revising-barrister that the poor-rates of the parish in which the qualifying premises are situated, are made half-yearly; that there was one made in April, 1863, which extended to the following September, when another was made which extended to March, 1864, in which month a new rate was made, which is the existing rate.

3. The voter went into occupation of the qualifying premises prior to the 1st of August, 1863, but paid no portion of the rate then in existence, which was not demanded of him; neither was his name inserted in that rate.

4. It was contended against the vote that, inasmuch as the 27th section of the 2 W. 4, c. 45, requires the payment of all rates payable from the voter, he should have gone to the overseers and paid his proportion of the April, 1863, rate, to which he was rendered liable [153] by the 12th section of the 17 G. 2, c. 38; and, if any dispute had arisen as to the amount, they could have had it settled by two justices in the manner provided by that section: and that, the voter having failed to adopt this course, he was disqualified, for the omission was not remedied by any provision of the Registration Act, as s. 75 of the 6 & 7 Vict. c. 18 only applies to a misnomer or inaccurate or insufficient description.

5. It appeared to the revising-barrister that, as the act of George 2 does not say the incoming tenant shall pay, but only that he shall be liable to pay, and as the proportion which he is so liable to pay must before he can pay it be first ascertained, either by agreement between the parties, or, in case of dispute, by the decision of two justices of the peace: and as, by the 6 & 7 Vict. c. 18, s. 75, a person in other respects qualified shall be considered as having paid all rates when he shall have bona fide paid all sums of money which he shall have been called upon to pay as rates, therefore an unascertained proportion, which the voter had never been called upon to pay, was not such a rate as had become payable from him in respect of the qualifying premises, within the meaning of the 27th section of the 2 W. 4, c. 45: and he overruled the objection, and retained the name.

6. If the court should be of opinion that he was wrong, the name of James Burrington was to be expunged from the list.

7. The validity of the objections in three other cases depended upon the same decision, and they were accordingly consolidated with the principal case.

Dowdeswell, for the appellant. The question is, whether Mr. Burrington was disqualified from being on the list of voters for the borough of Cheltenham, by reason of the proviso in the 27th section of the 2 W. 4, c. 45, [154] that no person shall be registered unless he shall have been rated in respect of the premises occupied by him to all rates for the relief of the poor made during the time of such his occupation, nor unless he shall have paid on or before the 20th of July all the poor-rates and assessed-taxes which shall have become payable from him in respect of such premises previously to the 6th of April then next preceding. The 11 & 12 Vict. c. 90, which enacts that "no person shall be required, in order to entitle him to have his name inserted in any list of voters for any city, town, or borough in England, to have paid any poor-rates or assessed taxes except such as shall have become payable from him previously to the 5th of January in the same year, and that no person shall be entitled to be on any such list of voters, unless the poor-rates and assessed-taxes payable from him previously to the 5th of January shall be paid on or before the 20th of July next following," and the 6 & 7 Vict. c. 18, s. 75, as to inaccurate statements in the rate, do not apply to a case like this. It is clear that the proportion of the rate made in April, 1863, accruing between the 1st of August, 1863, when Burrington's occupation commenced, and the month of September, when another rate was made, was payable from him, within the meaning of the 27th section of the Reform Act. The 12th section of the 17 G. 2, c. 38, enacts that, "where any person or persons shall come into or occupy any house, land, tenement, or hereditament, or other premises, out of or from which any other person assessed shall be removed, or which at the time of making such rate was empty or unoccupied, that then every person so removing from, and every person so coming into or occupying the same, shall be liable to pay to such rate in proportion to the time that such person occupied the same respectively, in the same manner, and under the like penalty of distress, as if such person so removing had not removed, or such person so coming in or occupying had been originally rated and assessed in such rate; which said proportion, in case of dispute, shall be ascertained by any two or more of His Majesty's justices of the peace." This provision in the Reform Act has always been construed most strictly. [Keating, J. Does it appear from the case that the outgoing tenant has not paid this very rate?] It is not so stated in terms: but it never was suggested, nor is it very likely, that it has been paid. Assessed-taxes are (by the 43 G. 3, c. 161, s. 23) payable quarterly, though, by the 48 G. 3, c. 141, the collectors are directed to collect them, and they are accordingly usually collected, half-yearly. In *Ford, App., Smedley, Resp.*, 12 C. B. 622, 2 Lutw. Reg. Cas. 203, a house-tax was payable on the 20th of December, 1851, but not demanded until the 11th of April, 1852, and the party assessed did not pay it until after the 20th of July: and it was held that he had not, within the meaning of the 11 & 12 Vict. c. 90, "paid on or before the 20th of July, all assessed-taxes which became payable from him in respect of the premises previously to the 5th of January," and consequently that he was not entitled to be registered. That was an extremely hard case: for no demand was or could be made on the party assessed until after the 10th of April. *Bishop, App., Smedley, Resp.*, 2 C. B. 90, 1 Lutw. Reg. Cas. 384, shews that it is the duty of the party from whom a rate is due to pay or tender it (a). This person never offered to pay any portion of the rate in question. He has not paid on or before the 20th of July all the poor-rates which had become payable from him in respect of the premises previously to the 6th of April. The Registration Act has nothing to do with the matter. The 75th section,—after reciting the 2 W. 4, c. 45, s. 27, as to rating and payment of rates, and that "doubts have arisen how far any misnomer or inaccurate or insufficient description in a rate of the person occupying any such premises as in the said recited act are mentioned, or any inaccurate description of the premises so occupied, has the effect of preventing any such person from being registered and entitled to vote in respect of such premises in any year,"—enacts that, "where any person shall have occupied such premises as in the said recited act are mentioned for twelve calendar months next previous to the last day of July in any year, and such person, being the person liable to be rated for such premises, shall have been bona fide called upon to pay in respect of such premises all rates made for

(a) That was the case of a claim to be rated: the party was doing an act to qualify himself to vote, and did not do it properly.

the relief of the poor in such parish or township during the time of such his occupation so required as aforesaid, and such person shall have bonâ fide paid, on or before the 20th day of July in such year all sums of money which he shall have been called upon to pay as rates in respect of such premises for one year previously to the 6th day of April then next preceding, such person shall be considered as having been rated and paid all rates in respect of such premises, within the meaning of the said recited act, and be entitled to be registered in respect of the same in any year, any misnomer or inaccurate or insufficient description in any rate of the person so occupying or of the premises occupied, notwithstanding." In *Moss, App., The Overseers of St. Michael, Lichfield, Resp.*, 8 Scott, N. R. 832, 7 M. & G. 72, 1 Lutw. Reg. Cas. 184, it was held that that provision has reference only to inaccuracies of description. There, a father and son jointly occupied premises as [157] partners: the name of the father alone was inserted in the first two rates made within the year, and both were inserted in the third: all the rates were paid by the hand of the son: and it was held that this was not a rating of the son, within the 2 W. 4, c. 45, s. 27, nor an inaccurate or insufficient description of the person rated, within the 6 & 7 Vict. c. 18, s. 75. "The appellant," says Maule, J., "clearly was not rated within the 2 W. 4, c. 45, s. 27: and the 75th section of the 6 & 7 Vict. c. 18, only applies where there is an inaccurate or insufficient description of the party intended to be rated and called upon to pay the rate. If he were the party intended to be charged, and was called upon to pay and did pay the rate, the blunder would not vitiate the rating. But here the father was rated, and not the son." Here there was no inaccuracy or mistake.

Campbell Foster, for the respondent. This person was entitled to be registered. The liability of the incoming tenant under the 17 G. 2, c. 38, s. 12, is to pay a proportionate part of the rate for the time of his occupation, provided the outgoing tenant has not already paid it. The case does not shew that the last occupant did not pay. [Erle, C. J. If our decision was to turn upon that, we should send the case back for amendment.] If there be any portion of the rate due, and the incoming tenant be liable for it, the non-insertion of his name in the rate is an inaccurate or insufficient description of the person liable, within the 75th section of the 6 & 7 Vict. c. 18 (a). The case finds that no demand was made upon Burrington. How was he to know whether anything or what was to be paid by him? The cases as to assessed-taxes are altogether inapplicable: the poor-rate is payable as [158] soon as it is allowed and published. *Bishop v. Dixon*, 2 Bos. & B. 321, was referred to. The Court called on

Dowdeswell. There is no uncertainty as to the amount which the incoming tenant is to pay: he is to pay in proportion to the time he has occupied. *Id certum est quod certum reddi potest.* [Willes, J. It may be that there is a dispute as to when his occupation began. It is not a sum payable from the party until the amount is ascertained.] If there be any doubt, that is to be settled before the justices. The act of parliament imposes upon the occupier the duty of paying the rates: he is not to wait for a demand. The parish officers have no means of knowing when the occupation commences: the party himself has. [Erle, C. J. How can the incoming tenant know what has been done by the outgoing tenant? The utmost that can be said is, that the former has a capacity to be made liable.]

Campbell Foster. This man has paid all the rates which had become payable from him, within the 2 W. 4, c. 45, s. 27. He has paid the September rate: and, if the collector had at that time made a demand on him for his proportion of the April rate, defining the sum, and he had refused to pay it, there would have been something in the argument. No sum could be payable from him, unless it was defined and ascertained. He was not absolutely liable, but only upon the contingency of his being resorted to on the default of the outgoing tenant. The 28th section of the Reform Act gives the right of voting in the case of different premises occupied in immediate succession, the party "having paid on or before the 20th of July all the poor-rates and assessed-taxes which shall previously to the 6th of April then next preceding have [159] become payable from him in respect of all such premises so occupied by him in succession." In *Rogers, App., Lewis, Resp.*, 7 C. B. (N. S.) 29, K. & G. 279, it was held that, in the case of an occupation of premises in succession under that section, it was not necessary that the party's name should appear on the

rate: it is enough that he has *paid* the rate. *Bishop, App., Smedley, Resp.*, 2 C. B. 90, 1 Lutw. Reg. Cas. 384, turned upon the 30th section of the 2 W. 4, c. 45, which was designed to meet the case of a man whose name had been altogether omitted from the rate. As the party had neither paid nor tendered the amount of the rate, it was held that he was not entitled to be registered. The claimant here has paid all that he has been called upon to pay, and all in respect of which a direct liability is imposed upon him by the legislature; and, if necessary, he is entitled to rely upon the curative power of the 75th section of the 6 & 7 Vict. c. 18.

Dowdeswell, in reply. Mr. Burrington claims to be retained on the list of voters in respect of a supposed right conferred on him by reason of the performance of two conditions contained in the 27th section of the Reform Act,—first, that he shall have been rated to all rates for the relief of the poor made during the time of his occupation of the qualifying premises,—secondly, that he shall have paid on or before the 20th of July all the poor-rates, &c., which shall have become payable from him in respect of such premises previously to the 6th of April. The second of these conditions is independent of the first, and is intended to be more extensive. Has it been complied with? It is submitted that it has not. A portion of the April, 1863, rate was clearly payable by Burrington. Though not defined or ascertained, he was liable for it. It was capable of being readily ascertained. He might and [160] ought to have tendered what he conceived to be the proper sum; and, if the overseers had refused to receive it, an appeal to two justices would have at once settled the matter. If the name of a party be omitted from the rate, it is his duty to demand to be rated: if he fails to do so, he loses his franchise. So, as to payment: being liable to pay, and not paying or tendering, he has failed to perform his duty to the public, and his right to vote is gone. [Erle, C. J. The liability here is somewhat like the liability of the drawer or indorser of a bill of exchange,—a contingent liability to pay, provided he has due notice of the default of the party primarily liable. Can it be said that the bill has become payable by him unless he has had notice?] The law-merchant can hardly be relied on to assist the construction of the Reform Act. [Willes, J. In order to deprive a party of the benefit of a condition, he must have notice. How can a man know whether or not he is liable to pay, until he has notice of the demand upon him?] This is not a contingent liability at all. The rate being unpaid, it is a debt: and it became payable by Burrington immediately upon his entering upon the occupation of the premises.

ERLE, C. J. The question raised by this appeal is, whether the claimant is disqualified from being placed upon the register by reason of the non-payment of a poor-rate payable from him in respect of the qualifying premises. The revising-barrister held that the party was not disqualified. The facts are, that the voter went into occupation of the qualifying premises prior to the 1st of August, 1863, and that the practice in this parish was to make rates for the relief of the poor half-yearly, viz. in April and September. The voter had paid every rate made during the period of his occupation. When he entered upon the premises [161] in July, there was a portion of the rate made in April left unpaid; and it is contended on the part of the appellant that that rate had become payable from him by virtue of the 17 G. 2, c. 38, s. 12, which makes provision for the case of the removal of an occupier leaving rates unpaid. That section enacts that, “where any person or persons shall come into or occupy any house, land, tenement or hereditament, or other premises, out of or from which any other person assessed shall be removed, or which at the time of making such rate was empty or unoccupied, that then every person so removing from, and every person so coming into or occupying the same, shall be liable to pay to such rate in proportion to the time that such person occupied the same respectively, in the same manner, and under the like penalty of distress, as if such person so removing had not removed, or such person so coming in or occupying had been originally rated and assessed in such rate, which said proportion, in case of dispute, shall be ascertained by any two or more of His Majesty’s justices of the peace.” The case does not so find, but we must assume that there was some arrear of the April rate left unpaid by the outgoing tenant: but the claimant has gone on in the full confidence and belief that everything due from him had been paid. Mr. Dowdeswell has insisted, on the part of the appellant, that there was a liability imposed upon the incoming tenant by the 17 G. 2 c. 38, s. 12, and that from the moment he entered into the occupation of the premises a proportion of that rate was payable from him by virtue of that statute: but

I take the words of that enactment to mean that the party is thereby subjected to be made liable, acquires a capacity for being made liable, to pay a proportion of the rate: not that he incurs a primary liability which he has the means of knowing of. It is a liability which the parish officers [162] may if they choose enforce. It is matter of contingency whether they will put the law in force, and also matter of contingency what amount they will demand, for the outgoing tenant may have already paid the rate. Until the party has been called upon to make good the default of the outgoing tenant, and has refused or neglected so to do, I think he is not disqualified by reason of the proviso in the 27th section of the Reform Act. The words of that section are, that no person shall be registered "unless he shall have paid on or before the 20th of July all the poor-rates and assessed-taxes which shall have become payable from him in respect of such premises previously to the 6th of April then next preceding." I think the words "which shall have become payable from him" involve the idea of a definite sum payable in presenti, which the party has been called upon to pay, and in respect of which he is in default, and not a contingency of being called upon to pay under the provision in the 17 G. 2, c. 38, s. 12. The words are, "shall have become payable from him," not "in respect of which he may become liable:" and it cannot become payable from him until the contingency of his being called upon to make good the default of the person primarily liable has been ascertained, and the amount which is claimed has been notified to him. The proviso in the 27th section of the Reform Act takes away the franchise in the event of the party making default in bearing his due share of the public burthens. The disqualifying section confirms me in this construction; because the party is disqualified from voting unless he shall have paid all the poor-rates and assessed-taxes which shall have become payable from him on or before a certain day. Now, the liability to the poor-rate is entirely different from the liability in respect of assessed-taxes. The latter are assessed for the year, and are pay-[163]-able at certain stated times: whereas, the poor-rate is levied according to the necessities of the parish, which cannot be foreseen, and the making it may be enforced by peremptory mandamus: and, as contradistinguished from the poor-rate, it is payable the moment the rate is complete, that is, made, allowed, and published. Practically, it would be impossible for the incoming tenant to know how much of the last rate the outgoing tenant has left unpaid. It might be that the proportion to be paid by the incoming tenant was so trifling that the overseers might not think it worth while to demand it: and, if such an objection as this were allowed to prevail, a keen election agent might make the overseers' forbearance or neglect a means of disfranchising a party who has been in no default. For these reasons I am of opinion that the arrears in question did not become payable from Burrington until the persons who had authority to demand payment had settled the amount and demanded it, and so fixed him with a liability to pay a certain and ascertained debt.

WILLIAMS, J. I have the misfortune in this case to differ in opinion from my Lord and my two learned Brothers. By the 27th section of the Reform Act the franchise for boroughs is conferred upon 10l. householders, subject to the fulfilment of certain conditions, one of which is that the party claiming to be retained upon the list of voters shall have paid, on or before the 20th of July, all the poor-rates and assessed-taxes which shall have become payable from him in respect of the premises previously to the 6th of April then next preceding. The question before us is narrowed to this, whether this party has fulfilled that condition. It appears to me that he has not. The point turns upon the construction of the 12th section of the 17 [164] G. 2, c. 38, which, after reciting that "persons frequently remove out of parishes and places without paying the rates assessed on them, and other persons do enter and occupy their houses or tenements part of the year, by reason whereof great sums are annually lost to such parishes and places," enacts that, "where any person or persons shall come into or occupy any house, land, tenement or hereditament, or other premises out of or from which any other person assessed shall be removed, or which at the time of making such rate was empty or unoccupied, that then every person so removing from, and every person so coming into or occupying the same, shall be liable to pay to such rate in proportion to the time that such person occupied the same respectively, in the same manner and under the like penalty of distress as if such person so removing had not removed, or such person so coming in or occupying had been originally rated and assessed in such rate; which said proportion, in case of dispute, shall be

ascertained by any two or more of His Majesty's justices of the peace." Was the proportionate amount of this rate payable by the claimant within the meaning of the proviso in the 27th section of the Reform Act? It is said that nothing can be considered to be payable from the party in respect of the April rate, because whether anything would be due from him would depend upon a variety of circumstances which remained to be ascertained, and therefore that, until those circumstances were ascertained, no sum at all was payable from him. The 17 G. 2, c. 38, s. 12, however, says that he shall be liable to pay: and in my opinion the rate does not become the less payable from him, because the payment is not enforceable until the contingency is ascertained. I apprehend he is equally liable in the same manner as if there were no difficulty in ascertaining the amount. [165] It depends upon the time when the party's occupation commenced, and cannot be varied by any circumstances. It seems to me, therefore, to be impossible to say that this person has fulfilled the condition upon which his right to be registered depended, viz. that of payment of all rates payable from him in respect of the premises occupied by him. On the whole, I do not think it can be properly said that all the rates have been paid, when the sum due under the 17 G. 2, c. 38, s. 12, which the voter is by the express words of the statute liable to pay, has not been paid.

WILLES, J. I incline to the opinion that the course taken by the revising-barrister in this case was right. At least, I cannot see my way to the conclusion that he was wrong, and therefore I cannot hold that his decision should be reversed. The question, no doubt, is one of considerable nicety. It turns upon the words "which shall have become payable from him" in the 27th section of the Reform Act. No difficulty arises as to the rates made during the time the premises were occupied by Burrington. He is bound to know when a rate is made. The payment of it is made a condition precedent to his right to be on the register. He is not allowed to excuse himself on the ground of any laches on the part of the parish officers. That is quite clear. But here we have to deal with a rate which was made, allowed, and published before the claimant came into the occupation of the premises. In respect of such a rate, it is wholly unknown to the incoming tenant whether it was in arrear or not. The knowledge of that fact is confined to the parish officers. The revising-barrister held that there was a distinction amounting to a difference between the two cases. It is easy enough to see the distinction: but the question is whether that should make a difference in the construction of the Reform Act. The distinction is that, with respect to a rate made before his occupation commenced, the party cannot be said to be bound to take notice that such a rate has been made, or that any obligation rested upon him to pay it or any portion of it, unless you go the length of holding that he is bound to make inquiry. Whether or not he was bound to make inquiry, appears to me to be the only troublesome question in the case. I apprehend that, when the recital and the enacting part of the 12th section of the 17 G. 2, c. 38, are looked at, it will be found that it is a section which was not intended to regulate generally the rights of outgoing and incoming tenants, but simply to give a remedy to parish officers for the recovery of rates left unpaid by tenants removing; such remedy being given against each tenant, the outgoing and the incoming tenant, for a proportionate part of the rate for the periods they may respectively have occupied. It is a special provision for the case of a tenant going out and leaving a current rate unpaid. Therefore you have at once the distinction between the liability of the party assessed and that of the person who has come lawfully into the possession of premises in respect of which he may be liable to pay something which is not primarily due from him. That is the obvious distinction between the two cases: the one is an absolute liability: the other contingent or conditional. Then there is the further distinction, that the liability created by the 17 G. 2, c. 38, s. 12, is one in respect of which the incoming tenant neither knows nor is bound to know of its existence. I cannot but think that, in construing the Registration Act, it should be borne in mind that the register is but evidence of the right to vote, and that the liability created by the 17 G. 2, c. 38, s. 12, is a limitation or condition imposed upon that right: and therefore I do not see why we should not [167] apply the ordinary law as to conditions to such a case. I disclaim altogether deciding this question upon the giving or taking away of the franchise. But I think a person who claims a right to vote should not have a condition enforced against him more strictly than conditions in ordinary cases are enforced. I cannot help thinking that the parish officers and

the claimant are to be considered as if the former were the obligees of a bond and the latter the obligor, and the obligation was that, if A. B. (the former tenant) has not already satisfied the amount due for the current rate, and the obligees choose to hold the obligor liable under the statute 17 G. 2, c. 38, s. 12, the latter should pay it. In that case I take it that, according to every ordinary principle of law, notice ought to be given by the party who is to receive the money, and that the obligor would incur no forfeiture until such notice had been given. To use a familiar illustration, there could be no more until such notice was given. In Comyns's Digest, *Condition* (L. 8), and *Pleadar* (C. 73), are abundant authorities that, in the case of ordinary conditions, notice of default must be given. This is evidently the distinction upon which the revising-barrister has acted. Forming the best judgment I am able, I have therefore come to the conclusion that his decision is right, or, at all events, that I cannot see that it is wrong.

KEATING, J. I have come to the conclusion, upon the whole, that the decision of the revising-barrister in this case is right. The question undoubtedly is one of considerable nicety, viz. what is meant by the proviso in the 27th section of the Reform Act, that the claimant before he shall be entitled to be registered shall have paid all the poor-rates, &c., which shall have become payable from him in respect of the premises. [168] I agree with my Lord and my Brother Willes that, the claimant not having himself necessarily any notice of the existence of a state of things which would make the antecedent rate payable from him when he entered upon the occupation, there must be an obligation on some one who is cognizant of the fact of its payability to give him notice. Here, that obligation could only rest upon the parish officers. The 17 G. 2, c. 38, s. 12, contemplates the tenant's not only going away during the currency of a rate, but also going away leaving the rate unpaid. The reasonable construction of the 27th section of the Reform Act appears to me to be that, there having been no demand of the rate made upon this person, or other notice to him of the existence of a state of things which would make it payable from him, the non-payment of it did not disqualify him from being upon the list of voters.

Decision affirmed (a).

BOROUGH OF KIDDERMINSTER.

RICHARD POWELL, *Appellant*: WILLIAM FARMER, *Respondent*. Jan. 17th, 1865.

[S. C. H. & P. 172: 34 L. J. C. P. 71: 11 L. T. 736: 11 Jur. N. S. 162;
13 W. R. 467.]

1. The tenant of land in a borough erected thereon at his own expense a wooden structure with boarded sides and a thatched roof, and supported by wooden posts let into the ground, and used the same for storing potatoes and other things connected with his business of a market gardener. The revising-barrister having found the thing so described to be a "building" within the 27th section of the Reform Act,—Held, that there was not sufficient in the description which he had given to authorize the court to reverse his decision.—2. And, the revising barrister having found that this building was occupied by the party "as tenant,"—the Court (acting on the general presumption that things affixed to the freehold pass to the landlord) held that they could not see sufficient on his statement to authorize them to reverse his decision.—3. The tenant had erected in like manner on the land a pig-stye, with a slated roof, but in other respects similar to the structure before mentioned:—*Semle*, that this was not a "building" within the act.

At a court held for the revision of the lists of voters for the borough of Kidderminster, Richard Powell objected to the name of William Farmer being retained [169] on the list of persons entitled to vote in the election of a member for the borough of Kidderminster in respect of property occupied within the parish of Kidderminster Borough.

The said William Farmer is a market-gardener, and, for the purposes of that business, had rented and occupied under the same landlord five acres of land in the parish of Kidderminster Borough, for more than twelve calendar months next previous to the last day of July, 1864, of the clear yearly value of 20l.

(a) The question being one which was fairly arguable, no costs were given.

There was no building on the land when the said William Farmer first took the same of his landlord: but, previously to the 31st of July, 1863, the said William Farmer had erected on the land, at his own expense, a *wooden structure with boarded sides and a thatched roof, and supported by wooden posts let into the ground.* The entrance to this structure was by a door fastened by a padlock; and it was used by the said William Farmer for storing potatoes and other things connected with his business. The said William Farmer had erected in like manner on the said land a *pig-stye, with a slated roof, but in other respects similar to the structure before mentioned.* The flooring of the pig-stye was cinders laid on the ground to keep it dry.

It was objected on behalf of the said Richard Powell, that the said William Farmer's name ought to be expunged from the said list, on the following grounds,—first, that the structures erected by the said William Farmer were not nor was either of them a “building,” within the meaning of the Reform Act,—secondly, that, inasmuch as the structures had been erected by the tenant, they formed no part of the property for which he paid rent, and could not be said to [170] be occupied by him with the land as tenant under the same landlord.

The revising-barrister held that the said structures were buildings within the meaning of the act; and that they were affixed to the freehold: and he decided to retain the name of the said William Farmer on the said list.

If the court should be of opinion that his decision was wrong, the name of the said William Farmer was to be expunged from such list.

Keane, Q. C., for the appellant. That which Farmer relies on as constituting his qualification to be upon the register is clearly not sufficient within the 2 W. 4, c. 45, s. 27. The words of the section are, “any house, warehouse, counting-house, shop, or other building,” occupied either separately or jointly with any land within the city or borough, &c. Land alone will not qualify under this section. The thing here described,—the shed,—clearly would not be such a tenement as would confer a settlement. In *The King v. The Inhabitants of Loundthorpe*, 6 T. R. 377, a pauper rented land in Grantham of the annual value of 6l. 10s. 6d., and built on part of it a post wind-mill, at the expense of 120l., which by agreement with his landlord he was to be at liberty to remove at pleasure. He let the mill for a part of the time at the rent of 9l. per annum: and it was held that this was not the taking of a tenement of 10l. a year, and consequently that the pauper gained no settlement in Grantham. The “wooden structure” here was no part of that which Farmer rented. [Keating, J. The revising-barrister finds that it was a “building,” and that it was affixed to the freehold.] He describes the structure; and the court may very well say that they do not agree that a thing so constructed could be a building or affixed to the freehold. Things [171] erected for the purpose of trade are removable: *Hellawell v. Eastwood*, 6 Exch. 295. [Erle, C. J. In *Elwes v. Maw*, 3 East, 38, a distinction is taken between things annexed to the freehold for the purposes of trade, and those erected for the purposes of agriculture.] This structure was erected for the convenience of the party's business of a market-gardener, and was clearly removable by him. [Byles, J. In *Watson, App., Colton, Resp.*, 5 C. B. 51, 2 Lutw. Reg. Cas. 53, it was held that, where the revising-barrister finds a certain erection to be a “building” within the statute, and gives a description which does not necessarily shew that it cannot be a building within the act, the court will not interfere with his decision.] The description of the building there was given as follows:—“The shed stood against a wooden paling, the boundary of the wharf, but was not fastened to it. Six posts put into the ground supported a tarpaulin or tar cloth, which formed the roof. One of the sides of the shed was boarded up with boards fastened to the posts by nails. The shed was used for purposes connected with the occupation of the wharf.” In the course of the argument, Maule, J., says: “The revising-barrister has found that this is a ‘building,’ within the meaning of the act; and he gives us a description embracing some of the incidents of a building. He describes two sides of the structure: *the rest may be of solid masonry.*” In giving judgment, Wilde, C. J., says: “The revising-barrister has found the erection in question to be a ‘building’ within the meaning of the act; and his decision must stand, unless the court is satisfied that the thing described cannot be a building. It is difficult accurately to define what is a building. The statute uses the word ‘warehouse.’ I do not apprehend that this could not be called a warehouse, merely because it might be open on all sides. The shed, as it [172] is called, appears to be closed on two sides; and to have a roof; and it is used by the respondent

for purposes connected with the occupation of the wharf. It is also stated to be used by one Marks as a place of deposit for goods. When, therefore, it is said that, to constitute a building within the act, the thing must be ejusdem generis with those particularly enumerated, I think that this does sufficiently appear to be a 'warehouse.' At all events, there is nothing in the case that is inconsistent with its being so held. The revising barrister having found it to be a 'building' within the act, I must assume that it has all the requisites to constitute a building, except the incidents he sets out. And I see nothing in the facts he has stated to guide the court in the exercise of its opinion, that can prevent this being a building analogous to a warehouse." And Maule, J., added: "Its being more or less substantial cannot affect the question." Here, however, we have a full description of the thing, and of the circumstances under which it was erected: and these totally exclude the notion of its being a building or any part of that which the respondent rented. It is neither a building, nor is he tenant of it. [Byles, J. Suppose the respondent does not exercise his right to remove this structure?] He may in that case be assumed to have ceded it to his landlord: and the next occupier may possibly become tenant of a building. The "pig-stye" clearly cannot in any sense be said to be a building: it must be either fit for the habitation of man, or a place to be used for commercial purposes.

Karslake, Q. C. (with whom was the Hon. R. Bourke), for the respondent. *Watson, App., Cotton, Resp.*, is precisely in point. It is impossible for the court to hold that a structure described as this is cannot be a building. Then, as to the character of the [173] occupation,—If the structure be irremovable, it cannot be said that the respondent does not occupy it as tenant. Whatever, as a general rule, is fixed to the soil becomes part of the soil. [Erle, C. J. The statute intended that, to be a voter for a borough, the party should be an inhabitant, or should have some commercial interest therein. Land may be joined to the other subject of qualification in order to eke out the value: but there must be "house, warehouse, counting-house, shop, or other building," that is, something of the same character and description as those mentioned. This principle was incidentally discussed in the recent case of *Cook, App., Hunter, Resp.*, 11 C. B. (N. S.) 33, K. & G. 413.] Then, a pig-stye may equally be a building within the meaning of the act. [Erle, C. J. It may be that the shed used by the market-gardener for storing his potatoes may be a building used for the purposes of trade. But it seems to me that a dog-kennel would form as good a qualification for a vote as a pig-stye.]

Keane, Q. C., in reply, referred to *Culling v. Tuffnal*, Bul. N. P. 34, *Wansbrough v. Maton*, 4 Ad. & E. 884, 6 N. & M. 367, *The King v. The Inhabitants of Otley*, 1 B. & Ad. 161, and *Martin v. Roe*, 7 Ellis & B. 237.

Cur. adv. vult

ERLE, C. J., now delivered the judgment of the court:—

Upon this appeal two questions are raised—first, whether the shed described in the case was a "building" within the statute, that is, whether it had sufficient permanence, and was ejusdem generis with the buildings specified in the statute, house, warehouse, counting-house, shop.

[174] The revising-barrister found it to be such a building: and, according to the principle laid down in *Watson, App., Cotton, Resp.*, 5 C. B. 51, 2 Lutw. Reg. Cas. 53, we do not see sufficient in the description he has given, to authorize us to reverse his decision. It is constructed of planks nailed to posts let into the ground, and used for storing potatoes, that being an article in the way of the claimant's trade of a market-gardener.

The second question is, whether this shed was occupied by the claimant in the capacity of tenant. As to this, the facts are that, at the time of the demise there was no shed on the premises: but the claimant placed it there during his term, and used it as above mentioned.

The revising-barrister found that it was so occupied: and we do not see sufficient on his statement to authorize us to reverse his decision.

If the shed had become the property of the landlord, it was occupied by the claimant in his capacity of tenant, although he constructed the shed and placed it there during the term: and the general rule is, "quicquid plantatur solo solo cedit." It may be that the shed continued the property of the tenant, and was subject to be removed by him at any time during the term. His right to do so might depend on his contract with his landlord, or on the nature of the structure being such as would

make it removable as a trade-fixture. But, whatever may be the right of the tenant it further facts were added, upon the statement made, we act on the general presumption that things affixed to the freehold pass to the landlord, and affirm the decision.

The revising-barrister has raised a further question, whether a pig-stye is a building ejusdem generis with "house, warehouse, counting-house, and shop." It is [175] not necessary to answer this question, which is only raised in case the shed was found insufficient: but we would add that we are by no means prepared to assent to the revising-barrister's opinion on this point, without further discussion.

We would further add that the revising-barrister has in our judgment done good service in sending this and the next following case to us for our decision, and giving us the opportunity of explaining what we consider to be the true meaning of the court in *Watson, App., Cotton, Resp.*, and thereby putting some limitation upon the wide inferences drawn therefrom,—contrary, in some degree, to the intention both of the legislature as expressed in the statute, and of the judges expounding the same.

Decision affirmed (a).

BOROUGH OF KIDDERMINSTER.

RICHARD POWELL, *Appellant*; JOHN GEORGE BORASTON, *Respondent*.
Jan. 17th, 1865.

[S. C. H. & P. 179; 34 L. J. C. P. 73; 11 L. T. 734; 11 Jur. N. S. 160; 13 W. R. 465. Discussed, *Morish v. Harris*, 1865, L. R. 1 C. P. 160. Referred to, *Powell v. Kempton Park Racecourse Company*, [1897] 2 Q. B. 266; [1899] A. C. 143.]

1. The respondent occupied a farm of which a few acres, worth more than 10l. a year, were within a borough, but with no building thereon. An electioneering-agent, for the purpose of creating a vote, erected on this land a shed, made of wood, having four boarded sides and a boarded roof, and being supported by four posts let into the ground three feet.—The revising-barrister having held that this was a "building" within the 27th section of the Reform Act, and that it was occupied by the respondent as "tenant,"—the Court (acting upon the rule laid down in *Cook, App., Humber, Resp.*, 11 C. B. (N. S.) 33, K. & G. 413), reversed his decision.—2. Remarks upon *Watson, App., Cotton, Resp.*, 5 C. B. 51, 2 Lutw. Reg. Cas. 53.

At a court held for the revision of the lists of voters for the borough of Kidderminster, Richard Powell objected to the name of John George Boraston being re-[176]-tained on the list of persons entitled to vote in the election of a member for the borough of Kidderminster in respect of property occupied in the parish of Kidderminster Foreign.

The said John George Boraston is a farmer, and for several years has rented and occupied a farm at Sutton Common, within the parish of Kidderminster Foreign, but being partly within and partly beyond the limits of the parliamentary borough of Kidderminster.

The greater portion of the farm, including the farm-buildings, is beyond the borough limits: but a few acres of land, of more than the clear yearly value of 10l., lie within the borough.

There was no building on the land within the borough when the said John George Boraston took the farm of his landlord: but, in the summer of 1862, a shed was placed upon the piece of land within the borough. *This shed was made entirely of wood, having four boarded sides and a boarded roof, and being supported by four posts let into the ground three feet.* It adjoins a public road; and most of the side boards of the shed facing the road have been broken to pieces. There is no floor to the shed. It is entered by a door, and *used by the tenant for keeping agricultural implements in.*

It was proved that the shed was erected by a builder of Kidderminster, in accordance with instructions received by him from an active political agent in that borough who had no interest either as landlord or tenant in the land upon which it was erected. But previously to its erection the permission of the said John George Boraston was asked, who replied that he could not give an answer; his landlord must be asked. There was no evidence of the landlord having given such permission: but the said

(a) See the next case.

John George Boraston gave [177] instructions to the builder as to the size of the door of the shed, and told him that, if he required it floored, he would do it himself.

It was objected on behalf of the said Richard Powell that the name of the said John Boraston ought to be expunged from the said list, on the following grounds,—first, that the shed erected as aforesaid was not a “building,” within the meaning of the Reform Act,—secondly, that, under the circumstances stated respecting its erection, there was no occupation of the shed by the said John George Boraston, within the meaning of the Reform Act,—thirdly, that the shed formed no part of the property for which the said John George Boraston paid rent, and could not be said to be occupied by him with the land, as tenant, under the same landlord.

The revising-barrister held the contrary of these objections, and decided to retain the name of the said John George Boraston on the said list.

If the court should be of opinion that his decision was wrong, the name of the said John George Boraston was to be expunged from such list.

Keane, Q. C., for the appellant. This is a stronger case than that of *Powell, App., Farmer, Resp.*, ante, p. 168. The thing described in the case cannot under any circumstances be considered as a “building” within the act: it formed no part of the premises for which the respondent paid rent. The revising-barrister was clearly wrong in holding that it could confer a qualification.

Karslake, Q. C. (with whom was the Hon. R. Bourke), for the respondent. The revising-barrister has found this structure to be a building. The description he gives of it is not such as to preclude the possibility of [178] its being a building. It is used by the tenant as part of his holding, for the storing of agricultural implements. The mere fact of its having been built by a stranger does not prevent it from being a “building” within the act.

Cur. adv. vult.

ERLE, C. J., now delivered the judgment of the court:—

The respondent occupied a farm of which a few acres, worth more than 10l. annually, were within the borough: and on this part of the farm there was no building at the time of the demise, nor for years after. In 1862, an electioneering agent, having no interest of any sort in the land, caused a shed, made of boards nailed to posts, to be erected, and therein the respondent had kept some agricultural implements. There was no evidence that the landlord had any knowledge on the subject. The revising barrister held that this shed was a building within the statute, and that it was occupied by the respondent as tenant. His decision is the subject of this appeal: and we are of opinion that it should be reversed on both points.

The legislature has not defined with clearness the qualification for a vote in a borough. In a county, all that is comprised under the term land is the principal source of qualification. But, in a borough, land alone does not qualify: it can only be used as an accessory to a building for the sole purpose of making up the value of 10l.

The intention of the legislature respecting a qualification for a borough was much considered in *Cook, App., Hunter, Resp.*, 11 C. B. (N. S.) 33, K. & G. 413. It is there laid down, at p. 41, “that the qualification is compounded of four elements,—tenement, value, occupation, and estate. For tenement, there must be [179] a house, warehouse, counting-house, shop, or other building analogous thereto: there must be the annual value, 10l.: there must be occupation, that is, actual exercise of the rights of an owner in possession, during the requisite time: and there must be an estate in the tenement, either of fee or less. If these four distinct elements are combined in the claimant, he is qualified [in respect of property]: if otherwise, he is not. Now, although they must exist in combination, in order to qualify, still, in inquiring into the existence of the combination, each element must be separately ascertained,—first, is the claimant tenant?—secondly, is he occupier?—thirdly, is the tenement sufficient in value?—and, fourthly, in kind?” Again, in pp. 44 and 45, it is said: “The statute required some permanent occupation of, and some independent interest in, the property. The permanence prevents the sudden creation of votes. The ownership or the tenancy (with rating) indicates some independence.” In other words, the requirement of at least a tenancy excludes some occupations of less independence, such as that of servants and objects of charity. “As to the kind of tenement which qualifies, the statute has described two classes of buildings, namely, those used for residential and those used for commercial purposes: that is house for residence: warehouse, counting-house, shop, or other analogous building, for commercial purposes.”

To apply these principles to the present case, we think that the so-called building is not of the class specified in the statute, that is, it is neither in the residuary class nor in the class connected with commercial industry. We also think that the claimant's occupation thereof was not in the capacity of tenant.

As to the first question, whether the so called building is sufficient to qualify,—we are aware of the impossibility of defining clearly what is included in [180] the class described in the statute by the words “or other building,” and of the difficulty of affirming that a thing is not in a class, when the boundary of the class is unknown. We are also aware of the immense variety of structures which are sufficient buildings, considering the locality and the use for which they are adapted in that locality. Still, we are of opinion that the intention of the legislature would be defeated, and the words indicating the class of buildings which qualify would be without any effect, if everything which could be called a building was held sufficient. It ought to be in some degree adapted both to be used by man either for residence or for the industry to which the statute relates, and also to have the degree of durability which is included in the idea of a building.

The shed in question fulfils neither of these conditions. The boards were nailed to the posts for the purpose of performing the part of a shed to the revising-barrister, not for any purpose connected with the interest of the occupier; and was so frail as to have been destroyed in part before the required year had elapsed.

The legislature intended that “building” should give the primary qualification; and that “land” should be a secondary resort, if the building was not worth 10l. per annum. But “land” would become the primary qualification, if a shed of no value added to land of the required value was held to qualify.

We are aware that the question whether a building qualifies is more a question of fact than law, to be answered by the revising-barrister, performing the part of a jury in applying the law to the facts before him. We are also aware of the soundness of the principle laid down in *Watson, App., Colton, Resp.*, 5 C. B. 51, 2 Lutw. Reg. Cas. 53, that, if the revising-barrister finds the building in question to be within the statute, the [181] court will make every presumption for the purpose of supporting his finding, and will not reverse it unless the case shews it to be erroneous. We adopt these principles as sound: still, we think that this decision is shewn to be erroneous.

The case of *Watson, App., Colton, Resp.*, has been treated by some text-writers as if it had decided that a tarpaulin supported by poles, as described in the case, was a “building” within the statute: and they have drawn wide inferences therefrom; and these inferences are carried to the furthest extent in 2 Lutwyche's Reports, 58. The learned reporter, in a note there, speaking of this case, thus expresses himself,—“It will not be easy in future to say what is *not* a ‘building,’ however slight and unsubstantial the structure may be, provided there be a roof to it.” And he goes on to say that, “if a building be *capable* of holding and protecting any articles, whether of a perishable nature or not, it may fairly be considered to be a warehouse.” He further goes on to say that, on these principles, “there seems to be no reason why a party may not be qualified to vote for a borough in respect of his occupation of a fowl-house, a donkey-shed, or a pig-stye, if the land occupied therewith will make up the required annual value.”

The report of this case in 5 C. B. 51, does not warrant the inference thus drawn from it. It appears there that the judges, resolving to support the finding of the barrister, unless he states facts shewing that he must have been in error, take his description to be incomplete, and assume that the description, if it had been complete, would have shewn that the shed was a building in the ordinary sense of the word, and was properly included in the same class as warehouse. At p. 52 of that report, Maule, J., says: “The revising-barrister gives us a description embracing some of the [182] incidents of a ‘building.’ He describes two sides of the structure: *the rest may be of solid masonry.* He does not profess to give a full description of it.” Wilde, C. J., says it is possible to conceive sheds of a very substantial and valuable character; for instance, the sheds in the docks, which for the most part consist of columns of iron or stone, supporting slated roofs. Then, in his judgment, the Chief Justice says,—“The revising barrister *having found it to be a ‘building’ within the act*, we must assume that it has all the requisites to constitute a ‘building,’ except the incidents he sets out.” And Maule, J., says: “*It is not denied that the shed in question is a ‘building.’* When once it is established that the thing is a ‘building,’ the only question which

remains, is to be decided by the uses and purposes to which the building is or may be put. If it is or may be applied to the purposes of a building such as is mentioned in the act, it may be said to be a building within the meaning of the act. Its being more or less substantial cannot affect the question. Nobody would for a moment doubt that a place constructed at great expense, and of great solidity, closed on two sides, and used for the stowage of goods, would be a building within the act. Assume this to be a building, and in what does that differ from this?"

It thus appears to us that the judges do not hold that the shed *as described* is a "building" within the act: but they declare it to be their duty to assume any possible facts not excluded by the case, for the purpose of affirming the barrister's finding. The barrister finds it to be a building: that finding is to stand, unless the case excludes the possibility of its being a building: and the judges say that, consistently with the case, the shed may have been on two sides of solid masonry, and may have been of a very valuable and substantial character, and may have been used for the stowage of goods.

[183] We may remark that it would have been better if the case had been sent back for re-statement, as Mr. Gray requested. The argument of that learned counsel, on behalf of the appellant, seems to have been considered by the court as perfectly sound in law; but it did not prevail, because the facts were assumed to exist which made it irrelevant. Mr. Gray contended that the building must be something substantial, something *ejusdem generis* with those specifically mentioned, and not a mere temporary erection for the more convenient use of the land, that could be removable by the tenant: and none of the judges disputed the correctness of this view of the law.

In deciding whether or not a building is within the act, the revising-barrister is bound to give effect to the intention of the legislature as expressed in the statute; and, in so doing, to be assisted by any rule of construction laid down in any of the cases relating thereto. But his attention should never be turned from the statute which he has to apply: and, though general principles of construction laid down by the judges may help to guide his decision, the specific facts of one case form a very fallacious guide in the decision on other specific facts supposed to resemble them. The specific facts of the case of the tarpaulin on poles seem to have led to unsound conclusions.

In the present case, we consider that the description of the shed is complete; that, according to that description, it was not of a substantial character, nor *ejusdem generis* with the buildings specifically mentioned, that is, it was neither adapted to nor intended for any purpose analogous to the purposes for which warehouses are used; and that therefore the decision holding the shed to be a "building" within the act, must be reversed.

Secondly,—if the shed is taken to be a "building" [184] within the statute, then the question is raised, whether it was occupied by the respondent in his capacity of tenant: and the answer is in the negative.

It is clear that the shed formed no part of the premises demised at the time of the demise: and, although it might become parcel of the freehold by being annexed thereto, under certain conditions, and so become parcel of the demised premises during the currency of the term, the case does not shew that it was made under such conditions as would vest the property in the landlord, subject to the interest of the tenant during the term. It is an incumbrance brought on the land by the licence of the tenant, and, for aught that appears, subject to be removed at the will of the incumbrancer, or on the revocation of the licence by the tenant.

The building, —not the land, is the substance of the qualification. The respondent cannot hold the shed as tenant, unless the landlord has the property in it as reversioner. But the landlord is not shewn to have assented to its being brought: neither is there any ground for affirming that he could object to its removal: nor does it appear that either landlord or tenant has the property in the boards, if the maker of the shed carried it away.

Decision reversed (a).

(a) See the preceding case.

[185] YORKSHIRE.—WEST RIDING.

JOHN FREEMAN, *Appellant*; ROBERT JOHN GAINSFORD, *Respondent*. Jan. 17th, 1865.
 [S. C. H. & P. 255; 34 L. J. C. P. 95; 11 L. T. 675; 11 Jur. N. S. 116; 13 W. R. 343. Referred to, *R. v. Southampton Port Commissioners*, 1870, L. R. 4 H. L. 459; *Spencer v. Harrison*, 1879, 5 C. P. D. 106. Adopted, *Watson v. Black*, 1885, 16 Q. B. D. 278.]

The proprietors of a Music Hall, possessed of real estate, by deed vested the same in trustees, who were to deal with and manage it for the general body of shareholders, who were to have an interest in the net profits in proportion to the amount of their respective shares:—Held, upon the authority of *Bennett, App, Blain, Resp.*, 15 C. B. (N. S.) 518, that such shareholders had not any equitable interest in the realty, so as to entitle them to be registered for the county.

1. At a court held to revise the lists of voters for the west riding of the county of York, Thomas Badfield objected to Charles Stanley as not having been entitled on the last day of July, 1864, to have his name retained in the list of voters for the township of Sheffield, in and for the west riding. The name stood on the copy of the register relating to the township of Sheffield, as follows:—

Christian and surname.	Place of abode.	Nature of qualification.	Place in township.
Charles Stanley.	31 Throgmorton Street, London.	Freehold shares.	Music Hall, Surrey Street.

2. By a deed made on the 2nd of October, 1828, certain persons became entitled to undivided freehold shares in the Sheffield Music Hall, and claimed to be on the register of voters; and it was admitted that the provisions of that deed were such as to qualify them to be there.

3. A subsequent deed dated the 13th of June, 1864, was prepared, a copy of which was appended to and to be taken as part of the case (a).

(a) The indenture of the 13th of June, 1864, was made between the several persons whose names and seals were subscribed and affixed in the schedule thereto of the first part, and William Bradley and eleven others of the second part. It recited that, by an indenture of the 2nd of October, 1828, made between James Smith, Pearson, and Hounsfield of the first part, Offley Shore of the second part, and Wilkinson and seventy-eight other persons, including the above-named James Smith, Pearson, Hounsfield, and Shore (being the several proprietors of the hereditaments and premises thereafter described), of the third part,—after reciting that the said Smith, Pearson, and Hounsfield were seised of the fee-simple and inheritance of the premises thereafter described and conveyed, in trust for themselves and the other of the several proprietors thereof; and reciting that the said several proprietors were desirous that the said premises should be conveyed to the said Offley Shore, his heirs and assigns, in trust for himself and the other of the said several proprietors thereof according to his and their respective shares therein, as thereafter mentioned; and reciting that the said Smith, Pearson, and Hounsfield, in order to effect the desire of the said several proprietors of the said premises, had agreed to convey the same in manner thereafter contained—It was witnessed that, in pursuance of the said agreement, the said Smith, Pearson, and Hounsfield (by the direction of the said several proprietors) did grant and release unto the said Offley Shore, and to his heirs and assigns, all that piece of land situate in or near a street in Sheffield aforesaid, called Surrey Street, bounded &c., and containing in the whole twelve hundred superficial square yards, or thereabouts, Together with the building then lately erected upon the said piece of land, and called “The Sheffield Music Hall,” Together with the appurtenances, To hold the same unto and to the use of the said Offley Shore, his heirs and assigns, in trust for himself and the other of the said several proprietors thereof, according to his and their respective shares therein, as thereafter mentioned, that was to say, as to ten undivided 184th

[186] 4. It was agreed that the income received by the claimant and by each of the other four claimants after mentioned was an annual amount sufficient to qualify, if the court should be of opinion that he and they were in other respects duly qualified

shares (the whole into 184 shares being considered as divided) in the premises, in trust for Wilkinson, his heirs and assigns for ever [and so on as to the shares of all the other parties of the third part].

The deed in recital then contained a power to Otley Shore, his heirs, executors, administrators, or assigns, to borrow any sum not exceeding 3000l. on the security of the premises: and,—after reciting an indenture of mortgage (for 2500l.) of the 26th of August, 1853: that, by indenture of the 26th of April, 1862, the mortgage was assigned to Marcus Smith and J. H. Barber, subject to the equity of redemption: that the principal sum and the current half-year's interest still remained due to Marcus Smith and J. H. Barber: that the several persons parties to those presents of the first part were shareholders in the premises comprised in the thereinbefore recited indenture of the 2nd of October, 1828, and severally held the number of shares specified opposite to their respective signatures thereto: that the said proprietors and all other persons who were or should thereafter become entitled to any share in the premises were thereafter referred to by the designation of "The proprietors:" and that the parties thereto of the first part lately agreed amongst themselves that the said piece of land, music-hall, hereditaments, and premises, and their several shares therein should be settled upon the trusts and in manner thereafter appearing, and that such of them as were made parties thereto of the second part should be trustees of those presents, and such parties thereto of the second part, and the survivors and survivor of them, and other the trustees or trustee for the time being of those presents, were thereafter referred to by the designation of "the trustees,"—It was witnessed that, in consideration of the premises, the parties thereto of the first part did for themselves, their heirs, executors, administrators, and assigns, mutually and reciprocally agree, each of them with the other and others of them, his, her, and their heirs, executors, administrators, and assigns, and such of them as were not parties thereto of the second part, did for themselves, their heirs, executors, administrators, and assigns, jointly, and each of them did for himself and herself, his and her heirs, executors, administrators, and assigns, severally agree with the parties thereto of the second part, their heirs, executors, administrators, and assigns, that all that piece of land, music-hall, buildings, and hereditaments comprised in and assured by the said indenture of the 2nd of October, 1828, or mentioned or intended so to be, together with all the rights, members, and appurtenances thereto, and all the shares, estates, and interests of the said parties thereto of the first part and of each of them therein, and also any hereditaments and premises thereafter acquired by the trustees,—all which hereditaments and premises were thereafter referred to by the designation of "The Sheffield Music Hall," should be governed by the rules thereafter appearing, and numbered 1 to 33 (inclusively), that is to say:—

1. *Trustees.*—The parties hereto of the second part, their heirs, assigns, and successors in office, shall be trustees of the Sheffield Music Hall, and shall have the several powers hereinafter appearing, and distinguished by the letters A., B., C., D., E., F., G., H., I., J., K., and L.:

(A.) *Fee-simple vested in trustees.*—To vest or cause to be vested the fee-simple and inheritance of the Sheffield Music Hall in themselves or any of their body for the time being, or in such person or persons as the trustees shall think proper:

(B.) *Their duties.*—To give directions to the said Otley Shore, his heirs and assigns, or other the person or persons for the time being entitled to the fee-simple and inheritance of the said Sheffield Music Hall, and to the said Marcus Smith and J. H. Barber, their executors, administrators, and assigns, or other the person or persons for the time being entitled to the term of years mentioned in the said indenture of the 26th of August, 1853, with regard to any lease, mortgage, sale, agreement, deed, conveyance, or assurance, action, suit, or other proceeding, matter, or thing which the trustees may think it proper that the person or persons receiving such directions should make, bring, do, or concur in:

(C.) To grant or cause to be granted any lease, or create any tenancy for any period not exceeding a tenancy from year to year, and subject to any provision:

(D.) With such consent as is mentioned in Rule 7, to grant or cause to be granted

and entitled to remain [187] upon the register. This deed was previous to the 31st of July last executed by but thirty-two of the proprietors of shares in the Music Hall; they being proprietors of one hundred and ten out of the whole one hundred and eighty-four shares. There were twenty [188] five other proprietors by whom it was

any lease or create any tenancy for any period exceeding a tenancy from year to year :

(E.) With such consent as aforesaid, to enlarge or alter the existing buildings, and to acquire any additional land, buildings, easements, or rights :

(F.) To pay off, transfer, or otherwise deal with any mortgage for the time being existing, or to make or cause to be made any new mortgage, either in fee, or for any term of years, or otherwise, for any sum or sums not exceeding the amount of such existing mortgage :

(G.) With such consent as aforesaid, to make or cause to be made any new mortgage, either in fee or for any term of years, or otherwise, for any money not exceeding 2500l or other existing principal mortgage-money.

(H.) With such consent as aforesaid, to sell :

(I.) To execute and cause to be executed such agreements, mortgages, conveyances, deeds, and assurances, as they shall think proper, and to receive or direct the payment or receipt of any money : and generally to do all acts necessary for effectually exercising the foregoing powers or any of them, and especially to confer on any mortgagee or mortgagees any powers of sale or lease or other powers ; and, upon any sale, to make any reservations, especially with regard to minerals or easements :

(J.) *Generally, in all matters not hereinbefore specified, to deal with and manage the Sheffield Music Hall as if the trustees were the absolute beneficial owners thereof :*

(K.) To receive the rents and annual profits, and all income and capital moneys arising from the "Sheffield Music Hall," or the exercise of the power aforesaid :

(L.) To make from time to time bye-laws for regulating their proceedings as amongst themselves, and especially to name a quorum for meetings of their own body :

2. *Majority.*—The powers hereinbefore given to the trustees, as also all powers and authorities hereinafter given to them, may be exercised by a majority of their body for the time being ; to the intent that in all respects the acts of such majority shall be effectual as the acts of the whole body :

3. *Ratification.*—Whenever by these presents anything is required or authorized to be done by the trustees, any subsequent order for or in confirmation of any such thing done without previous order shall be as effectual as a previous order :

4. In confirmation and extension, but by no means in curtailment, of the powers and privileges arising expressly under the wording of these presents, the trustees shall be entitled to all powers and privileges incident to their office, especially under the provisions of the statutes 22 & 23 Vict. c. 35, and 23 & 24 Vict. c. 145.

5. *Interest of shareholders.*—*Out of the rents and annual profits and money in the nature of income, and not capital, the trustees shall annually, or oftener if they think proper, declare a dividend ; and such dividend shall be divided amongst the proprietors according to their respective shares in the Sheffield Music Hall. The trustees may from time to time set aside such money if any as they shall think proper as a reserved fund to meet contingencies and in aid of future dividends ; and such reserved fund shall rank as capital until it is otherwise appropriated. The reserved fund shall never, however, exceed 5000l. ; it may be invested by the trustees upon any securities allowed by law for trust-money, or upon mortgage of freehold, copyhold, or leasehold hereditaments, or upon the mortgages or debentures or preferential stocks or shares of any municipal or other corporation or company incorporated by special act of parliament, and the income therefrom shall rank as income from the Sheffield Music Hall*

6. *All capital moneys from time to time in the hands of the trustees, and not otherwise applicable under the provisions of these presents, shall belong to the proprietors according to their respective shares in the Sheffield Music Hall, and shall be accordingly divided amongst them as early as may be after the receipt thereof.*

7. *Consent of proprietors to certain acts.*—The several powers hereinbefore given to the trustees, and respectively distinguished by the letters D., F., G., and H., shall be exercised by the trustees with the consent of the proprietors, testified by the resolution of a special general meeting of them, or by writing under the hands of such number of proprietors as shall represent two thirds of the shares.

8. *Receipts of trustees.*—The said Offley Shore, his heirs and assigns, shall not, nor

not then executed, by some small number of whom it has since been executed. The present claimant and the four other claimants after named had, however, all executed this deed previous to the 31st of July last, as also had all the new trustees.

[189] 5. It was contended for the claimant that the second deed of the 13th of June last had not yet come into operation, so as to constitute a new body of trustees; and, inasmuch as twenty-five proprietors, representing 74 184th shares, had not yet executed the deed that, [190] until the whole had signed, no trustees thereunder

shall the said Marcus Smith and J. H. Barber, their heirs, executors, administrators, or assigns, nor shall any lessee, mortgagee, purchaser, or other person, be bound to inquire whether such consent as aforesaid has been obtained by the trustees, whose directions and receipts shall in all cases be as effectual as if they were absolute beneficial owners.

9. *Chairman, secretary, manager.*]—The trustees shall from time to time in writing appoint one of their body to be chairman, and one other of their body, or any other person, to be their secretary; and they may from time to time appoint one of their body or any other person to be their manager; and they shall also have power from time to time to remove the persons so appointed, and to supply vacancies in the offices aforesaid respectively arising from death, resignation, or otherwise. The secretary and manager shall respectively have such powers as the trustees from time to time confer upon them.

10. *Chairman to preside.*] The chairman, if present, shall preside at all meetings of the trustees or proprietors; but, in case of his absence, the trustees or proprietors, as the case may require, present at such meeting, shall choose one of their number to preside, and the person so chosen shall be called vice-chairman; and the chairman may subsequently sign any resolution passed by a meeting presided over by a vice-chairman.

11. *Register and minute-books.*]—The secretary shall keep two books, one of which shall be called "the register," and shall contain a record of the names, additions, and residences of the proprietors, and of all future transfers of shares; and the other of such books shall be called "the minute-book," and shall contain a minute of the meetings of the trustees and proprietors respectively, and of the resolutions passed at such meetings, and of any other business matters relating to the Sheffield Music Hall which the trustees may think proper to record: and every entry appearing in such books respectively, to be signed by the chairman and secretary for the time being, shall be conclusive evidence of all matters so entered.

12. *Share certificates to be given to proprietors.*]—Every proprietor shall (after giving evidence satisfactory to the trustees of his proprietorship, and delivering to them such title-deeds as they shall require, it being intended that all the proprietors' title-deeds shall be deposited with the trustees whenever that can be done without causing what the trustees shall consider unreasonable inconvenience) be entitled to a certificate or certificates under the hands of the chairman and secretary specifying the share or shares held by such proprietor, and to a renewal of each certificate on satisfactory evidence of the loss of the original.

13. *Transfers.*]—Every transfer inter vivos of a share or shares shall be in the form following, or in such other form as the trustees for the time being shall approve, and shall be signed by the transferor and transferee, and shall, on delivery to the secretary, and payment of 2s. 6d. per transfer, be recorded in the said register. Until the transfer is so delivered and recorded, the transferor shall be deemed to remain the holder of the share or shares comprised therein. Every such transfer shall be retained by the trustees: but the transferee shall be entitled to a transfer certificate under the hands of the chairman and secretary: such transfer certificate to be indorsed on the original share certificate, or given in such other manner as the trustees shall direct.

Form of Transfer.

"I of being the proprietor of the share No. in the Sheffield Music Hall, in consideration of the sum of £ sterling paid to me by of , do hereby grant the same share to the said , his heirs and assigns, subject to the provisions of the association deed dated the 13th day of June, 1864, and to any rules in force in pursuance of such deed. And I the

were effectually appointed, and the rights of those who had not were not affected by its provisions. It was also urged that the deed could not operate in any way until it had been executed by all the shareholders: [191] and that the only deed before the court was the original deed of 1828.

6 It was also argued, on behalf of the claimants that, even if the effect of the deed of the 13th of June was, to create a body of trustees for the purposes thereof [192] in named, such creation would not destroy the equitable freehold interests of the claimant and his co-proprietors in the Music Hall.

7. For the respondent it was argued that, the proprietors being resident in various distant places, and [193] inasmuch as it would in all probability be long before the deed of 1864 could be executed by all of them, clause 32 of that deed was inserted for the very purpose of making the deed valid and effectual as to the shares of those who from

said do hereby accept the said share, subject to such provisions and rules.
As witness our hands and seals this day of ."

14. *Fractional parts.*]—No proprietor shall be entitled to sell or transfer any fractional part of a share.

15. *Trusts to be disregarded.*]—The proprietors as a body shall not, nor shall the trustees, be affected by any trust, whether express, implied, or constructive, to which any of the shares may be subject: and the receipt of the person in whose name any share shall stand in the register book, or, if such share stands in the names of more persons than one, the receipt of any one of such persons, shall from time to time be a sufficient discharge for all dividends and other money payable in respect of such share; and that notwithstanding any trust to which such share may be subject, and whether the proprietors as a body or the trustees may or may not have notice of such trust: and the proprietors as a body shall not nor shall the trustees be bound to see the application of the money upon such receipt.

16. *Transfer by death or bankruptcy, &c.*]—Any person or persons becoming entitled to a share or shares in consequence of the death, bankruptcy, or insolvency of any proprietor, or in any way other than by transfer under Clause 13, shall be recorded in the register as a proprietor or proprietors upon such evidence being produced as shall from time to time be required by the trustees, and upon payment of 2s. 6d. per share transfer-fee.

17. *General meetings.*]—A general meeting of the proprietors shall be held on the first Monday in February in every year, at 12 o'clock at noon, at the Music Hall. The trustees shall lay before such meeting a statement made up on the 31st day of December then last, of the income and expenditure of the proprietors from the foot of the last statement, or, in the case of the first statement, from the 31st day of March, 1864; and such statement shall be accompanied by a report whenever the directors think there is any matter of special interest or importance calling for such report. At such general meeting, any then-existing vacancies in the trusteeship may be supplied; and one or two of the trustees, or one or two other persons, whether proprietors or not, may be appointed auditors of the accounts for the then current year.

18. *Special meetings.*]—The trustees may, whenever they think fit, and they shall upon a written requisition signed by twelve or more proprietors, convene a special general meeting of the proprietors. Every such requisition shall express the object of the meeting, and shall be delivered to the chairman or secretary or sent by post addressed "To the trustees of the Music Hall, Sheffield." Upon receipt of such requisition, the trustees shall forthwith convene a meeting of the proprietors. If they do not convene such meeting within twenty-one days from the delivery or posting of the requisition, the requisitionists or any six of them may themselves convene a meeting of the proprietors, to be held within sixty days from the delivery or posting of the requisition.

19. *Notice of special meetings.*]—Seven clear days' notice, at the least, specifying the place, day, hour, and purpose of every special general meeting shall be given by advertisement inserted twice in some Sheffield newspapers, or by circulars sent by post to the proprietors.

20. *Votes.*]—Every proprietor shall have one vote for every share that he holds. Votes may be given personally or by proxy. Every proxy shall be appointed by writing under the hand of the appointor, or, if such appointor be a corporation, under their common seal. The proxy shall be a proprietor, and the instrument appointing

time to time executed it, [194] even although not executed by all the proprietors, but that all the present claimants had executed the deed of 1864, and that their shares were therefore liable to the operation of it: that each proprietor of an undivided 184th share was competent to execute a deed [195] declaring trusts respecting his share, and that, on the execution of such deed, his share would be liable to such trusts; that what one could do without the concurrence of all, any intermediate number of proprietors could do without the concurrence of all, and bind their [196] own shares as effectually as all the shares would be bound by the execution of all: and that, in this instance, a majority of the shareholders holding a majority of the shares, and all the new trustees, had executed the deed of 1864, and they had therefore practically the power and control in their hands.

[197] 8. Under these circumstances, the revising-barrister was of opinion that the claimant ought not to have been on the register, and expunged his vote. If the court should be of opinion that the said Charles Stanley and the other four claimants were not disqualified [198] under the provisions of the said deed of the 13th of June, 1864, the register was to be amended by the insertion of the names of the said Charles Stanley and the other four claimants: but, if the court should be of opinion that they were disqualified by that deed, then the register was to remain as amended by the revising-barrister.

9. The case of the other four claimants were consolidated with the principal cases. Cleashy, Q. C., for the appellant. The main question is, whether this case is

him shall be left for the trustees with their secretary, or sent by post to them, not less than forty-eight hours before the time fixed for holding the meeting.

21. *Joint proprietors' receipts and votes.*]—When several persons are joint proprietors of any share or shares, any one of such persons may give effectual receipts for any money payable in respect of such share or shares, and may vote at any meeting in respect thereof as if he were the sole proprietor thereof: but, if more than one of such joint proprietors shall be present personally or by proxy at any such meeting, then that one of the persons so present whose name shall in the register of proprietors precede the name or names of the other or others of such joint proprietors present as aforesaid, shall alone be entitled to vote in respect of the same share or shares.

22. *Closing of register.*]—No proprietor shall be entitled to vote at any meeting, unless his name shall appear in the register as a proprietor. And the register shall be closed seven days before each meeting.

23. *Lunatics.*]—If any proprietor be a lunatic, or of unsound mind, such proprietor may vote by his committee; and every such vote may be given either in person or by proxy.

24. *Rules may be altered.*]—The rules for the time being subsisting may be altered either by the resolution of a special meeting of proprietors, or by writing under the hands of such number of proprietors as shall represent two thirds of the shares.

25. *Majority to bind.*]—Any resolution carried by a majority of the votes of the proprietors present at a meeting of proprietors shall be binding. In case of an equality of votes, the chairman of the meeting shall have a casting vote, in addition to his vote as a proprietor: and a declaration by such chairman that a resolution has been carried or negatived shall be sufficient evidence of the fact, unless a poll be demanded by three proprietors. If such poll be demanded, the same shall be taken in such manner as the chairman of the meeting shall direct: and the result of the poll, certified under the hand of such chairman, shall be conclusive as the resolution of the meeting.

26. *Notices.*]—All notices shall be in writing, or in print, or partly in writing and partly in print: and all notices to the proprietors shall, with respect to any share or shares to which such persons are jointly entitled, be given to whichever of the said persons is named first in the register; and notice so given shall be sufficient notice to all the proprietors of such share or shares.

27. *Errors.*]—All acts done by any meeting of proprietors, or by the trustees, or any person or persons acting as a trustee or trustees, shall, notwithstanding it may be afterwards discovered that there was some defect in the calling of or proceedings at such meeting, or in the appointment or qualification of such trustees or any of them, or persons or person acting as such trustees or trustee, be as valid as if no such defect had existed.

28. *Retirement of trustees.*]—Any trustee may retire from office by giving notice in

governed by the decision in *Bennett, App., Blain, Resp.*, 15 C. B. (N. S.) 518, 1 Hopw. & Ph. 35, where this court held that the members of a company provisionally registered under the 7 & 8 Vict. c. 110, s. 58, established for the erection of a corn-exchange at Manchester, under a deed of settlement which gave them only a right to a share of profits,—the real estate of the company being vested in trustees, and the management in a committee,—had no such equitable interest in land as to entitle them to be registered. It is submitted that it is not, inasmuch as the whole scope of the deed here shews that the claimant has an interest in land. It appears that the Sheffield Music Hall was by a deed of the 2nd of October, 1828, vested in certain persons in undivided shares, in fee. Under this deed, it was conceded that each shareholder was entitled to be registered. The question is, whether the subsequent deed of June 13th, [199] 1864, deprives them of that right. On the part of the appellant, it is submitted that that deed was not intended to alter the equitable rights of the parties, but merely to vary the mode of management of the Hall. After reciting the interest which the parties of the first part,—the shareholders,—had in the premises, and that they had agreed amongst themselves that “the said piece of land, Music Hall, hereditaments, and premises,” should be settled upon the trusts thereafter appearing, the deed witnesses that, in consideration of the premises, “the parties thereto of the first part did, for themselves, their heirs, &c., mutually and reciprocally agree each of them with the other and others of them, his and their heirs, &c., and such of them as were not parties thereto of the second part did for themselves, &c., severally agree with the parties thereto of the second part (the trustees), their heirs, &c., that all that piece of land, Music Hall, buildings, and hereditaments comprised in and assured by the said indenture of the 2nd of October, 1828, or mentioned or

writing of such his desire; such notice to be directed “To the trustees of the Sheffield Music Hall,” and to be left for them with the chairman or secretary, or sent through the general post office directed “To the secretary of the Music Hall Trustees, Sheffield.” Whenever a trustee shall cease to be a proprietor, he shall then ipso facto cease to be a trustee.

29. *New trustees.*]—When by death or otherwise the trustees shall be reduced to three in number, a special meeting of the proprietors shall be convened; and at that meeting such a number of new trustees shall be elected as the meeting shall think proper, but so, however, that the total number of trustees shall not exceed twelve.

30. *Trustees not disqualified from having shares.*]—Every trustee may purchase or acquire shares in all respects as if he were not a trustee, any rule of law or equity to the contrary, notwithstanding.

31. *Interpretation.*]—Whenever, in any of the foregoing or following rules, words or expressions are used importing the singular number only, or the plural number only, or males only, such words or expressions shall be construed to include several persons as well as one person, and the converse, and females as well as males, and bodies corporate as well as individuals, unless it be otherwise specially provided, or there be something in the subject or contract repugnant to such construction.

32. *Parties executing bound, though all proprietors do not sign.*]—If all the proprietors of shares in the Sheffield Music Hall shall not execute these presents, the same shall nevertheless bind all the parties who do execute the same; and the same proportion of majorities of the parties who do so execute shall bind the whole of them, as are heretofore appointed to bind the whole body of proprietors.

33. *Arbitration clause.*]—Whenever any dispute shall arise between any proprietors or other persons for the time being affected by the rules in force concerning the Sheffield Music Hall, the question in dispute or difference shall be referred to two arbitrators, one to be appointed by each party, or an umpire to be appointed by the two arbitrators before they proceed with the reference; and the decision of the said arbitrators or umpire, as the case may be, shall be final and bind the contending parties, and settle the liability to defray all the expenses attending such reference; and such award may at the instance of any party interested therein be made a rule of one of Her Majesty's courts at Westminster: and, if either party in difference shall neglect to appoint an arbitrator for twenty-one days after the appointment notified to such party of an arbitrator by the other party, then an arbitrator appointed by the arbitrator so chosen shall be as competent to act in all respects as if he had been chosen by the necessary party.

intended so to be, together with all the rights, members, and appurtenances thereto, and all the shares, estates, and interests of the said parties thereto of the first part and each of them therein, and also any hereditaments and premises thereafter acquired by the trustees, should be,"—not conveyed, assigned, and assured to the said trustees, but,—"governed by the rules hereinafter appearing,"—one of which is, that the fee-simple and inheritance of the Sheffield Music Hall should be vested in themselves or any of their body for the time being, or in such person or persons as they should think proper: another, that they should receive the rents and profits, and divide the same amongst the shareholders: and another, that they should generally deal with and manage the Sheffield Music Hall as if they were the absolute beneficial owners thereof. [Wil[200]liams, J. The trustees are to receive and divide the net proceeds. Would not the principle of *Myers v. Perigal*, 11 C. B. 90, 16 Simons, 533, 2 De Gex, M.N. & G. 599, apply, viz. that the shareholders took only an interest in a share of the profits?] Each shareholder, it is submitted, still continues the equitable proprietor of a share in the Music Hall,—an interest in the realty. The question is, whether there is a trust in the land, or only in the result, the profits. The only object of the deed of the 13th of June, 1864, was, to regulate the future management of the concern, for the benefit of the shareholders. There is nothing, therefore, to bring the case within the rule laid down in *Barnett, App., Blain, Resp.* The court there properly held the shares to be personal estate. The deed expressly declared that they should be so treated. Further, it admits of considerable argument whether the deed of the 13th of June, 1864, could have any operation at all until signed by all the shareholders. But for Rule 32, which provides that, "if all the proprietors of shares in the Sheffield Music Hall shall not execute these presents, the same shall nevertheless bind all the parties who do execute the same," this objection would have been unanswerable. That clause, however, may well operate to bind those who have executed the deed so far as regards the management of the property, without operating to convey the property until all the shareholders had executed it.

Hannen, for the respondent. We begin with this, that the legal estate in these premises was originally vested in a trustee, who had power to raise a sum of money by mortgage, and who has exercised that power. In order to ascertain what interest the cestuis que trust have, we must look at what they have agreed to. They have agreed amongst themselves that the property shall remain vested in trustees, and the [201] income be applied in a particular manner. The operative part of the deed is that which declares that the land, Music Hall, &c., "shall be governed by the rules hereinafter appearing." Those rules shew that the property, and the sole control and management thereof, were vested in the trustees, and that all the interest the shareholders have or can have, is a participation in the net profits according to the amount of their respective shares. The decision of the revising-barrister proceeded on the ground that the present case falls within the principle of *Barnett, App., Blain, Resp.* It is impossible to distinguish the two cases. The rules there correspond as nearly as may be with those in the present case, except that there the general body of proprietors had a much greater control over the receipts than here. The dividends were to be declared by a general annual meeting. In the argument of that case *Bligh v. Brent*, 3 Y. & C. 268, *Watson v. Spratton*, 10 Exch. 222, *Myers v. Perigal*, 11 C. B. 90, 16 Simons, 533, 2 De Gex, M.N. & G. 599, and *Barker, App., Brown (or Newman), Resp.*, 7 M. & G. 198, 8 Scott, N. R. 1019, 1 Lutw. Reg. Cas. 287, were cited: and Williams, J., in giving judgment, says:—"This case must be governed by the principle which has been established in the several cases which have been referred to in the course of the argument, and especially in the case of *Edwards v. Hall*, 6 De Gex, M.N. & G. 74, where it was held by Lord Cranworth, upon a careful review of all the authorities, that shares in joint-stock companies,—canal, waterworks, and gas-light companies,—are not an estate or interest in land, within the meaning of the Statute of Mortmain [9 G. 2, c. 36], whether the act of parliament incorporating the company does or does not contain a clause declaring the shares to be personal estate. That principle has, in *Myers v. Perigal*, been solemnly [202] decided to apply equally to a company not incorporated by act of parliament. The principle established by these cases is this, that a shareholder in a company of this description has no direct interest in or right to any specific portion of the property of the company, but only a right to receive a share of the profits. Applying that principle to the present case, it seems to me that, according to the terms of the deed of settlement which governs the affairs

of this company, the income of the real estate in respect of which the franchise is claimed, is to be taken by the committee appointed to conduct the business of the company: and they, having received the income, and made the necessary disbursements for carrying on the concern, are to pay over the balance to and amongst the shareholders. What each shareholder is entitled to, therefore, is not any particular income arising from the land held by the trustees. Neither in law nor in equity is he so entitled. All he is entitled to is, a proportionate share of the profits. According, therefore, to the principle which led the courts in those cases to hold that shares in the companies which came under consideration before them did not constitute an interest in land, I am of opinion that the shareholders in this case have no such interest, legal or equitable, in this land, or in the income arising from it, as to confer upon them the franchise." It is impossible to have a statement of the principle of law more closely applicable to this case. The other point is founded upon a fallacy. It is assumed that the deed is to have no operation at all until the whole of the shareholders or proprietors have executed it. The 32nd rule shews that that is not so.

Cleasby, in reply. Baron Martin's judgment in *Watsm v. Spratley* is strongly in favour of the appellant. [203] The matter was much considered in *Baxter, App., Brown (or Newman), Resp.*, which was the case of a partnership in a mill, the property being vested in one partner as trustee for the others, with powers of management very similar to those contained in this deed: and the court held that each partner had an interest in the realty corresponding with the amount of shares held by him in the partnership. [Keating, J. Lord St. Leonards did not quite agree with the decision of this court in that case: see *Mors v. Perigal*, 2 De Gex, M'N. & G. 599.] Tindal, C. J., puts the right of the claimants in that case to vote upon this ground,—“that the property of which the trustees are seised in trust for the benefit of the shareholders who form the co-partnership, is freehold land: that the co-partners by their committee are in possession thereof; that the trusts declared by the deed are no more than agreements and regulations entered into between the co-partners for the better carrying on their joint trade by the means of such land and the mill erected thereon, and are not trusts inconsistent with an equitable seisin of the freehold in the co-partners.” And, in the course of the argument, Cresswell, J., puts the test,—are they trustees of the land itself? The rules here are merely rules for the management of the concern amongst the parties themselves, and afford no legitimate argument against the appellant. He had confessedly an interest in the land at starting; and he has never parted with that interest. It is not like the case of an ordinary joint-stock company.

ERLE, C. J. I am of opinion that the decision of the revising-barrister in this case should be affirmed. Looking at the provisions in this deed and at those of the deed in the case of *Bennett, App., Blain, Resp.*, it appears to me that the two deeds are substantially the [204] same, and vest substantially the same interest in the shareholders in the respective speculations, viz. an interest in the profits which result from the management of the trustees. I take the principle laid down by my Brother Williams in *Bennett, App., Blain, Resp.*, to be sound law, and to be decisive of this case. He lays it down that, under deeds of this description, the shareholders have no direct interest, either legal or equitable, in the land, but only a right to participate in the profits of the concern. The circumstance of the deed not having been executed by the whole of the shareholders is not available for the purposes of the appellant; for, the 32nd rule provides that, “if all the proprietors of shares in the Sheffield Music Hall should not execute these presents, the same shall nevertheless bind all the parties who do execute the same.” I think that provision precludes the appellant from taking any benefit from that point.

WILLIAMS, J. I concur with my Lord in thinking that we are bound by the case of *Bennett, App., Blain, Resp.* The principle on which that decision proceeded is precisely applicable to the present case, viz. that the trusts on which the equitable claim in question is founded, give the shareholders no direct right to any portion of the receipts of the Music Hall, but only to a proportionate share of the net profits. It is upon that principle that a long series of cases on the Mortmain Act was based. I think it is impossible to distinguish this case from *Bennett, App., Blain, Resp.*

WILLES, J. I am entirely of the same opinion: and I give my judgment in the language of my Brother Williams in *Bennett, App., Blain, Resp.*,—“A shareholder in a

company of this description has no direct interest in or right to any specific portion of the pro-[205]-perty of the company, but only a right to receive a share of the profits."

KEATING, J. I am of the same opinion. I can see nothing in the deed regulating the affairs of the Sheffield Music Hall, to distinguish this case in principle from that of *Beauchamp, App., Blain, Resp.*

Decision affirmed, without costs.

BOROUGH OF NEW WINDSOR.

THOMAS SCOTT, *Appellant*: BENJAMIN C. DURANT, *Respondent*. Jan. 17th, 1865.

[S. C. H. & P. 269: 34 L. J. C. P. 81: 11 L. T. 676: 11 Jur. N. S. 115:
13 W. R. 316.]

The court cannot entertain an appeal against a decision of a revising barrister unless the requirements of the 42nd section of the 6 & 7 Vict. c. 18 have been duly complied with, or there be a clear and unequivocal consent to waive the performance of them.

This case having been set down in the list of appeals for argument in Michaelmas Term last,

J. O. Griffiths, on behalf of the respondent, obtained a rule calling upon the appellant to shew cause why the case should not be struck out of the list of appeals, on the grounds,—that there was no notice in writing given by or on behalf of the appellant to the revising-barrister in court; that the revising-barrister did not state the case or his decision, or read the statement, or indorse or sign it in open court or as required by the statute 6 & 7 Vict. c. 18, s. 42; that the requirements of the 44th section of the statute were not complied with, and no declarations were signed, and no respondent or appellant was appointed, as required by the last-mentioned section; and that the said B. C. Durant had been improperly entered as the respondent.

The facts disclosed by the affidavits upon which the [206] motion was founded, were as follows:—Mr. Durant duly objected to the names of Thomas Scott and six others being retained on the list of voters for the borough of New Windsor. At a court held by adjournment on the 28th of October, 1864, after hearing evidence and arguments in support and in opposition to the objections, the revising-barrister decided against some of the objections, but held one of them to be fatal, and accordingly struck out the names of the persons objected to. After the decision, the attorney for the voters verbally applied to the revising-barrister for a case. The latter stated that he would grant a case if a question of law could be raised, and said that, if a case was taken, it must be submitted to Mr. Rogers (a solicitor of Reading, who had appeared for Durant) for revision, and that he should have an opportunity of raising the points which had been decided against him. Nothing more was done during the sitting of the court, or at the rising thereof, beyond a further verbal statement made on behalf of the persons so struck out, that they intended to take a case and prosecute the appeal. On the 4th of November, between 11 and 12 o'clock in the morning, Mr. Long (the appellant's agent) brought Durant a case which he said had been prepared and perused but not finally settled by the revising-barrister, and requested him to see Mr. Rogers, at Reading, and obtain his approval thereof: saying that he must have it back in the evening of that day, by post time. Durant accordingly at once proceeded to Reading, but found that Mr. Rogers would not be at home until the following day; and, on his return to Windsor in the evening, he communicated to Mr. Long the result of his journey, and told him he could neither approve nor disapprove of the case, and that, as it was distinctly understood that Mr. Rogers was to have the case submitted to him for [207] his approval on his (Durant's) behalf before it was signed by the revising-barrister, he (Durant) could not take upon himself the responsibility of assenting to the case as drawn up, and declined to sign it. On Saturday evening, the 5th of November,—which was the last day for lodging appeals under the statute,—Mr. Long called on Durant, and said he had got the revising-barrister to sign the case: and he handed to him a document purporting to be a copy of the case as altered and settled and signed by the revising-barrister, and which Mr. Long said he had

lodged. No notice in writing of the desire of the parties whose names were so struck out, to appeal, was given either by themselves or by any other person on their behalf to the said revising barrister in court, before the rising of the court, on the same day on which the decision of the revising-barrister striking out the said names was pronounced. The revising-barrister did not state in writing the facts and his decision, and did not read the said statement in open court to the appellants, and did not then and there sign the same. The appellant did not at the same time make a declaration in writing under his hand to the effect mentioned in the 42nd section of the 6 & 7 Vict. c. 18; and the revising-barrister did not then indorse upon any statement the name of the borough and of the parish to which the same related, or the Christian and surname and place of abode of the appellant and of the respondent, and did not then and there sign and date any such indorsement; and the revising-barrister did not there and then deliver any such statement, with any such indorsement thereon, to the appellant, to be by him transmitted to this court, as directed by the statute; nor did he direct the cases of the other parties to be consolidated with this appeal. There was no understanding between the parties whose names were struck [208] out as aforesaid, or their agents, and Durant or his agent, that any of the formalities required by the statute should be dispensed with.

The 42nd, 43rd, and 44th sections of the 6 & 7 Vict. c. 18 were referred to; and it was submitted that they were imperative, and such as could not be dispensed with, even by consent.

ERLE, C. J. You may take a rule: if the statement was considered as having been written down at the time, I incline to think it might be done *nunc pro tunc*. I see nothing in the statute to require us to press with undue rigour. We will do our utmost to do substantial justice between the parties.

R. Sawyer now shewed cause (a). The question [209] turns upon the construction of three sections of the 6 & 7 Vict. c. 18, which it is contended on the other side are imperative. The 42nd section enacts that "it shall be lawful for any person who, under the provisions thereinbefore contained, shall have made any claim to have his name inserted in any list, or made any objection to any other person as not entitled to have his name inserted in any list, or whose name shall have been expunged from any list, and who in any such case shall be aggrieved by or dissatisfied with any decision of any revising-barrister on any point of law material to the result of such case, either by himself or by some person on his behalf, to give to the revising-barrister, in court, before the rising of the said court, on the same day on which such decision shall have been pronounced, a notice in writing that he is desirous to appeal, and in such notice shall shortly state the decision against which he desires to appeal; and the revising-barrister thereupon, if he thinks it reasonable and proper that such appeal

(a) The affidavits in opposition to the rule stated in substance that both Durant and Rogers stated in open court before the revising barrister that they would waive all objections in point of form, and would appear to answer the appeal, with a view of having the decision of this court on the question raised, and that they did not insist upon a notice in writing of the desire of the persons whose names had been objected to to appeal against the decision of the revising barrister, or that he ought to state the facts in writing, or that he ought to read the statement of facts in open court to the said persons whose names had been so objected to as aforesaid, or that he ought then and there to sign the same, or that the persons whose names had been so objected to ought to make a declaration in writing under their hands at the end of such statement, or that the said barrister ought to make any indorsements upon any such statement, or that the said barrister should then and there sign or date any such indorsement, or that the said barrister should then and there deliver the said statement to the appellants; that Durant stated in open court before the revising-barrister that he would consent to appear as respondent to defend the appeals upon the case to be granted by the revising-barrister, and that the several appeals might be consolidated; that both Durant and Rogers stated in open court that they would agree to any case which could be drawn up, so as to have the case fairly argued; and that, the case having been afterwards signed by the barrister and sent to Durant, the latter declined to sign it.

In other respects the statements in the affidavit filed on behalf of the respondent were not controverted.

should be entertained, shall state in writing the facts which, according to his judgment, shall have been established by the evidence in the case, and which shall be material to the matter in question, and shall also state in writing his decision upon the whole case, and also his decision upon the point of law in question appealed against : and such statement shall be made as nearly as conveniently may be in like manner as is now usual in stating any special case for the opinion [210] of the court of Queen's Bench upon any decision of any court of quarter sessions : and the said barrister shall read the said statement to the appellant in open court, and shall then and there sign the same : and the said appellant, or some one on his behalf, shall at the end of the said statement make a declaration in writing under his hand, to the effect following, that is to say, 'I appeal from this decision : ' and the said barrister shall then indorse upon any such statement the name of the county and polling-district, or city and * borough, and of the parish or township to which the same shall relate, and also the Christian name and surname and place of abode of the appellant and of the respondent in the matter of the said appeal, and shall sign and date such indorsement : and the said barrister shall deliver such statement, with such indorsement thereon, to the said appellant, to be by him transmitted to Her Majesty's court of Common Pleas at Westminster in the manner thereafter mentioned : and the said barrister shall also deliver a copy of such statement, with the said indorsement thereon, to the respondent in such appeal who shall require the same." The 43rd section enacts that, "in the matter of every such appeal, the party in whose favour the decision appealed against shall have been given shall be the respondent : but, if there be no such party, or if such party, or some one on his behalf, shall in open court decline and state in writing that he declines to support the decision appealed against as respondent, then and in every such case it shall be lawful for the said revising-barrister to name any person who may be interested in the matter of the said appeal, and who may consent, or the overseers of any parish or township, or the town-clerk of any city or borough, to be, and such person so consenting, or such overseers or town-clerk respectively so named, shall be deemed to [211] be the respondent or respondents in such appeal." And s. 44 enacts that, "if it shall appear to any revising-barrister that the validity of any number of such claims or objections determined by him at any court as aforesaid depends and has been decided by him upon the same point or points of law, and the parties, or any of them, aggrieved by or dissatisfied with his decision thereon, shall have given notice of an intention to appeal therefrom, it shall in such case be lawful for the said barrister to declare that the appeals against such decision ought to be consolidated, and the said barrister shall in such case state in writing the case, and his decision thereon, in manner hereinbefore mentioned, and that several appeals depend upon the same decision, and ought to be consolidated, and shall read such statement, and sign the same as hereinbefore [s. 42] mentioned, and thereupon it shall be lawful for the said barrister to name any person interested, and consenting, for and on behalf of himself and all other persons in like manner interested in such appeals, to be the appellant or respondent respectively in such consolidated appeal, and to prosecute or answer the said appeal, in like manner as any appellant or respondent might in his own case under the provisions of this act : and the person so named appellant in such consolidated appeal, or some one on his behalf, shall, at the end of the said statement, make and sign a declaration in the form or to the effect following, that is to say, — 'I, for myself and on behalf of all the other persons who are interested as appellants in this matter, and whose names are hereunder written, do appeal against this decision, and agree to prosecute this appeal : ' and the person so named respondent in such consolidated appeal, or some one on his behalf, shall in like manner make and sign a declaration in writing in the form or to the effect [212] following, — 'I, for myself and on behalf of all the other persons interested as respondents in this matter, and whose names are hereunder written, do agree to appear and answer this appeal : ' and the name, and, where necessary, the particulars of the qualification of every party intended to be joined in such consolidated appeal, shall be written under the aforesaid declaration of the appellant or respondent respectively to which they may respectively refer : Provided always that it shall be lawful for the said barrister, if necessary, in any case to name the overseers of any parish or township, or the town-clerk of any city or borough, to be, and they or he so named shall

be, the respondents or respondent in such consolidated appeal, without any such declaration being made or signed by them or him as hereinbefore mentioned." It will be contended on the part of the appellant that these provisions are imperative and cannot be dispensed with. The signature of the barrister to the case may be affixed at any time. [Keating, J. In *Withorn, App., Thomas, Resp.*, 8 Scott, N. R. 783, 7 M. & G. 1, 1 Lutw. Reg. Cas. 125, an amendment was made in court here (*a*)¹.] The provisions in ss. 42 and 43, it is submitted, are purely directory. There are no negative words, which in general are required to render a statute imperative; as in ss. 62 and 64, which latter [213] section this court in *Auten, App., Topham, Resp.*, 7 Scott, N. R. 402, 5 M. & G. 1, 1 Lutw. Reg. Cas. 1 (*a*)² held to be binding upon them. "If," said Tindal, C. J., in that case, "the case had stood upon the words of the 62nd section alone, we might, perhaps, have been inclined to hold that they were directory only, and have let in the party to prosecute his appeal: but then comes the 64th section, by which it is provided that 'no appeal or matter of appeal shall be entertained or heard, unless notice shall have been given by the appellant to the Masters of the court,' in the time and in the manner mentioned in the 62nd section,—words so express and positive, that I do not see how we can by any possibility avoid their operation." Reliance will probably be placed upon the case of *In re Knowles and Holden*, 24 Law J., Exch. 223. There, the parties to a plaint in a county-court appeared before a judge, and consented to a reference, without objecting to the want of jurisdiction, but one of them, during the progress of the reference, objected to the jurisdiction of the arbitrators, on the ground that title to land came in question, but the arbitrators nevertheless proceeded with the reference: and the court granted a prohibition. There, however, there was no jurisdiction at the commencement: here there was. And this was the ground of the decision in *Andrewes v. Elliott*, 5 Ellis & B. 502 (in error, 6 Ellis & B. [214] 338). If consent can give jurisdiction, there was abundant consent here. It will be said that the revising-barrister had no jurisdiction to do anything after the last day of October: ss. 33, 41. But those provisions apply to the holding of courts, and the clauses regulating the appeal came after them. The Irish Registration Act, 13 & 14 Vict. c. 69, s. 46, prescribes the time of holding registry sessions for 1851 between the 1st of January and the 15th of February. In *Agnew, App., Fowler, Resp.*, 1 Irish Common Law Rep. 462, the assistant-barrister signed the statement of facts and the appeal on the 15th of February; and it was held that he had no jurisdiction, and that the appeal could not be entertained. But there the mode of proceeding is very different; the revising takes place at the sessions: here it is a special court. [Williams J. Unless you can rely on the consent, I fear you have no case.] Many cases may be cited where an act of parliament which fixes a time for the doing of an act has been held to be directory only. In *Freeman, App., Read, Resp.*, 30 Law J., M. C. 123, the appellant in an appeal against a highway-rate entered into recognizances to pay costs, as required by the 5 & 6 W. 4, c. 50, s. 105. The appeal was heard at the October sessions, 1858, when the justices confirmed the rate. Nothing was said at those sessions as to costs; but by a standing order of sessions, made in 1843, it was ordered that the costs of every appeal tried should be taxed by the clerk of the peace during the sessions, and be paid by the unsuccessful party,

(*a*)¹ That was to cure an ambiguity in the statement of the case.

In *Natthson, App., Burrell, Resp.*, 8 Scott, N. R. 738, 7 M. & G. 35, 1 Lutw. Reg. Cas. 157, the court refused to entertain an appeal where the case had not been signed by the revising-barrister. See also *Barton, App., Brooks, Resp.*, 11 C. B. 41, 2 Lutw. Reg. Cas. 197, and *Barton, App., Blake, Resp.*, 11 C. B. 47, 2 Lutw. Reg. Cas. 197.

So, as to the signature of the indorsement: *Wanklyn, App., Woollett, Resp.*, 4 C. B. 86, 1 Lutw. Reg. Cas. 597. But see *Pring, App., Estcourt, Resp.*, 4 C. B. 71, 1 Lutw. Reg. Cas. 505.

(*a*)² See *Simpson, App., Wilkinson, Resp.*, 7 Scott, N. R. 406, 5 M. & G. 3, n., 1 Lutw. Reg. Cas. 5; *Colell, App., Lewis, Resp.*, 2 C. B. 60, 1 Lutw. Reg. Cas. 380a; *Randals, App., The Overseers of West Derby, Resp.*, 2 C. B. 77, 1 Lutw. Reg. Cas. 373; *Newton, App., The Overseers of Moulbury, Resp.*, 2 C. B. 203, 1 Lutw. Reg. Cas. 335; *Pring, App., Estcourt, Resp.*, 4 C. B. 73, 1 Lutw. Reg. Cas. 543; *Norton, App., The Town-Clerk of Salisbury, Resp.*, 4 C. B. 32, 1 Lutw. Reg. Cas. 538; *Clarke, App., Beaton, Resp.*, 5 C. B. 76. But see *Barton, App., Blake, Resp.*, 11 C. B. 47, 2 Lutw. Reg. Cas. 197.

unless the justices who tried the appeal should order to the contrary. The clerk of the peace certified (under the 11 & 12 Vict. c. 43, s. 27), that, at the trial in October, 1858, the justices had made no order to the contrary, and that the solicitors of the respective parties had agreed that the costs should be taxed out of court; that, in [215] April, 1859, he attended the respondent's solicitor and taxed his costs at 33l. 7s., the appellant's solicitor having objected to attend the taxation; and that the costs had not been paid to him, the clerk of the peace. A distress-warrant having issued, on application by the respondent, against the appellant, for these costs,—it was held by the court of Queen's Bench that the distress-warrant had properly issued: that the appellant, by consenting at the trial that the costs should be taxed after the sessions, was precluded from objecting that the taxation was not made at the sessions; and that the justices might well assume, it being so stated in the certificate of the clerk of the peace, that the appellant had consented. That case proceeded in a great measure upon the authority of *The Queen v. The Shrewsbury and Hereford Railway Company*, 25 Law Times, 65, where it appeared that the taxation had been after the end of the sessions, by consent; and, when the order of sessions was brought up for execution, and the party who had so consented moved to set aside the order on account of such taxation after the end of the sessions, Lord Campbell refused the rule, saying,—“The point is not now whether the sessions had jurisdiction to make the order, but whether the appellants are not precluded by the act from taking the objection: and the court holds that they are.” The same was held in *The Queen v. The Justices of Hampshire*, 32 Law J., M. C. 46. [Willes, J. The whole subject was much discussed in *The Queen v. The Mayor and Assessors of Rochester*, 7 Ellis & B. 910 (in error), 1 Ellis, B. & E. 1024. Erle, C. J. Where a great duty is to be performed within a given time, and the time has been allowed to elapse, the court will interfere, to prevent a public inconvenience. But that principle will hardly apply to a case like this.] Under the 2nd section of the 20 & 21 Vict. c. 43, power is given [216] to appeal against a decision of a justice, provided a written notice be given *within three days after the decision*, and certain conditions precedent observed: the performance of these conditions has been held to be imperative by all the courts (*a*). But in none of those cases was there any consent.

Griffiths, in support of his rule. The short facts are these,—At the revising-court held on the 21st of October, Rogers appeared as the attorney for Durant, and urged two objections against the validity of the votes. The revising-barrister took time to consider, and adjourned the court to the 28th, when he gave a decision holding one objection to be valid, the other not. The attorney for the voters said he would appeal; but the revising-barrister doubted whether there was any question of law upon which to found an appeal. At the end of the day,—both parties being desirous of waiving all technical objections, provided, of course, the person whose duty it was to prepare the case did it within a reasonable time,—it was understood that a case should be prepared by the attorney who represented the voters, and submitted to Rogers for his approval before the revising-barrister was asked to sign it. No formal adjournment took place: and nothing was done until the 4th of November, when a case was forwarded to Durant containing only one of the points decided by the barrister. Durant thereupon proceeded to Reading for the purpose of getting Rogers to insert the facts raising the other point. Rogers being absent, [217] Durant was obliged to return the case unaltered, the 5th being the last day for lodging appeals with the Master: and, as the case, as stated, did not truly represent the decision, he of course declined to assent to it. Under these circumstances, it cannot be contended that Durant gave any authority for the insertion of his name as respondent in the case which the revising-barrister has so thought fit to sign, even if any consent could give jurisdiction. By the 33rd section of the 6 & 7 Vict. c. 18, the revising-courts can only be held between the 15th of September and the last day of October. Power to adjourn from time to time is given by s. 41, “but so that no such adjourned court shall be holden after the last day of October in any year.” The jurisdiction of the

(a) See *Woodhouse, App., Woods, Resp.*, 29 Law J., Q. B. 164, *Syred, App., Carruthers, Resp.*, Ellis, B. & E. 469, and *Chapman, App., Robinson, Resp.*, 1 Ellis & Ellis, 25, in the Queen's Bench; *Peacock, App., The Queen, Resp.*, 4 C. B. (N. S.) 264, in the Common Pleas; and *Morgan, App., Edwards, Resp.*, 5 Hurlst. & N. 415, in the Exchequer.

revising barrister therefore was at an end before the case even in its imperfect state was presented to him for signature. The conditions annexed to the power to appeal by s. 42 must be strictly complied with. The party objecting must, before the rising of the court on the day on which the decision shall have been pronounced, give a notice in writing to the barrister; and the barrister, if he thinks it reasonable and proper that such appeal should be entertained, is to state the facts and his decision, and to read the statement to the appellant in open court, and then and there sign the same. The appellant, or some one on his behalf, is then to declare in writing his intention to appeal: and the barrister is to indorse the case and sign the indorsement, and to deliver the statement with such indorsement to the appellant, to be by him transmitted to the court of Common Pleas. Nothing of this was done. It has always been held that a statutory jurisdiction must be pursued strictly. If it be said that consent will give jurisdiction,—which is denied,—there has been no unqualified consent here. The case of *The [218] Queen v. The Mayor and Assessors of Rochester*, 7 Ellis & B. 910, in error, 1 Ellis, B. & E. 1024, proceeded upon the ground of the general jurisdiction of the court of Queen's Bench to control all public officers, and to prevent injury arising to the public from their neglect or delay. In the ordinary case, unless a notice of appeal has been given, the quarter sessions have no jurisdiction: and, where a right of appeal is given subject to a condition, the condition must be performed. [Williams, J. That argument would hold if there was the most express agreement and consent of the parties.] No doubt. It is conceded that the 62nd section is imperative.

ERLE, C. J. (stopping Griffiths). I feel bound to give judgment in favour of making this rule absolute, on the ground that there has been no completed appeal.

The rest of the court concurring,
Rule absolute.

End of the Registration Cases.

[219] CASES ARGUED AND DETERMINED IN THE COURT OF COMMON PLEAS, IN HILARY TERM, IN THE TWENTY-EIGHTH YEAR OF THE REIGN OF VICTORIA.

The judges who usually sat in banco in this term, were,—Erle, C. J., Williams, J., Willes, J., and Keating, J.

MEMORANDA.

In consequence of continued indisposition, the Hon. Mr. Justice Williams, who had filled the office of puisne judge of the court of Common Pleas since Michaelmas Term, 1846, retired from the Bench on the last day but one of this Term.

He was subsequently sworn in a member of the Judicial Committee of the Privy Council.

Montague Smith, Esq., one of Her Majesty's counsel learned in the law, was shortly afterwards appointed to fill the vacancy occasioned by the retirement of Mr. Justice Williams.

On being coifed, he gave rings with the following motto:—"Pro lege."

[220] IN RE COOPER AND TILLOTSON'S ACKNOWLEDGMENTS. Jan. 11th, 1865.

An acknowledgment by a married woman, under the statute 3 & 4 W. 4, c. 74, was taken in the state of Wisconsin, in the United States of America. The affidavit of verification was sworn before "E. B. Quince, notary public, Dane county, Wisconsin;" and annexed thereto was a certificate, signed by and under the seal of the secretary of state for Wisconsin, that E. B. Quince was a notary public in Dane county, duly appointed, qualified, and empowered by the laws of that state to administer oaths there.—The Court allowed the documents to be received and filed, though not strictly in compliance with the rule of Hilary Term, 14 G. 3.

These acknowledgments were taken at Madison, in the state of Wisconsin, in the United States of America. The affidavit of verification was sworn at Madison before

E. B. Quince, notary public, Dane county, Wisconsin. Annexed thereto was a certificate signed by and under the seal of Lucius Fairchild, secretary of state for the state of Wisconsin, in the United States of America, that E. B. Quince, whose name appeared subscribed to the annexed instrument, was at the date thereof a notary public in Dane county, duly appointed, qualified, and empowered by the laws of that state to administer oaths, take acknowledgments, &c., &c.

The registrar of deeds under the statute 3 & 4 W. 4, c. 74, having declined to enrol the certificates of acknowledgment, on the ground that the affidavit was not sworn before a person duly authorized,

M'Leod moved that he might be directed to do so. He submitted that the rule of court of Hilary Term, 14 G. 3 (a), which requires that the affidavit of acknow-[221]-ledgment should be taken before some magistrate of the place, applies only to our own colonies, and not to foreign countries: and that all the court requires is, to be satisfied that the party administering the oath is qualified by law so to do, which, he contended, was abundantly testified here by the notarial certificate and the state seal of Wisconsin. And he referred to the case of *In re Birch and Bell*, 6 Scott, 185, 4 N. C. 394, where the court allowed the acknowledgment of a married woman, taken at Hamburg, to be filed, with an affidavit verifying the certificate of the due taking thereof, in the German language, sworn before the proper officer there, but not signed by the deponent,—it being sworn that, by the practice of the country the affidavit is never signed by the deponent. [Willes, J., referred to *Ex parte Mary Ann Mann*, 7 Scott, 142, 5 N. C. 226, where an affidavit verifying the taking of an acknowledgment by a married woman in the state of Illinois, U. S., was held to be properly sworn before a notary public of that place.]

ERLE, C. J. In this case the acknowledgments were taken at Madison, in the state of Wisconsin, in the United States of America: and the affidavit of verification was sworn at Madison before a notary public, and it comes to us accompanied by a certificate signed by and under the seal of the secretary of state for the state of Wisconsin, that the person before whom it was sworn is a notary public and duly qualified as such by the laws of the state to administer oaths there. Now, the rule of Hilary Term, 14 G. 3, requires that the affidavit shall be sworn either before some person duly authorized to take affidavits in this court, or before some magistrate of the place where the acknowledgment is taken, having authority to administer an oath, and in [222] the presence of a notary public: and that the notary shall also certify in writing, under his hand and seal, as well the due administering of the oath, as also the name, signature, and office of the magistrate administering it. Here, the affidavit is sworn before a notary public of the place where the acknowledgments were taken, and the authority of the notary to administer oaths is certified by the secretary of state for Wisconsin, under the seal of the state, exactly reversing the order of things mentioned in the rule of court. The essence of the rule, I think, is that the court shall be satisfied that the affidavit has been sworn before some person who is duly qualified to administer oaths. In the case of *Ex parte Mary Ann Mann*, 7 Scott, 142, 5 N. C. 226, we find that, where a commission was issued for taking the acknowledgment of a married woman at Illinois, another state of the Union, this very question arose, and the judgment of Tindal, C. J., was that, upon the court's being satisfied by affidavit that the notary public was by law duly authorized to take affidavits, the certificate and affidavit should be accepted. A similar question arose in a case still more recent, of *Ex parte Hutchinson*, 5 C. B. 499, where the court received an affidavit sworn before the British Consul at Madeira, the jurat describing him as being authorized by the laws of the island to administer oaths there, and the affidavit being

(a) That rule provides, "that, if the party or parties shall be in Ireland, or in any other part or parts beyond the seas, then the affidavit or affidavits shall be made by one of the commissioners who hath taken the acknowledgment of the warrant or warrants of attorney, and shall be sworn either before some person duly authorized to take affidavits in this court, or before some magistrate of the place where such acknowledgment shall be taken, having authority to administer an oath, and in the presence of a notary public; which notary shall also certify in writing, under his hand and seal, as well the due administering of this oath, as also the name, signature, and office of the magistrate administering the same."

accompanied by a notarial certificate to the same effect. I therefore think we keep within the course of precedent in granting this application.

The rest of the court concurring,

Rule granted (a)¹.

[223] IN RE MARY DOWLING. Jan. 17th, 1865.

Where part of the purchase-money is to be paid to the wife, the court will not allow the certificate of an acknowledgment under the 3 & 4 W. 4, c. 74, to be filed, without an affidavit of the commissioner taking it that he is satisfied from what passed before him that the lady was content that the money should be paid over to her without any settlement.

The rule of Hilary Term, 4 W. 4, requires that, in the affidavit of verification of the certificate of an acknowledgment by a married woman under the 3 & 4 W. 4, c. 74, it shall be deposed, amongst other things that, previously to such acknowledgment being taken, the deponent had inquired of the married woman whether she intended to give up her interest in the estate to be passed, and also the answer given thereto: and, where any such married woman, in answer to such inquiry shall declare that she intends to give up her interest without any provision, the deponent shall state that he has no reason to doubt the truth of such declaration, and he verily believes the same to be true: and that, where any provision has been agreed to be made, the deponent shall state that the same has been made by deed or writing, or, if not actually made before, that the terms of the intended provision had been reduced into writing, which deed or writing he verily believes has been produced to the said judge, &c.

In this case the affidavit stated that, in answer to the inquiry of the commissioner, the lady stated that a sum of money (half the amount of the purchase-money) was to be paid to her in lieu of her interest in the estate; but it did not go on to state that she declared that she intended to waive any provision by deed. The registrar appointed under the act having declined to act upon this affidavit,

Quain now moved that he might be directed to receive and file the documents. [Willes, J. The matters [224] which this affidavit omits are essential. Where the wife expects to receive some benefit from the arrangement, and a deed is necessary to secure that, the matter ought not to be allowed to pass without her being informed of it. If the money were simply put into her hands, the husband or his creditors might take it.] It is competent to the woman to dispense with any provision. [Willes, J. She has not declared that she intended to do that. Erle, C. J. If the parties are acting in good faith, the money may be settled upon the wife. Nothing can be more illusory than placing the money in her hands. I think the registrar has done good service in sending this case up. Let the lady go before a judge, and say whether she is content to give up her interest in the property without having any provision made for her.] The money has already been paid over to her by the purchaser. There may be a difficulty, therefore, in complying with the suggestion: the purchaser has no means of compelling the lady to go before a judge. [Erle, C. J. The certificate of acknowledgment does not become a document of title until it has been filed. The parties have been somewhat premature in paying over the money. Willes, J. What are married women to do, if the court permits property to be taken from them under such loose arrangements as this?]

ERLE, C. J. Under the circumstances, we may allow the certificate to pass, if the commissioner before whom it was taken will add an affidavit stating that, from what passed before him, he is satisfied that the lady was content that the money should be paid over to her without any settlement. If that was clearly the intention of the lady, let the documents be filed: otherwise the matter must be mentioned again.

[225] The required affidavit was not produced to the officer, and consequently the documents were not filed (a).²

(a)¹ See *In re Eliza Hall*, post, Easter Term.

(a)² See *In re Mary Dixon*, 4 C. B. 631, where the court refused to allow a certificate of acknowledgment by a feme covert to be filed, where it appeared from her answers to the inquiry of the commissioner as to whether she intended to give up

FOY AND WIFE v. THE LONDON, BRIGHTON, AND SOUTH COAST RAILWAY COMPANY. Jan. 14th, 1865.

[S. C. 11 L. T. 606; 13 W. R. 293. Commented on, *Since v. Great Western Railway*, 1869, L. R. 4 Ex. 117. Referred to, *Robson v. North Eastern Railway Company*, 1875-76, L. R. 10 Q. B. 274; 2 Q. B. D. 85.]

On the arrival of a train at the railway terminus, there not being room for all the carriages to be drawn up to the platform, some of the passengers were required to alight upon the line beyond it, the depth from the carriage to the ground being about three feet. In so alighting, a lady, instead of availing herself of the *two* steps, with the assistance of a gentleman jumped from the *first* step to the ground, and sustained a spinal injury from the concussion. The jury having found that the company were guilty of negligence in not providing reasonable means of alighting, and that the lady had not by any misconduct on her part contributed to the injury, and having awarded her 500*l.*—the Court held that there was evidence to warrant their finding, and declined to interfere with the amount of damages.

This was an action against the London, Brighton, and South Coast Railway Company, for an injury sustained by the female plaintiff, under the following circumstances:—

The lady was a second-class passenger by a train from Brighton to London, and, on the arrival of the train at the terminus in London, in consequence of there being two other trains before it on the same line, the whole of the train by which she had travelled was unable to come up to the platform, and she was desired by a porter to alight at a spot a little below the end of the platform. The distance from the floor of [226] the carriage to the ground was about three feet, and there were two steps, the ordinary iron step, and a wooden one below it extending along the whole length of the carriage. The lady placed her foot upon the first step, and, taking the hand of a gentleman, jumped down. Being, however, in delicate health, the concussion seriously injured her spine.

On the part of the defendants, it was submitted that they were not responsible, inasmuch as the lady's own careless mode of alighting from the carriage, combined with her delicate state of health, had mainly caused the injury complained of.

The Lord Chief Justice, before whom the cause was tried at the sittings in London after the last Term, left it to the jury to say whether the accident was occasioned by the lady's own carelessness or by the negligence of the company in not providing convenient means for descending from the carriage.

The jury returned a verdict for the plaintiffs, damages 500*l.*

Bovill, Q. C., now moved for a new trial, on the ground that there was no evidence to warrant the jury in finding that the company had by themselves or their servants been guilty of negligence, and also that the damages were excessive. He submitted that, having the option of descending by two steps, and not choosing to avail herself of the second, the lady was herself the cause of the accident; and that the case in this respect closely resembled that of *H. J. J. v. Fairbrother*, 1 Hurlst. & Colt. 633, where the plaintiff, a carman, being sent by his employer to the defendants' premises to fetch some goods, was, after waiting some time, directed by a servant of the defendants to go along a passage to a counting-house where he would find the warehouseman, and, the passage being dark, [227] in going along it he fell down a staircase and was injured; and the court of Exchequer held that the defendants were not responsible, inasmuch as there was no obligation on them to light the passage or fence the staircase. [Keating, J. Is there no obligation on a railway company to provide reasonably convenient means of ingress to and egress from their carriages?] In *Corrigan v. The Eastern Counties Railway Company*, 4 Hurlst. & N. 781, the defendants, a railway company, had on their platform, standing against a pillar which

her interest in the estate, without any provision being made for her in lieu thereof, that the consideration for her consent was a provision made for her by her husband's will,—although it was shewn *by another affidavit* that she perfectly understood that to be no provision, inasmuch as the will was revocable. And see *In re Welcher*, 5 C. B. 179.

passengers passed in going to and coming from the trains, a portable weighing-machine, which was used for weighing passengers' luggage, and the foot of which projected about six inches above the level of the platform. It was unfenced, and had stood in the same position, without any accident having occurred to persons passing it, for about five years. The plaintiff, being at the station on Christmas Day inquiring for a parcel, was driven by the crowd against the machine, caught his foot in it, and fell over it and was hurt: and it was held that there was no evidence of negligence on the part of the company to go to the jury, the machine being in a situation where it might have been seen, and the accident not being shewn to be one which could have been reasonably anticipated. Here, if the lady had, instead of jumping as she did, turned herself round and availed herself of the assistance of both steps, and of the handles of the carriage the accident could not have happened. In cases of this kind, as in actions for negligent driving, the judge is not justified in submitting the case to the jury, where the plaintiff's evidence is equally consistent with the absence as with the existence of negligence in the defendant: *Cotton v. Wood*, 8 C. B. (N. S.) 568. The damages, at all events, are extravagantly excessive.

[228] ERLE, C. J. It was for the jury to say whether or not the company were guilty of negligence in not having provided convenience for getting down from the carriage. The jury have found that in the affirmative, and have negatived that the lady contributed to the accident. I do not feel authorized to interfere upon either ground.

WILLIAMS, J. I am of the same opinion. I think the conduct of the company's servants warranted the jury in finding that the company were guilty of negligence, because the place and the means of descent provided were not reasonably convenient. The finding of the jury negatives the lady's having by her conduct in any way contributed to the accident. In the present fashion of female attire, the mode of descent suggested by the learned counsel would be scarcely decent.

WILLES, J. The only question was, whether under the circumstances it was a reasonable thing for the lady to get out of the carriage in the way she did. The finding of the jury disposes of that. And they are the constitutional judges of the amount of damages, and we only interfere in cases of misconduct or evident mistake.

KEATING, J., concurred.

No leave having been reserved, "unless the court should think it ought to have been," Bovill asked whether he might have leave to appeal.

Per Curiam. We do not think this a fit case for an appeal.

Rule refused.

[229] GRAHAM v. THE NORTH EASTERN RAILWAY COMPANY. Feb. 18th, 1865.

1. Where a railway has running powers over the line of another company,—*Quere* whether it is not the duty of the former to see that its engines and carriages are reasonably adapted for safe travelling thereon.—2. In an action by the guard of a railway exercising such powers, for an injury sustained by him through his head coming in contact with a post on the servient railway, while looking out in the reasonable performance of his duty,—the jury having found that the position of the post was such as to be dangerous to a guard who is to keep a look out reasonable for the safety of the train:—Held, that the servient railway company were liable.

This was an action brought by the plaintiff, a guard employed by the North British Railway Company, against the North Eastern Railway Company, to recover damages for an injury sustained by him through the alleged faulty construction of the line of the latter company.

The declaration stated in substance that the plaintiff was lawfully passing and being carried in a carriage upon the defendants' railway, and that a wooden post and timber gearing by the side of the same was by the negligence and default of the defendants placed and suffered to remain in so unsafe, dangerous, and improper a condition, state, and position,—which the defendants well knew, but of which the plaintiff was ignorant,—that, by the negligence, carelessness, and improper conduct of the defendants in that behalf, the plaintiff, whilst passing and being carried as aforesaid, was forced and came with great force and violence upon and against the said

post and gearing, and thereby his head and face were greatly wounded and injured, and divers of his teeth were knocked out, and the plaintiff was rendered unfit for work, and incurred great expense for medical attendance, &c. Claim, 300l.

The defendants pleaded,—first, not guilty,—secondly, that, before the making of the agreement constituting Schedule B. to the North Eastern and Carlisle Amalgamation Act, 1862 (25 & 26 Vict. c. cxlv.), the said post and gearing were in the same condition and position as they were when the plaintiff was hurt; that the said railway was one which the North British Railway Company were by virtue of the said act entitled to exercise running powers over, and lawfully [230] causing a carriage to pass along the said railway; that the plaintiff was a servant of the North British Railway Company by them employed in the course of his said service to accompany and attend the said carriage when passing along the said railway, for reward payable to the plaintiff by the North British Railway Company; that the plaintiff had the means of knowing the condition and position of the post and gearing, and might by the exercise of reasonable care have known of the same; that the North British Railway Company had always notice and knowledge of the same, and adapted the dimensions of their carriages and of their loads so as to avoid all danger from the position of the said railway post and gearing; that, for upwards of nineteen years before, persons knowing of the position of the post and gearing passed in safety in carriages upon the railway by the post and gearing, as the plaintiff might have done if he had had such knowledge; and that the risk from the railway post and gearing, and from the position thereof, and from the plaintiff's ignorance, and from the neglect, &c., arising to the plaintiff while passing in a carriage along the railway, was a risk which the plaintiff voluntarily incurred and took upon himself and was to bear the consequences of, as incident to his service as such servant, in consideration of the said reward. Issue thereon.

The cause was tried before Pigott, B., and a special jury, at the last Durham Summer Assizes. The following admissions were put in:—

"1. That the Newcastle-upon Tyne and Carlisle Railway Company, the company which was dissolved by the North Eastern and Carlisle Railways Amalgamation Act, 1862 (25 & 26 Vict. c. cxlv.), were at the time of the erection and placing of the post and wood-work by which the plaintiff was on the 1st of November, 1863, hurt, the owners and proprietors of the [231] land and railway on and near which it was erected and placed, and that they until the said dissolution continued to be, and the defendants since that time have ever since been, and on the said 1st of November were, such owners and proprietors.

"2. That the said post and woodwork were erected and placed thereon under and by virtue of a certain agreement bearing date the 1st of October, 1832; and that the Newcastle-upon-Tyne and Carlisle Railway Company according to the said agreement suffered and permitted the same to be so erected and placed, and afterwards kept and maintained, and the defendants after the said dissolution suffered and permitted them to be so kept and maintained until the plaintiff was so hurt; and that the defendants, so far as they are able, will grant the plaintiff an inspection of the said agreement and the plans, &c., if any, under which the post and woodwork were erected and placed, and will so far as they are able produce them at the trial, and consent to their being read and used as evidence, without further proof.

"3. That the North British Railway Company exercised running-powers over the railway at the place where the accident happened, pursuant to the agreement constituting Schedule B. to the North Eastern and Carlisle Railway Amalgamation Act, 1862; and that they were at the time of the accident exercising such powers while using the railway with the carriages in one of which the plaintiff met with the accident."

The facts proved on the part of the plaintiff were as follows:—The plaintiff was and had been for about two years a guard on the North British railway, and had been in the habit of travelling for some time in the company's carriages between Newcastle and Hexham twice every other Sunday. On Sunday the 1st of November, 1863, he left Newcastle to go to Hexham [232] in a second-class carriage, one compartment of which consisted of the guard's break-van, with a passenger-train. When just past the Bladen station, the driver shut off the steam to check the speed, when the plaintiff put his head out of the window of his van to see that all was right (as it was his duty to do), and was violently struck against a post at the side of the railway, and seriously injured.

The post against which the plaintiff struck formed part of a bridge across the railway supporting a tramway from the Stellastocks colliery, which was constructed in the year 1835 with the consent of the Newcastle and Carlisle Railway Company,—the post resting upon a block of stone on the line. The distance of this post from the window of the van out of which the plaintiff was looking at the time of the accident was 16 inches. The distance between the post and the outer rail of the line was 28½ inches. The post was 14 inches out of the perpendicular, leaning inwards, and was so when the bridge was originally constructed.

The plaintiff stated that he was not acquainted with the position of the post or the construction of the Stellastocks Bridge.

The van in which the plaintiff was riding was an ordinary-sized van of the North British Railway Company. Its width was 7 feet, 8 inches,—which was wider than the ordinary vans belonging to the North Eastern Railway Company. There was a window at the top through which the guard might see from one end of the train to the other over the roofs of the carriages; but, in order to look along the sides, it was necessary for him to put his head out of the window at the side. The same carriage had gone over the line in question for about fifteen months: and no accident had ever before happened at this spot.

[233] The North British Railway Company had running powers over this section of the North Eastern Railway Company's system of railways, under the agreement set out in Schedule B. of the North Eastern and Carlisle Railways Amalgamation Act, 1862.

By article 1 of that agreement it was provided as follows:—"The company shall at all times hereafter permit the North British Company, with their engines, carriages, &c., to run over and use the Newcastle and Carlisle railway, sidings, junctions, stations, &c., upon that railway, between the Hexham Junction and the Central Station at Newcastle, and the station at Redheugh, and any contiguous stations which the North British Company may acquire or construct, subject to the payment by the North British Company to the company for such user, of such tolls, rates, or dues, or such share or proportion of tolls, rates, or dues, as have or has been or shall be agreed upon by and between the said companies, or, in default of such agreement, as shall be fixed by arbitration, in manner hereinafter provided."

And article 5 provides as follows:—"The entire control and management of the several stations at which the North British Company are to be accommodated, and the clerks, porters, and other servants thereat, shall remain exclusively with the company, but shall not be exercised so as to limit in any degree the full enjoyment by the North British Company of the privileges at and in connection with those stations to which under this agreement, or under the North British Border Counties Amalgamation Act, 1860 (23 & 24 Vict. c. cxcv.), or under any agreement between the company and the North British Company from time to time in force, the North British Company shall be entitled."

On the part of the defendants, it was submitted that [234] there was no case to go to the jury, the post and gearing not being the property of the company. But, upon the learned Baron intimating that he should ask the jury to find whether or not the post stood upon the defendant's line, this objection was not pressed.

It was further submitted that there was no evidence of negligence on the part of the defendants: and that, the North British Railway Company, having running powers over a section of an already-constructed line of railway, were bound to use their privilege with carriages so constructed as to suit its requirements.

The learned Baron intimated that it would be for the jury to say whether there was negligence or not.

The engineer and the manager of the Newcastle and Carlisle section of the North-Eastern railway were called. The former stated that the bridge at the Stellastocks was constructed under his direction in the year 1835, that the present inclination of the post in question was its original position, and that no accident had ever occurred there. He further stated that the rolling stock of the North Eastern Railway Company runs throughout their lines, *except the vans*; that the Newcastle and Carlisle vans are kept to their own section; that the width of the North Eastern vans is 7 feet, 5½ inches, and that of those of the Newcastle and Carlisle section 6 feet, 10 inches; and that, if one of the vans of the Newcastle and Carlisle section had been used on this occasion, the distance between the window and the post would have been

1 foot, $7\frac{3}{4}$ inches. The manager stated that the "clearing system," to which all the railway companies are privy, ascertains the width of load proper to the Newcastle and Carlisle section of the North Eastern railway to be 8 feet, 6 inches maximum: that on the rest of the North Eastern railway, except the main line, being 9 feet.

[235] The learned judge left it to the jury to say,—First, was the position of the wooden post such as to be dangerous to a guard who is to keep a look-out as stated in the company's rules, or a look-out reasonable for the safety of the train?—Secondly, did the plaintiff know of the position of the post, or could he by the exercise of reasonable care have known it, so as to avoid it?—Thirdly, was the North British van a wider carriage than was proper with reference to the clearing-house rules?—Fourthly, did the plaintiff by any negligence of his contribute to the accident?—Lastly, was the construction of that van improper as to the means of looking out?

The jury answered the first question in the affirmative, and all the others in the negative: and they returned a verdict for the plaintiff, with 80l. damages.

The learned Baron reserved leave to the defendants to move to enter a nonsuit, if upon the findings and the facts the court should be of opinion that the plaintiff was not in point of law entitled to maintain the action. He also reported that he thought the findings right.

Mellish, Q. C., in Michaelmas Term last, obtained a rule nisi accordingly.

S. Temple, Q. C., and T. Jones, now shewed cause. There was abundant evidence to go to the jury of negligence on the part of the defendants. The contention on the other side will be that, the North British Railway Company having taken running powers over the Newcastle and Carlisle railway under the agreement set out in Schedule B. to the North Eastern and Carlisle Railway Amalgamation Act, 1862, the former company were bound to take the line as they found it, and to accommodate the width and construction of [236] their carriages to its condition. The jury have found that the position of the post at Stellastocks Bridge was dangerous and improper; and, though it was placed where it now stands in 1835, when the defendants had no interest in that part of the line, they are nevertheless responsible for keeping a dangerous structure upon the line after it came into their hands. Subject to the due exercise of the powers conferred upon the company by their acts of parliament, the public have a right while passing along the line to be protected from everything that is dangerous. The length of time that the post has stood where it is without accident, affords only ground for an argument that the danger was not imminent. The 1st article in the agreement in Schedule B. of the 25 & 26 Vict. c. cxlv., which provides that the North British Company may traverse this portion of the line with their engines, carriages, &c., authorises them to traverse it with such carriages as they are in the habit of using. It is no excuse for the defendants to say that the carriages are wider than their line will reasonably accommodate. Besides, the evidence shews that the carriages of the North British Railway Company are within the dimensions stipulated for in the clearing-house rules. The case of *Parnaby v. The Lancaster Canal Company*, 11 Ad. & E. 223, 3 P. & D. 162, 1 Railway Cases, 696, shews that it is a duty imposed by the common law upon a public company to prevent accidents arising from obstructions in a canal or railway. Tindal, C. J., delivering the judgment of the Exchequer Chamber in that case, says: "The facts stated in the inducement shew that the company made the canal for their profit, and opened it to the public upon the payment of tolls to the company: and the common law in such a case imposes a duty upon the proprietors, not, perhaps, to repair the canal, or absolutely to free it from obstruc-[237]-tions, but to take reasonable care, so long as they keep it open for the public use of all who may choose to navigate it, that they may navigate without danger to their lives or property." That duty has clearly been neglected by these defendants.

Mellish, Q. C., and Davison, in support of the rule. The question involved in this case is one of vast importance to railway companies throughout the kingdom. The carriage in which the plaintiff was when the misfortune befel him belonged to the North British Railway Company, and the plaintiff was a guard in their service. The line of railway upon which the train was running, was one of the lines under the management of the North-Eastern Railway Company, over which the North British Railway Company possessed running powers by virtue of the statute 25 & 26 Vict. c. cxlv. This line was one of the earliest which was constructed, and it came into the possession of the defendants under the provisions of that act. If the plaintiff had been

riding in one of the defendants' carriages, the accident confessedly would not have happened. Assuming that this section of the line with its bridges was so narrow as to necessitate the use of carriages exceptionally narrow, it was the duty of the North British Railway Company, before they began to exercise their running powers over it, to provide carriages fitted for the exigencies of the line. They could not call upon the defendants to alter the line: and the defendants could not remove the post without the leave of the owners of the Stellastocks colliery. No such duty as that spoken of in *Parnaby v. The Lancaster Canal Company* can be by law imposed upon these defendants. [Keating, J. If one of the public wanted to exercise the power of running his own engine and [238] carriage on the line in question, he would be bound to construct them so as to satisfy the engineer of the company.] Doubtless he would. The ordinary course of railway legislation at the present day is to confer running powers almost without limit. Suppose a railway company acquires running powers over a portion of another company's line, and the carriages of the latter are provided with bars to prevent passengers from putting their heads out of the windows, and those of the former are not, — would the latter company be liable for an injury resulting to a passenger of the former company by reason of the absence of that precaution? There is no inherent vice in the construction of the Newcastle and Carlisle portion of the railway; and the accident occurred solely in consequence of the greater width of the North British Company's carriages. [Keating, J. The jury have not found that the post was dangerous with reference to any particular width of carriage.]

ERLE, C. J. Having regard to the finding of the jury in this case, I feel bound to come to the conclusion that the rule must be discharged. The jury have found that the position of a particular post upon the defendants' line was such as to be dangerous to a guard who is to keep a look-out reasonable for the safety of the train. And that is found in absolute and unqualified terms. If the facts would have warranted Mr. Mellish's argument, I should have been strongly inclined to think that a railway company taking running powers over an existing line must take care to have their carriages so constructed as to be reasonably adapted for travelling upon that line: and, if the jury had found here that the accident was occasioned by the excessive relative width of the North British Railway Company's carriages, I should pro-[239]-bably have yielded my assent to that argument. But the finding of the jury precludes me from that.

The rest of the court (Byles, J., having gone to Chambers,) concurring,
Rule discharged.

COX v. BOCKETT AND OTHERS. Jan. 13th, 1865.

[S. C. 34 L. J. C. P. 125; 11 L. T. 629; 11 Jur. N. S. 88; 13 W. R. 292.]

It is no answer to an application for the address of the plaintiff, under the 7th section of the Common Law Procedure Act, 1852, that the defendant makes it for the purpose of enabling him to enforce against the plaintiff an attachment out of the court of Chancery for non-payment of costs in a suit there.—Discovery under s. 50 of the Common Law Procedure Act, 1854, refused, in an action against an attorney for alleged negligence and misconduct as attorney for the plaintiff,—the object of the application being to compel the production of the defendants' books, for the purpose of inspecting entries therein upon which it was surmised were founded the items in a certain bill of costs which had been delivered by the defendant to the plaintiff.

Keane, Q. C., moved to set aside an order made by Willes, J., at Chambers, calling on the plaintiff's attorney, under the 7th section (a) of the Common Law Procedure

(a) Which enacts that "every attorney whose name shall be indorsed on any writ issued by authority of this act, shall, on demand in writing made by or on behalf of any defendant, declare forthwith whether such writ has been issued by him or with his authority or privity: and, if he shall answer in the affirmative, then he shall also in case the court or a judge shall so order and direct, declare in writing, within a time to be allowed by such court or judge, the profession, occupation, or quality, and place of abode of the plaintiff, on pain of being guilty of a contempt of the court from which

Act, 1852 (15 & 16 Vict. c. 76), to furnish the address of his client. The objection to complying with the order was, that the information was not wanted for the bona fide purpose of the section, but for the purpose of enabling the defendants to execute [240] a writ of attachment for non-payment of certain costs in a Chancery suit, under the circumstances detailed in the plaintiff's affidavit. He referred to *Harris v. Holler*, 19 Law J., Q. B. 62, where a similar application was refused by Patteson, J., at Chambers, where the plaintiff, a female, who had been employed by the defendant to take care of his house, but who had subsequently left it, brought an action against him for breach of promise of marriage: the order being resisted on the ground that the defendant had threatened to proceed criminally against the plaintiff on a charge of taking away from the house some property belonging to him: and, on the application being renewed before the same learned judge in the Bail Court, his Lordship said: "When the matter was before me at Chambers, I thought that the avowed object of the application, which was to enable the defendant to arrest the plaintiff in a criminal proceeding, was so collateral to the action that I ought not to interfere. I remain of the same opinion. The defendant knows who the plaintiff is perfectly well. I have always thought that applications of this sort are entertained by the courts with a view of preventing sham actions; and I do not feel myself justified in assisting criminal proceedings in this manner by a step in a civil suit" [Willes, J. The case referred to was one where the party sought to avail himself of the provision in the Common Law Procedure Act for the purpose of forwarding a criminal proceeding. Here, the defendants are only seeking to enforce a cross-claim. I thought it quite a matter of course to make the order, that the defendants might have an opportunity to obtain their costs. Williams, J. If the defendants have a right conferred upon them by the statute, an inquiry into their motives seems to me to be quite out of place.] The statute gives a discretion [241] to the court or judge: and the question is whether this is a case in which that discretion should be exercised. This discretion is exercised strictly under the 51st section: for, in *Pearson v. Turner*, 16 C. B. 157, it was held that a defendant in ejectment will only be allowed to deliver interrogatories to the plaintiff under that section, where his affidavit discloses special circumstances which satisfy the court or judge that justice requires it.

ERLE, C. J. I think there should be no rule. The application is to rescind an order of my Brother Willes for the disclosure of the plaintiff's address, under the 7th section of the Common Law Procedure Act, 1852, on the ground that it is wanted, not for the purpose of ascertaining that the action is brought by a real person, but for the purpose of serving the plaintiff with an attachment for non-payment of costs of certain Chancery proceedings. It seems to me that the defendants have a right to know the address of their adversary, and that we have no right to narrowly scan their motives in asking for the information.

WILLES, J. I am of the same opinion. I did not mean to suggest that the judge at Chambers is not to exercise a discretion under the section in question. I do not at all quarrel with the decision of Patteson, J., in *Harris v. Holler*. As at present advised, I think it was quite right. A judge at Chambers may well say that he was administering civil law only, and therefore ought not to be called upon to assist in forwarding a criminal proceeding.

The rest of the court concurring,
Rule refused.

Jan. 27th.—An application having been made to Byles, J., at [242] Chambers, without success, for an order upon the defendants for discovery under s. 50 of the Common Law Procedure Act, 1854,

Keane, Q. C., now renewed the application, upon an affidavit which disclosed that the action was brought against the defendants charging them with negligence and misconduct as attorneys for the plaintiff. The discovery sought was of original entries in the defendants' books, on which were founded the items of charge in a certain bill of costs which the defendants had delivered to the plaintiff. [Erle, C. J. In this

such writ shall appear to have been issued: and, if such attorney shall declare that the writ was not issued by him or with his authority or privity, all proceedings upon the same shall be stayed, and no further proceedings shall be taken thereupon without leave of the court or a judge."

action charging misconduct and negligence, I see no right the plaintiff can have to look at the defendants' books.] The entries would, or at least might, shew that the defendants were acting as the plaintiff's attorneys; and that is enough to entitle him to a discovery.

ERLE, C. J. I think my Brother Byles exercised a very wise discretion in refusing the order. The power of permitting private papers and books of a party to be looked at by his adversary is one which is to be exercised with the greatest caution and reserve. This clearly is not a case for it.

The rest of the court concurring,

Rule refused.

[243] FREDERICK HAYES WHYMPER, *Appellant*: JOHN JONES HARNEY, *Respondent*.
Jan. 25th, 1865.

[S. C. 34 L. J. M. C. 113; 11 L. T. 711; 11 Jur. N. S. 269; 13 W. R. 440.]

The weaving or plaiting by steam or other mechanical power of cotton thread into a covering for strips of steel to be used for making "crinoline skirts," is a manufacture or a process incidental to the manufacture of a cotton-fabric, within the meaning of the 73rd section of the Factory Act, 7 & 8 Vict. c. 15.

This was a case stated for the opinion of the court under the 20 & 21 Vict. c. 43.

1. On the 14th of October, 1864, John Jones Harney (hereinafter called the respondent) appeared in petty sessions before the mayor and justices for the borough of Sheffield, to answer to a summons issued on the complaint of Frederick Hayes Whympier, sub-inspector of factories (hereinafter called the appellant), charging that he the respondent had offended against the 13 & 14 Vict. c. 54, intituled "An Act to amend the Acts relating to labour in factories," inasmuch as he, the respondent, on the 26th of August last past, at the parish and borough of Sheffield, did unlawfully employ a female above the age of eighteen years, named Charlotte Roxburgh, in the factory of him the respondent after six of the clock in the evening of the said day, to wit, at thirty minutes past the same hour (and not to recover lost time, as provided by the said act).

2. The respondent is the occupier of premises in Granville Street, in Sheffield, in which he carries on the trade of a manufacturer of crinoline-steel and crinoline-skirts. There is a steam-engine on the premises, the power of which is employed to move and work machinery in three rooms used in cutting steel into strips, and working and preparing such strips as hereinafter described, and also in wrapping or covering the strips of steel with cotton thread as hereinafter described. There are four other rooms in the premises in which by hand sewing-machines steel strips are inserted into skirts, and the skirts finished for market. The course of manufacturing crinoline-steel [244] is, that the respondent purchases of the steel-manufacturers sheets of steel rolled very thin, about three inches in width, and about fifty feet in length, which sheets are cut by circular shears into strips of from one inch to three sixteenths of an inch in width. These strips are then riveted together by the ends in lengths of 1000 yards or thereabouts, and reeled or wound into coils of about 80 lbs. each. The coils are then unwound; and, as the strip of steel passes along, it is exposed to the influence of heat, then to that of oil, and passed over or between chilled dies or plates of cold steel: by this operation the steel strips are hardened, and, being again heated, become properly tempered: they are then ground or polished, and blued in a finished state, and are then again reeled or measured out into coils of 36, 72, or 144 yards each. In this process women are employed. Some portions of such coils are sold or used up into skirts without undergoing any other process than has been above described; but other portions are previously wrapped or covered with cotton thread. This cotton thread is invariably purchased by the respondent from spinners or their agents in hanks or bundles, which on the respondent's premises undergo no further manufacturing process, but by means of steam power are next wound or reeled upon bobbins of various sizes for more convenient application around or about the strips of steel. One process of such application is effected by a machine called a wrapping-machine, which by steam-power turns the cotton thread in single file round and round the strips of steel. The other process or application of the cotton thread is effected by a machine called a

plaiting-machine, which by steam-power effects a covering for the steel by the interlacing or plaiting of sixteen threads together around and over every part of the strips. In the process of covering the steel with cot-[245]-ton, as above described, by steam-power, women are employed. The whole of the rooms and premises are within one boundary or curtilage.

3. On the hearing of the complaint before the justices, the appellant proved that he was sub-inspector of factories for the district in which Sheffield is included; that, on the 26th of August last, in consequence of some information, he went to the works of the respondent, in Granville Street, Sheffield, between half-past six and quarter to seven o'clock in the evening; and, on going up stairs, he found in a first room a number of girls and young women standing in an opening in one side of the room, which he could best describe as resembling the bar of an inn; that the persons were in the act of delivering their work to a woman inside an apartment where the skirts are received after they are made; that Charlotte Roxburgh, named in the information, was at the bar delivering or passing over skirts; that he the appellant proceeded into a further room, and there, seated on benches by the side of long tables, he found a second and larger number of females occupied in making up crinoline-skirts; that two male assistants of the respondent were present; that he, the appellant, pointed out to them what he conceived to be the illegality of the proceedings in their being employed after 6 o'clock; that he, the appellant, had on previous occasions been in other parts of the respondent's premises; that there is machinery propelled by steam-power, and the process in such other parts carried on is the covering of steel with cotton by machinery which twists or winds the cotton round the steel; that the rooms in which the young women were working were within the outer gate and the boundary walls of the premises where the steam-power is applied; and that some of the young women were employed in inserting or securing [246] the covered steel into skirts for garments called crinoline skirts.

4. On cross-examination by the respondent's attorney, the appellant stated that he saw no machinery in the two rooms; that the young women could have done the work they were upon just as well at their own homes; and that the respondent is what is termed a crinoline-manufacturer.

5. The skirts referred to in the above evidence are composed of gores cut from pieces of calico, nets, or plain or coloured cloths of various kinds, and sewed together, into the folds or hems of which the strips of steel are run or inserted; and so the articles are formed into the female garment or appendage called a crinoline-skirt.

6. On the above statement of facts and evidence, the justices were of opinion that the respondent's premises at Sheffield were not and could not be called or considered in the ordinary use of words a cotton-mill, and did not become a cotton mill or factory within the intent of the 3 & 4 W. 4, c. 103, by reason of the application of steam-power to machinery used therein for manufacturing steel and cotton thread and other materials into crinoline by the means and in the manner hereinbefore described. They were also of opinion that, on such premises, and for such a purpose, the process of wrapping or covering by machinery crinoline-steel with cotton thread was not within the meaning of the 7 & 8 Vict. c. 15, s. 73, a process incident in any way to the manufacture of cotton, or to any fabric made thereof or mixed therewith, but was incident to the manufacture of crinoline, in like manner as the covering or wrapping of driving or riding whips (if effected by machines of the same character) with silk twist or strong linen thread and other materials, would not be a process incident to the manufacture of silk or [247] linen, or to any fabric made thereof, but would be a process incident to the making of whips. They therefore dismissed the summons.

7. If the court should be of opinion that their determination was correct, the same was to be confirmed: if otherwise, the court was to make such order as to the court might seem fit.

Hannen (with whom was the Solicitor General), for the appellant (*a*). The question

(*a*) The points marked for argument on the part of the appellant were as follows:—

"1. That the premises of the respondent in Granville Street, Sheffield, in which by the aid of steam and other mechanical power he carried on the trade of a manufacturer of crinoline-steel and crinoline-skirts, were 'a cotton-mill' or 'factory' within the meaning of the 3 & 4 W. 4, c. 103, s. 1, and 7 & 8 Vict. c. 15, s. 73:

"2. That the word 'winding' mentioned in the 3 & 4 W. 4, c. 103, s. 1, includes

is whether the place described in the case is a "factory" within the 3 & 4 W. 4, c. 103, or the 7 & 8 Vict. c. 15, s. 73. By the 1st section of the former act it is enacted that, "no person under eighteen years of age shall be allowed to work in the night, that is to say, between the hours of half-past 8 o'clock in the evening and half-past 5 o'clock in the morning, except as hereinafter provided, in or about any cotton, woollen, worsted, hemp, flax, tow, linen, or silk mill or factory, wherein steam or water or any mechanical power is or shall be used to propel or work the machinery in such mill or factory, either [248] in scutching, carding, roving, spinning, piecing, *twisting*, *winding*, throwing, doubling, netting, making thread, dressing or weaving cotton, wool, worsted, hemp, flax, tow, or silk, either separately or mixed, in any such mill or factory situate in any part of the United Kingdom of Great Britain and Ireland." This act was extended by the 7 & 8 Vict. c. 15, the 73rd section of which defines "factory" as follows,— "The word 'factory,' notwithstanding any provision or exemption in the Factory Act, shall be taken to mean all buildings and premises situated within any part of the United Kingdom of Great Britain and Ireland wherein or within the close or curtilage of which steam, water, or any other mechanical power shall be used to move or work any machinery employed in preparing, manufacturing, or finishing, or in any process incident to the manufacture of cotton, wool, hair, silk, flax, hemp, jute, or tow, either separately or mixed together, or mixed with any other material, or any fabric made thereof; and any room situated within the outward gate or boundary of any factory wherein children or young persons are employed in any process incident to the manufacture carried on in the factory shall be taken to be a part of the factory, although it may not contain any machinery; and any part of such factory may be taken to be a factory within the meaning of this act: but this enactment shall not extend to any part of such factory used solely for the purposes of a dwelling-house, nor to any part used solely for the manufacture of goods made entirely of any other material than those herein enumerated, nor to any factory or part of a factory used solely for the manufacture of lace, of hats, or of paper, or solely for bleaching, dyeing, printing, or calendering." Then comes the 13 & 14 Vict. c. 54, s. 1, which, after reciting the two acts above mentioned, and also the 10 & 11 Vict. c. 29, [249] enacts that, "save as thereafter mentioned, so much of the said acts as restricts or limits the hours of the employment or labour of any young persons and of females above the age of eighteen years, shall be repealed, and after the passing of this act no young person and no female above the age of eighteen years shall be employed in any factory before six of the clock in the morning or after six of the clock in the evening of any day (save to recover lost time, as thereafter provided), and no young person and no female above the age of eighteen years shall be employed in any factory, either to recover lost time or for any other purpose, on any Saturday after two of the clock in the afternoon." It is submitted that this is a "factory" within that definition, because steam-power is used therein in winding and twisting cotton, and not merely, as contended on the other side, in the manufacture of "crinoline-steel" and "crinoline-skirts." The mischief intended by the act to be guarded against will be equally effected by carrying on the process in combination with steel as without it. In *Haydon, App., Taylor, Resp.*, 32 Law J., M. C. 30, the respondent was the owner of premises in Mansfield Street, Leicester, in which he carried on the manufacture of cotton sewing-thread: he also had other premises in Leicester to which he was in the habit of sending the thread in bunks, and where it was wound by machinery moved by steam power, first, on to cops, and secondly on to spools. No other process except this particular winding was carried on in the last mentioned premises: and it was held that these latter premises were a mill or factory within the meaning of the 3 & 4 W. 4, c. 103, s. 1. Wightman, J., in the course of the argument, said: "Probably the intention of the legislature was to protect the health of young children, and it makes no difference whether the child was employed in the earlier or the later processes: [250] it is clearly within the meaning of the statute." There are two windings here,—from the spools on which

the process carried on by the respondent at his premises in Sheffield, of winding or reeling cotton by steam power upon bobbins, as found in the case:

"3. That the word 'twisting' mentioned in the 3 & 4 W. 4, c. 103, s. 1, includes the process carried on by the respondent at his premises in Sheffield, of interlacing or plying of sixteen threads together by steam-power round and over every part of the strips, as found in the case."

the cotton was brought into the respondent's premises to other spools, and then round the strips of steel which are to form the skirts. Is it the less a manufacture because it is wound on and round the steel? The case of *Taylor, App., Hicks, Resp.*, 12 C. B. (N. S.) 152, affords a good illustration of the meaning of the statute. There, the appellant was the occupier of premises in Birmingham in which steam-power was used to work machinery employed in manufacturing cotton and wool into "webbing," of which he made men's braces and horses' girths by cutting the material into lengths, and sewing pieces of leather and buckles thereto. The buildings formed an inclosed square, entered from the street by a gateway: on the left was the building in which the steam-power was used and the webbing manufactured: on the right, within the curtilage, the manufacture of braces and girths was carried on in rooms entered from the square. One Heeley, a child under 13, was engaged in the last-mentioned manufacture. His occupation was, the preparation of the pieces of leather for attaching to the webbing, by boring holes round the edges with an awl. No part of the webbing was ever placed in his hands or brought into the room: nor was there any machinery in the room where he was so employed. And it was held that this was an employment in a "factory," within the meaning of the Factory Acts.

Quain, for the respondent. These statutes are of a highly penal character, and are not to be extended to a manufacture which does not come strictly within their provisions. The main object of the first act, 3 & 4 W. 4, c. 103, was, to limit the hours of labour in factories. It recites that "it is necessary that the [251] hours of labour of children and young persons employed in mills and factories should be regulated, inasmuch as there are great numbers of children and young persons now employed in mills and factories, and their hours of labour are longer than is desirable, due regard being had to their health and means of education." The 2nd section enacts that no person under the age of eighteen years shall be employed in any such mill or factory in such description of work as aforesaid more than twelve hours in any one day, nor more than sixty-nine hours in any one week, except as thereafter provided; and there is a further limitation of the number of hours for the employment of children under the respective ages of eleven, twelve, and thirteen years, in s. 8. [Erle, C. J. The statute 13 & 14 Vict. c. 54, assumes it to be a *presumptio juris* that young persons and females found working in a factory or mill after 6 o'clock in the evening, have been working since 6 o'clock in the morning. Williams, J. I do not think the act of parliament is susceptible of your construction.] The object manifestly was, to limit the hours of working in the case of women and children. [Erle, C. J. The statute contemplates a maximum number of hours, and also prohibited hours. The words are very distinct.]

Then, this is not a factory within the meaning of the acts. The legislature in the first act restricting free labour,—the 3 & 4 W. 4, c. 103,—and in the 7 & 8 Vict. c. 15, s. 73, evidently contemplated cotton-mills or factories strictly and properly so called. The information is founded upon the 13 & 14 Vict. c. 54, s. 1, and the penalty is imposed by the 7 & 8 Vict. c. 15, s. 56. The process here carried on was not the twisting and winding of cotton: neither was it a manufacture of a fabric composed of cotton and steel combined. The winding of cotton round the steel strips cannot be [252] called "a process incidental to the manufacture of cotton." [Erle, C. J. The 73rd section of the 7 & 8 Vict. c. 15, contains the words "or mixed with any other material." Willes, J. The article manufactured here is of cotton combined with steel. Is it the manufacture of an article of cotton *mixed with steel*? It is submitted not. [Erle, C. J. A factory for the manufacture by steam or water power for the manufacture of articles of female attire composed of cotton and india-rubber would clearly be within the acts. Keating, J. Suppose the fabric for covering the steel alone was made on the respondent's premises, would not that constitute them a "factory" within the acts?] That is supposing that which cannot be. *Coles, App., Dickinson, Resp.*, 16 C. B. (N. S.) 604, is an authority to shew that the statute is not to be extended. [Erle, C. J. In that case, the article made was to be used in the manufacture of paper: it was part of the process of paper-making: and that is a manufacture which is specially excepted out of the statute.] *Hodgson, App., Taylor, Resp.*, 35 Law J., M. C. 30, does not govern this case. It was expressly found there that the respondent was the owner of a factory in which he carried on the manufacture of cotton thread.

Hannen, in reply. The notion that a penal statute is to receive a different construction from that which is to be put upon any other class of statutes has been long

exploded: and, if it were necessary, it might be contended that the statutes now under consideration are of a remedial character, and ought to be construed so as to suppress the evil and to advance the remedy. As to the twelve hours, there can be no doubt. [Williams, J. It is impossible to get over the plain words of the act.] The statute 3 & 4 W. 4, c. 103, does not define what is a "factory": but it enumerates a [253] variety of processes in the manufacture of cotton and certain other materials,—including *twisting* and *winding*,—by means of machinery, in which young persons are not to be employed within certain prohibited hours. Here, cotton is wound by machinery round strips of steel. For whatever purpose the manufacture of cotton is carried on, the place where it is carried on is a cotton factory within the statute. *Haydon, App., Taylor, Resp.*, is precisely in point. The court there held that winding cotton by means of machinery upon spools or reels, was a *winding* within the 3 & 4 W. 4, c. 103, as well as a "process" in the manufacture of cotton within the 7 & 8 Vict. c. 15. Is a fabric of cotton less a fabric of cotton because it is used in combination with something else? [Erle, C. J. For instance, the combination of a fabric of cotton with whalebone for the purpose of making stays.] Whether in combination with whalebone, or steel, or any other substance, can make no difference.

ERLE, C. J. The question in this case has been, whether the premises of the respondent are upon the facts stated shewn to be a factory wherein steam-power has been used to work any machinery employed in the manufacture, or in any process incidental to the manufacture of cotton, either separately or mixed with any other material, or any fabric made thereof. I am of opinion that they are shewn to be a factory within the meaning of the acts. Two samples have been produced before us,—one, in which the cotton thread is wound round the strip of steel,—the other, a covering formed by the interlacing or plaiting of cotton as a covering for crinoline-steel. It appears to me that this fabric composed in the way described in the case is a fabric made by the manufacture of cotton within the words of the statute. The case put by my Brother [254] Keating in the course of the argument, of a factory for making the material for covering the steel, seems to me to be decisive. Nobody could for a moment doubt that the premises would be used for a process in the manufacture of cotton. I cannot see that it ceases to be so because by the same process it is wound round the strips of steel. This is a cotton fabric, and steam-power is used in the making of it. The premises, therefore, are a factory within the act, and the magistrates in my judgment came to a wrong conclusion.

WILLIAMS, J. I am of the same opinion. I think the weaving or plaiting by machinery of cotton thread in the manner shewn by the second sample produced to us is an employment of machinery in the manufacture of a cotton fabric within the 73rd section of the 7 & 8 Vict. c. 15. It appears from the statement of facts in the case that the thread is woven by machinery into a fabric for covering crinoline-steel. It is unnecessary to say whether the combined article falls within the description of "a manufacture of cotton mixed with any other material," because I think it is clear that, when once it is made out that steam or other mechanical power is employed in the manufacture of any of the fabrics enumerated, it is unnecessary to shew what becomes of it afterwards.

WILLES, J. I am of the same opinion. The article produced to us is a cotton fabric: and it is not the less a cotton fabric because it is intended to be used in combination with strips of steel for the purpose of making the article also produced to us,—crinoline-steel. I am disposed to agree with Mr. Quain that this is not the manufacture of cotton mixed with any other material. But the combination of the cotton fabric with steel does not make it the less a cotton [255] manufacture. I therefore think the case falls within the obvious meaning of the Factory Acts.

KEATING, J., concurred.

ERLE, C. J. The result will be that we send back the case to the justices with an intimation of our opinion that the respondent's premises are a factory within the meaning of the acts. But we do not think it a case for costs.

Rule accordingly.

LANGMEAD v. MAPLE. Jan. 18th, 1865.

1. It is competent to the court of Chancery, —notwithstanding the provisions in the Chancery Amendment and Regulation Acts of 1858 and 1862 (21 & 22 Vict. c. 27, and 25 & 26 Vict. c. 42).—in refusing an injunction, to reserve to the plaintiff the right of proceeding at law. 2. To a declaration for an injury to the plaintiff's reversion, by building upon and against certain walls of the plaintiff, the defendant pleaded that the plaintiff ought not to be permitted to implead him in respect of those causes of action, because, after their accrual, and after the passing of the Chancery Regulation Act, 1862, the plaintiff commenced his suit and filed his bill in Chancery against him, and impleaded him therein for the very same rights, claims, and causes of action as in the declaration alleged; and that such proceedings were thereupon had that the court of Chancery determined the same alleged causes of action in favour of the defendant, and gave judgment and decreed in respect thereof in favour of the defendant; and that the said judgment and decree still remained in force:—Held, a good plea by way of estoppel. —3 The plaintiff replied that he ought to be permitted to implead the defendant in respect of the causes of action in the declaration alleged, because he said that the court of Chancery, in dismissing his bill, reserved to him the right of proceeding at law for the causes of action in the declaration alleged, and ordered his bill to be dismissed, without prejudice to such right:—Held, a good replication

The first count of the declaration stated that certain gardens, with the walls thereof, were respectively in the possession of certain persons respectively as tenants thereof respectively to the plaintiff, the reversion thereof then respectively and still belonging to the plaintiff, and that the defendant injured the plain-[256]-tiff's said reversion in the said walls and premises, by wrongfully building and erecting certain other walls and certain buildings and erections upon and against the said walls wherein the plaintiff had such reversionary estate and interest as aforesaid, and keeping and continuing the same so there erected and built, to wit, hitherto.

The second count stated that certain dwelling-houses, with the appurtenances, were respectively in the possession of certain persons respectively as tenants thereof respectively to the plaintiff, the reversion of and in the said dwelling-houses respectively then and still belonging to the plaintiff, in which said dwelling-houses respectively there of right were and still ought to be divers windows respectively through which the light and air of right ought to have entered, and still of right ought to enter into the said dwelling-houses respectively; yet that the defendant prevented and obstructed the light and air from entering through the said windows respectively into the said dwelling-houses respectively, by erecting certain walls and buildings near to the said windows respectively, and keeping and continuing the same so there erected and built, to wit, hitherto; whereby the said dwelling-houses were and are rendered dark, unwholesome, and of less value, and the plaintiff was and is injured in his reversionary estate therein.

The third count stated that the defendant broke and entered a certain wall of the plaintiff, being the southern boundary of certain houses and premises of the plaintiff, situate, &c., and erected and built upon and against the said wall a certain other wall and certain buildings and erections, and kept and continued the same so there erected and built, to wit, hitherto; and the plaintiff claimed 500*l.* and a writ of injunction to restrain the defendant from the continuance and repe-[257] titution of the injuries above complained of, and the committal of other injuries of a like kind relating to the same properties and rights respectively.

The defendant pleaded,—first, not guilty, to the whole declaration.

Secondly,—to the first count,—that the said gardens, with the walls thereof, were not respectively in the possession of the tenants of the plaintiff, as alleged.

Thirdly,—to the first count,—that the reversion of the said walls and premises respectively did not belong to the plaintiff, as alleged.

Fourthly,—to the second count,—that the said dwelling-houses, with the appurtenances, were not respectively in the possession of the tenants of the plaintiff, as alleged.

Fifthly,—to the second count,—that the reversion of and in the said dwelling-houses respectively did not belong to the plaintiff, as alleged.

Sixthly,—to the second count,—that there were not nor was of right in the said

dwelling-houses respectively, or any of them, the said windows respectively, or any of them, through which the light and air ought to have entered, as alleged.

Seventhly,—to the third count,—that the said wall was not the plaintiff's, as alleged.

Eighthly,—to the first count,—that the plaintiff ought not to be permitted to implead the defendant in respect of the causes of action in the first count alleged, because he said that, after the accruing of the causes of action in the first count alleged, and after the passing of the Chancery Regulation Act, 1862 (25 & 26 Vict. c. 41), the plaintiff commenced his suit and filed his bill in the high court of Chancery against the defendant, and impleaded the defendant therein for the very same rights, claims, and causes of action as in the said first count alleged; and such proceed-[258]-ings were thereupon had in the said suit that, before the commencement of this suit, the said court of Chancery determined the same alleged causes of action in favour of the defendant, and gave judgment and decreed in respect thereof in favour of the defendant; and the said judgment and decree still remains in force.

The ninth plea (to the second count) and the tenth plea (to the third count) were similar to the eighth.

The plaintiff took and joined issue upon all the pleas. And, for a further replication to the eighth plea, the plaintiff said that he ought to be permitted to implead the defendant in respect of the causes of action in the first count alleged, because he said that the said court of Chancery, in dismissing the said bill of the plaintiff in the said eighth plea mentioned, reserved to the plaintiff the right of proceeding at law for the causes of action in the said first count alleged, and ordered the said bill to be dismissed, without prejudice to such right: and this the plaintiff was ready to verify, wherefore he prayed judgment that he ought to be permitted to implead the defendant in respect of the causes of action in the said first count alleged. And for a further replication as to the defendant's tenth plea, the plaintiff repeated the allegations contained in his further replication to the defendant's eighth plea, substituting the words "last count" for the words "first count," and the words "tenth plea" for the words "eighth plea."

The plaintiff also demurred to the eighth, ninth, and tenth pleas, the ground stated in the margin being, "that the decree of a court of equity cannot be pleaded at law by way of estoppel." Joinder.

[259] The defendant took and joined issue upon the second and third replications to the eighth and tenth pleas respectively, and also demurred to those replications. Joinder.

Lush, Q. C. (with whom was H. James), for the plaintiff (a)¹. The Chancery Regula-

(a)¹ The replication was not pleaded to the ninth plea, because the decision of the court of Chancery reserved the plaintiff's right to try at law in respect only of the matters alleged in the first and third counts.

(a)² The points marked for argument on the part of the plaintiff were as follows:—

"1. That the Chancery Regulation Act, 1862, does not affect any legal remedies, but merely provides that, in respect of any equitable relief or remedy sought in the court of Chancery, that court shall determine any question of law or fact upon which the right to such equitable relief or remedy may depend:

"2. That it is possible that the court of Chancery may have determined in favour of the defendant on grounds which do not at all concern or negative the legal right of the plaintiff, or his right of action:

"3. That the determination in favour of the defendant may have been upon such grounds as are mentioned in the 4th section of the act, viz. that such matter had been improperly brought into equity, and that the same ought to have been left to the sole determination of a court of law:

"4. That it is not possible, consistently with the nature of the causes of action and the respective jurisdictions of the court of Chancery and a court of common law, that the plaintiff should have impleaded the defendant in Chancery for the very same rights, claims, and causes of action as alleged in the declaration, or that the court of Chancery should have determined such causes of action in favour of the defendant:

"5. That, even if the defendant's pleas are *prima facie* good, the replications demurred to are good, as virtually denying the defendant's pleas, and as shewing that the court of Chancery did not so determine the causes of action in favour of

tion Act only requires the court of Chancery to do what it was before in the habit of doing. The 25 and 26 Vict. c. 42, recites "that the high court of Chancery has power in certain [260] cases to refuse or postpone the application of remedies, within its jurisdiction, until questions of law and fact on which the title to such remedies depends have been determined or ascertained in one of Her Majesty's courts of common law: and that it was expedient that the said power should no longer exist, and that in all such cases, every question of law and fact cognizable in a court of common law, arising in the said court of Chancery, in which the right of any party to any equitable relief or remedy depends, and whether the title to such relief or remedy be or be not incident to or dependent upon a legal right, should be determined by or before the said court itself." The 1st section enacts that, "in all cases in which any relief or remedy within the jurisdiction of the said courts of Chancery respectively is or shall be sought in any cause or matter instituted or pending in either of the said courts, and whether the title to such relief or remedy be or be not incident to or dependent upon a legal right, every question of law or fact cognizable in a court of common law, on the determination of which the title to such relief or remedy depends, shall be determined by or before the same court." The 2nd section provides that, "whenever it shall appear to either of such courts that any question of fact may be more conveniently tried by a jury at the Assizes, or at any sitting in London or Middlesex for the trial of causes in the superior courts of common law, it shall be lawful for such court, notwithstanding anything in this act contained, to direct an issue to try any question of fact at the Assizes to be held in and for any county where the same may be conveniently tried, or at any such sitting for the trial of issues in London or Middlesex as aforesaid: and (subject to such general orders, if any, as may hereafter be made in relation thereto), the practice hitherto existing in such court in [261] reference to the trial of issues shall prevail in reference to the trial of any issues directed under this proviso." The 3rd section enacts that "all the provisions with reference to the trial of questions of fact by or before the high court of Chancery, and by or before the court of Chancery of the county palatine of Lancaster, which are contained in 'The Chancery Amendment Act, 1858' [21 & 22 Vict. c. 27], shall apply to the determination of questions of fact by or before the said courts respectively under this act." And the 4th section provides "that, in all cases in which the object of any suit in equity shall be to recover or to defend the possession of land under a legal title, or under a title which would have been legal but for the existence of some outstanding term, lease, or mortgage (and whether mesne profits or damages shall or shall not also be sought in that suit), such relief only shall be given in equity as would have been proper according to the rules and practice of the court if this act had not been passed: and that nothing in this act shall make it necessary for a court of equity to grant relief in any suit concerning any matter as to which a court of common law has concurrent jurisdiction, if it shall appear to the court that such matter has been improperly brought into equity, and that the same ought to have been left to the sole determination of a court of common law." To raise an estoppel, it is necessary to shew that the matter *did* come in issue in the former proceeding: it is not enough to shew that it *might* come in issue. This is laid down in the notes to *The Duchess of Kingston's case*, 2 Smith's Leading Cases, 5th edit. 669, where it is said: "It need hardly be remarked that the effect of verdicts, whether upon parties or privies, altogether depends on the question *whether the same point was in issue*. A verdict between two parties upon one question can, of course, [262] have no binding effect in an issue joined between them on another. (See Bull. N. P. 233.) Nor will the verdict be admissible, unless it appears clear that the same point actually *was* in issue. It is not sufficient that it *might have been so*." The pleas here are not specific enough.

Rochefort Clark, *contra* (a). The pleas are good, and the replications bad. By the defendant as to prevent the plaintiff from maintaining this action in respect of these causes of action."

(a) The points marked for argument on the part of the defendant were as follows:—

In support of the pleas,—"1. That the declaration only raises such questions of law and fact as are shewn by the pleas to be the same as those submitted to the court of Chancery for the determination of that court at the instance of the plaintiff:

"2. That, by the Chancery Regulation Act, 1862 (25 & 26 Vict. c. 42), extending

the 2nd section of the [263] Chancery Amendment Act, 1858 (21 & 22 Vict. c. 27), it was enacted that, "in all cases in which the court of Chancery has jurisdiction to entertain an application for an injunction against a breach of any covenant, contract, or agreement, or against the commission or continuance of any wrongful act, or for the specific performance of any covenant, contract, or agreement, it should be lawful for the same court, if it should think fit, to award damages to the party injured, either in addition to or in substitution for such injunction or specific performance; and such damages might be assessed as such court should direct." The 3rd section enacted that "it should be lawful for the court of Chancery, if it should think fit, to cause the amount of such damages in any case to be assessed, or any question of fact arising in any suit or proceeding to be tried, by a special or common jury, before the court itself;" and then it proceeded to describe the mode in which this was to be done. The 5th section enabled the court of Chancery to assess the amount of such damages without a jury; and the 6th section empowered the court to send the assessment of damages to a court of law. By the Chancery Regulation Act, 1862 (25 & 26 Vict. c. 42), what the court of Chancery was before impowered to do, is now made obligatory: *Young v. Fernie*, 33 Law J., Chan. 192. The subject-matter of this action having already been disposed of by a court of competent and concurrent jurisdiction, the plaintiff cannot be permitted to re-agitate the matter in this court. If an issue were directed by the court of Chancery, and tried here, the court would not [264] allow the same question to be tried again in an action commenced here. Why, then, should it be allowed if tried in the court of Chancery. [Erle, C. J. To constitute a good plea of estoppel, the defendant must shew that the same identical causes of action were tried in Chancery. That is properly tried before a jury. Lush. The court of Chancery is not compelled to find damages.] Assuming the pleas to be good, the replications are clearly bad. They allege that the court of Chancery, in dismissing the plaintiff's bill, reserved to him the right of proceeding at law for the causes of action in the first and third counts alleged, and ordered the said bill to be dismissed, without prejudice to such right. As a matter of fact the court of Chancery did not, and as a matter of law it could not, do as alleged. [Willes, J. You must make out that the court of Chancery had exclusive seisin of the matter.] In *Young v. Fernie*, Vice-Chancellor Stuart had directed an issue to try the validity of a patent by a jury at common law. On appeal, Lord Westbury, C., reversed his decision, saying—"The statute laid down the rule that, for the future, these things should be heard and determined in this court; and the proviso in the 2nd section was introduced by way of exception to the rule; and, in order to bring a case within that proviso, the court must be satisfied that the administration of justice would be more conveniently arrived at by directing an issue. His Lordship did not think anything could be more inconvenient than that, where there were mixed questions of law and equity, there should

the Chancery Amendment Act, 1858 (21 & 22 Vict. c. 27), that court was not merely impowered, but absolutely bound, to inquire into and determine those facts, and also every question of law incident thereto; the same being questions of law and fact on which the plaintiff's title to relief depended:

"3. That the pleas shew that the said court did in due course determine those matters of law and fact in the defendant's favour:

"4. That the matters of law and fact attempted to be tried in this action, having already been so determined by the court of Chancery, the plaintiff is estopped from trying the same matters of law and fact over again in this action."

In support of the demurrers to the replication to the eighth and tenth pleas,—"1. That the plaintiff does not by his replication deny that the questions of law and fact attempted to be raised in this action have been already tried and determined by the court of Chancery at his instance, as shewn by the eighth and tenth pleas; nor does he allege that his bill was dismissed on any other ground than that the court of Chancery determined the question of law and fact in favour of the defendant; but merely shews that, although that court determined those questions in favour of the defendant, yet that court affected to reserve to the plaintiff the right to proceed at law:

"2. That, the court of equity, having once determined the questions of law and fact as aforesaid, could not give any power or right to the plaintiff to try the same question over again in this action."

be an attempt to cut such cases in half, and send one half to be tried by a jury, reserving the other to be dealt with in this court : and it was impossible that any satisfactory conclusion could be arrived at by that mode of investigating the case, though there would be a great expenditure both of time and money." [265] Here, the pleas allege distinctly that the plaintiff impleaded the defendant in Chancery for the very same rights, claims, and causes of action as in the declaration alleged, and that such proceedings were thereupon had in the said suit, that, before the commencement of this suit, the court of Chancery *determined* the same alleged causes of action in favour of the defendant, and gave judgment and decreed in respect thereof in favour of the defendant. And the replication does not deny that, but merely states that the plaintiff's bill was dismissed, without prejudice to the right of the plaintiff to proceed at law for the causes of action in the declaration alleged. The decision of the court of Chancery, it is submitted, is a complete bar, and the subsequent permission to try at law amounts to nothing more than saying that, if the plaintiff has a right at law, that court would not by injunction restrain him from pursuing it.

ERLE, C. J. I have already intimated my opinion that the pleas are good. I am also of opinion that the replications are good. The declaration complains that the defendant has injured the reversion of the plaintiff in certain walls and premises, by wrongfully building and erecting certain other walls and certain buildings and erections upon and against the same. The second plea is, that the plaintiff ought not to be permitted to implead the defendant in respect of the causes of action in the first count alleged, because the defendant said that, after the accruing of the causes of action in the first count alleged, and after the passing of the Chancery Regulation Act, 1862 (known familiarly as Mr. Rolt's Act), the plaintiff commenced his suit and filed his bill in Chancery against the defendant, and impleaded the defendant therein for the very same rights, claims, and causes of action as in the first count alleged ; and [266] that such proceedings were thereupon had in the said suit, that, before the commencement of this suit, the court of Chancery determined the same alleged causes of action in favour of the defendant, and gave judgment and decreed in respect thereof in favour of the defendant ; and that the said judgment and decree still remains in force. Upon a traverse of that plea, the defendant would have to shew that there was a final judgment in the court of Chancery upon these very causes of action. Upon demurrer, therefore, we may assume that the plea would be an answer to the action. Then comes the replication, in which the plaintiff says that he ought to be permitted to implead the defendant in respect of the causes of action in the first count alleged, because he says that the court of Chancery, in dismissing the plaintiff's bill, reserved to him the right of proceeding at law for the causes of action in the first count alleged, and ordered the bill to be dismissed, without prejudice to such right. Upon demurrer to that replication, I am of opinion that it is a valid replication. It does substantially traverse the main point of the plea, viz. that there was a final adjudication upon the matters complained of by the plaintiff in his first count. The defendant alleges that the plaintiff sought relief in equity in respect of the causes of action declared on, and that his bill was dismissed. The plaintiff says that this dismissal was not a final adjudication upon the matters in issue, but a mere *ad interim* adjudication, reserving leave to him to try the question at law. On the part of the defendant, it is now contended that the effect of Sir Hugh Cairns's Act (21 & 22 Vict. c. 27), and Mr. Rolt's Act (25 & 26 Vict. c. 42), is to make this a bad replication ; and that the decision of the court of Chancery must be taken to have been a final determination of the matter, just as if it had been the judgment of a court [267] of law upon the same question. But I take the judgment of the Lords Justices in *Swaine v. The Great Northern Railway Company*, 33 Law J., Chan. 399, to be a direct adjudication to the contrary of Mr. Clarke's argument. There, Swaine possessed a house and premises within about eighty feet of a station of the Great Northern Railway Company. Previous to 1859 there had been but one siding at the place, and it was on the opposite side of the line from the property of Swaine. In 1859 the company constructed a second siding, on the side of the line nearest to the property of Swaine, and used it for carrying from London manure of an offensive description. Swaine remonstrated from time to time ; but, in 1862, finding the nuisance greatly increased, in the month of May he made a formal complaint. Obtaining no redress, he, after a demand by his solicitors, filed, in January, 1863, his bill for an injunction, and for an inquiry as to damages. One of the Vice-Chancellors considered that the

plaintiff, having had ample time to establish his right at law, and having failed to do so, was not entitled to file a bill for an injunction, and dismissed the bill. On appeal, the Lords Justices held that there had not been a nuisance so continuous and systematic as to justify the grant of the injunction, and they agreed to the dismissal of the bill, *but without prejudice to the plaintiff's right to an action*. A question was then raised as to whether it was not the duty of the court to go on and to decide whether or not the plaintiff was entitled to damages at law: and upon this Lord Justice Turner said: "Upon the question of damages, the court had recently to consider it when *Johnson v. Wgatt*, 33 Law J., Chan. 394, the case of the photographic studio, was argued on appeal: but the court must consider it again upon the present appeal. The law, he thought, stood thus:—According to Sir Hugh [268] Cairns's Act, the court had jurisdiction to give damages in a case where the bill was properly filed in this court: but, under Mr. Rolt's Act, it was not compulsory for the court to exercise that jurisdiction. The court had the power, therefore, but was under no compulsion. Then, looking at the nature of the case, it was, in his judgment, not one in which the court would be well advised in going into the question of damages. He thought that the bill must be dismissed, as the bill in *Johnson v. Wgatt* had been dismissed, though not exactly upon the same grounds, for there the court was of opinion that the plaintiffs were not entitled to any damages at all. That was by no means said here: but their Lordships thought that the case could be more effectually disposed of by a court of law than in a court of equity. It was perhaps somewhat unfortunate that Mr. Rolt's Act had placed the court in the position of being compelled to determine questions of fact upon the very insufficient statements of affidavits, or else by a *vivâ voce* examination of all the witnesses before itself. Upon the whole, the bill must be dismissed; *but it would be expressly without prejudice to the right of the plaintiff to bring any action he might be advised to bring, for, without that declaration, it might perhaps be thought that the court had by the dismissal of the bill concluded the question of damages, as it had the power to do.*" That is a solemn adjudication directly on the point, and entirely satisfies my mind. In *Johnson v. Wgatt* the bill prayed an injunction and damages for an alleged nuisance. The bill was dismissed; and, upon the question of damages, Lord Justice Turner said: "Upon the best consideration which I have been able to give to the Chancery Regulation Act, 1862 (25 & 26 Vict. c. 42, Mr. Rolt's Act), I am not satisfied that, under the provisions of that act, we are *absolutely bound* to enter [269] into this part of the case; for I much doubt whether the question as to the plaintiff's right to damages ought to be considered as being, within the meaning of the act, a question of law or fact cognisable in a court of common law, on which the plaintiff's title to relief in equity depends: but Sir Hugh Cairns's Act (21 & 22 Vict. c. 27) has, I think, given us jurisdiction to entertain this question of damages; and, having regard to the spirit and intention of the later act (the Chancery Regulation Act), I think that, having this jurisdiction, we ought under the circumstances of this case to exercise it. I have, therefore, considered the question of damages, and looked into several cases at law on the subject,—*Buck v. Stacey*, 2 Car. & P. 465, *Parker v. Smith*, 5 Car. & P. 438, *Pringle v. Wernham*, 7 Car. & P. 377, and *Hells v. Odg*, 7 Car. & P. 410. Upon the authority of those cases, my opinion is that the plaintiffs have not established a sufficient case to entitle them to any damages, and that their case fails upon this point also." The court, therefore, assume the jurisdiction, and finally decide the question of damages. These two cases seem to me to be directly in point. Upon their authority, therefore, as well as upon the construction of the statutes, and the reason of the thing, I am clearly of opinion that this replication is good.

WILLIAMS, J. I am of the same opinion. If the plea had stood altogether unanswered by the replication, it seems to me that it would have been a good plea, because it avers that the court of Chancery in the former suit determined in favour of the defendant in respect of the causes of action alleged in this declaration. The cases to which my Lord has referred shew that the court of Chancery might have done that if they had pleased, but that it was in their discretion either to [270] determine the matter finally themselves or to send it to a court of law for adjudication. But then comes the replication, which shows that the allegation in the plea is not well founded, and is not to be taken to be true. It states that the court of Chancery, in dismissing the plaintiff's bill, reserved to him the right of proceeding at law, and ordered the bill to be dismissed, without prejudice to such right. It therefore appears from that that the court of Chancery did not exercise the jurisdiction they might have

done by finally dismissing the bill, but thought fit to reserve to the plaintiff the right to try the question at law. I therefore think the replication is a good answer to the plea.

WILLES, J. I am of the same opinion. I apprehend that if the same matter or cause of action has already been finally adjudicated on between the parties by a court of competent jurisdiction, the plaintiff has lost his right to put it in suit either before that or any other court. The conditions for the exclusion of jurisdiction on the ground of *res judicata* are, that the same identical matter shall have come in question already in a court of competent jurisdiction, that the matter shall have been controverted, and that it shall have been finally decided. The question arising in one respect on the pleas in this case, and in another on the replications, is, whether these conditions for the exclusion of the jurisdiction of this court are existing here. Assuming it to be true, as we must for the purpose of this argument, that the court of Chancery had jurisdiction in the matter conferred upon it by Sir Hugh Cairns's Act and Mr. Rolt's Act, and that it was bound to exercise that jurisdiction, was the same matter in issue before that Court? Different considerations arise upon the pleas and upon the replications. I was at first disposed to think the pleas bad. It is not sufficient to constitute *res judicata* that the matter has [271] been determined on: it must appear that it was controverted as well as determined upon. Looking at the pleas, it seemed to me that probably the court of Chancery may not have dismissed the plaintiff's bill on the merits, but, judging upon equitable grounds, may have considered it not to be a case for an injunction, and may have declined to go into the question whether the plaintiff had any legal right or not. It may have been unnecessary to go into that, except for the amount of damages. Therefore the court of Chancery may have given the go-by to the right now asserted by the plaintiff. But, as the plea alleges that the court of Chancery determined the same alleged causes of action, I think we are bound to assume it to mean that the court decided upon the legal merits, against any right of action in the plaintiff in respect of those causes; and, as that court had jurisdiction, it might have made a final end of the matter. I can quite conceive that the first view may be the proper one to take on the evidence given. It may appear that the decree was upon the face of it final, and, either on the face of the decree, or on the evidence (if admissible) that the dismissal of the plaintiff's bill proceeded upon grounds peculiar to the court of Chancery, and that this matter was not disposed of. But, on looking at the plea, for the reasons mentioned, I think I must assume that the court of Chancery did dispose of the legal merits, and that the plaintiff has no right to ask this court to come to a different decision on the same matter. So far as to the pleas. The aspect of the case, however, is changed when we introduce the replication, viz. that the said court of Chancery, in dismissing the plaintiff's bill in the eighth plea mentioned, reserved to the plaintiff the right of proceeding at law for the causes of action in the first count alleged, and ordered the bill to be dismissed, without prejudice to such right: be-[272]-cause it is clear not only that the matter may or may not have been controverted, but the third condition of a plea of *res judicata* is not complied with, viz. that there must have been a final adjudication. For these reasons, I am of opinion that there should be judgment for the defendant on the demurrer to the pleas, and for the plaintiff on the demurrer to the replications.

KEATING, J. I am entirely of the same opinion. The strength of Mr. Clarke's argument has been upon the 25 & 26 Vict. c. 42, which he contends precludes the court of Chancery from doing what it did. The cases, however, which my Lord has cited, shew that the court of Chancery had power to do what the replication alleges that it did. If so, the replication is a good answer to the pleas.

Judgment for defendant on the demurrer to the pleas, for plaintiff on the demurrer to the replications.

KILLBY v. WRIGHT. Jan. 18th, 1865.

A deed of composition made between "the several persons whose names were subscribed and seals affixed in the schedule (being creditors of T. H. W., of the first part, and T. H. W. of the second part,") recited that the debtor was indebted to the said several persons parties thereto of the first part, in the sums set opposite their respective names, and had agreed to pay a composition of 6s. in the pound,—"such payment or composition to be made and paid to all and every the creditors of the

said debtor upon their the said creditors executing this deed,"—and witnessed that, in consideration of the payment by the debtor to the plaintiff for money lent by the plaintiff to the defendant, the parties of the first part released the debtor:—Held, a void deed, as excluding non-assenting creditors from all benefits under it, notwithstanding all the formalities prescribed by s. 192 of the Bankruptcy Act, 1861, had been duly observed.

This was an action by payee against acceptor of a bill of exchange for 150l. drawn by one Theodore Anthony Rochussen on the 25th of March, 1863, at twelve months' date; and for money payable by the defendant to the plaintiff for money lent by the plaintiff to the defendant, for money paid by the plaintiff for the defendant [273] at his request, for money received by the defendant for the use of the plaintiff, for interest upon money due from the defendant to the plaintiff and forborne at interest by the plaintiff to the defendant at his request, and for money found to be due from the defendant to the plaintiff on accounts stated between them. Claim, 200l.

Plea, —that, after the accruing of the cause of action, and after the Bankruptcy Act, 1861, took effect, an indenture was made in the words following, that is to say:—"This indenture, made the 14th of May, 1864, between the several persons whose names are subscribed and seals affixed in the schedule hereunder written (being respectively either individually or in co partnership with others creditors of Thomas Harby Wright, on behalf of themselves and all and every other the creditors of the said T. H. Wright, of the first part, and T. H. Wright, of, &c., tobacconist and wine-merchant, hereinafter called 'the said debtor,' of the second part: Whereas, the said debtor is indebted to the said several persons parties hereto of the first part in the several sums of money set opposite their respective names in the said schedule hereunder written, and, being unable to discharge the same in full, hath agreed to pay a composition of 6s. in the pound, such payment or composition to be made and paid to all and every the creditors of the said debtor, upon their the said creditors executing this deed, and to be in full discharge of all and every the debts of the said debtor due and owing at the time of the execution of these presents: Now, this indenture witnesseth that, in pursuance of the said agreement, and in consideration of the payment by the said debtor to the said several creditors of such composition as aforesaid, they the said several persons parties hereto of the first part, for themselves and their several and respective partners, [274] do hereby accept the said composition in full satisfaction and discharge of their respective debts, and do by these presents release and for ever quit claim unto the said debtor, his heirs, executors, and administrators, all and all manner of action and actions, suit and suits, debts and sums of money, accounts, costs, reckonings, agreements, judgments, extents, executions, claims, and demands whatsoever which they the said several parties hereto of the first part and their several and respective partners now have, or at any time heretofore had, against the said debtor. In witness," &c.: Averment, that the said deed was valid, effectual, and binding on all the creditors of the defendant, including the plaintiff, as if they were parties and had executed the same; and that the conditions of the Bankruptcy Act, 1861, had been observed: that a majority in number and three fourths in value of the creditors had in writing approved of and assented to the said deed; that the deed was duly attested and stamped, and registered, with the affidavit required by the said Bankruptcy Act; that a certificate of registration was given to the defendant; that the plaintiff was a creditor, and had notice of the deed, and was requested to execute the same; and that the defendant, by means of the premises, was released and discharged from the cause of action in the commencement of this plea set out.

To this plea the plaintiff demurred; the ground of demurrer stated in the margin being, "that it does not appear that the plaintiff did or could execute the said deed; and that it is not a deed for the composition of all the defendant's debts and liabilities, and his release therefrom, but only of the debts due to the creditors parties to the deed." Joinder.

Laxton, in support of the demurrer. The deed set out in the plea is clearly bad: it does not place the [275] executing and non-assenting creditors upon the same footing; and it precludes the plaintiff from obtaining any benefit under it unless he executes it. This is clear from two recent cases in the Exchequer Chamber, of *Benham v. Broadhurst*, 11 Law Times (N. S.), 537, and *Raphael v. Davis*, 11 Law Times (N. S.) 539. In *Benham v. Broadhurst*, a composition-deed was made between a debtor of the

one part, and the several persons creditors who were parties thereto of the other part; and the debtor thereby covenanted with the said several persons parties thereto of the second part respectively to pay them the composition therein mentioned: the deed was executed by the requisite majority in number and value of the creditors, according to the 192nd section of the Bankruptcy Act, 1861: and it was held void as against a non-assenting creditor. Crompton, J., in giving judgment, said: "The present deed, it will be observed, is made between the debtor and the assenting creditors only, the non-assenting creditors being no parties to the deed: but the assenting creditors take a covenant to themselves respectively and individually, and there is no covenant by this debtor with the non-assenting creditors, or some trustee for them, on which they or the trustee can sue. *They have not equal protection.*" In *Raphael v. Davis*, the plea alleged that, after the accruing of the cause of action, and after the Bankruptcy Act, 1861, to wit, on, &c., by indenture between the defendant of the first part, J. C. and M. C., trustees on behalf of themselves and others the undersigned creditors of the defendant, of the second part, and the several other persons, creditors of the defendant, whose names were thereunder signed, of the third part, the defendant assigned to the said trustees all his estate, &c., upon trust out of the proceeds to pay to the several persons parties thereto of the third part a composition [276] of 2s. 6d. in the pound upon the amount of their respective debts; in consideration whereof the said parties thereto of the third part released the defendant, his executors, &c., from their said respective debts: and it was declared that the said deed should not be binding upon any creditor party thereto to whom the amount of the said composition should not be paid within seven days from the time of such creditor executing the deed,—with the usual averments that the deed was a trust-deed under s. 192 of the Bankruptcy Act, 1861, and duly executed by the requisite majority, &c., and that the plaintiff was a creditor, &c.: it was held that the deed was bad, inasmuch as, upon the face of it, it excluded non-assenting creditors from getting any benefit under it. Blackburn, J., characterized the deed as the "worst deed he ever saw." And Mellor, J., added,— "It carefully excludes the possibility of a non-assenting creditor getting any benefit under it." *Dingwall v. Edwards*, 33 Law J., Q. B. 161, is also a distinct authority to shew that a deed which excludes from its benefits non-executing creditors is void. Cockburn, C. J., there says: "It is not disputed that, in order that creditors not executing a composition-deed shall be bound under the 192nd section of the Bankrupt Act, they must be entitled to the same benefit under it as is secured by it to the creditors executing it. If by the terms of the deed creditors are excluded except on the condition of executing it, the deed will not be binding on those who do not execute it. While we should desire to give effect to the intention of the legislature by upholding composition-deeds to which the proportion of the creditors required by the statute have been parties, we must take care not to enable an insufficient number of creditors to obtain unduly the execution of reluctant creditors, by the apprehension of the latter that they may [277] be placed at a disadvantage by omitting to execute." And Crompton, J., says: "It was conceded in the argument in this case that the deed of arrangement under the arrangement clauses of the last Bankrupt Act was invalid, and no bar to the plaintiffs' action, if, as contended by the plaintiffs' counsel, its construction was, that the composition was only to be paid to the creditors who should actually sign the deed, or if, which is the same thing, it imposed on the non-assenting creditors the condition of signing before or when they received the composition. As it is now to be taken as decided that a composition-deed is within the act, without any assignment of any property of the debtor, it seems still more necessary to see that a provision is made for the non-assenting creditors having their share of the composition, as there is no trust-fund in such case which can be administered either under the deed or under the 197th section of the last Bankrupt Act. If the provision for the payment of the composition is to stand in the same position as the trust for the administration of the property, it clearly must not exclude the class of non-assenting creditors."

Watkin Williams, contra, admitted that, if *Dingwall v. Edwards*, 33 Law J., Q. B. 161, was in point, he could urge nothing in support of the present deed.

ERLE, C. J. It seems to me that the case of *Dingwall v. Edwards* is decisively in point.

The rest of the court concurring,
Judgment for the plaintiff.

[278] CLARKE, Assignee of the Estate and Effects of Francis Ayers, a Bankrupt,
AND OTHERS, v. WATSON AND ANOTHER. Jan. 25th, 1865.

[S. C. 34 L. J. C. P. 148 ; 11 L. T. 679 ; 13 W. R. 345.]

By the terms of a contract certain works were to be done for the defendants by the plaintiffs according to certain plans and specifications, and to be paid for by certain instalments "on production by the contractors to the defendants, or one of them, of the certificate of W. L. or other the surveyor for the time of the defendants, that they (the contractors) had duly and efficiently performed and completed such work to his satisfaction."—In an action upon this contract, the declaration averred that all things necessary had been done by the plaintiffs to entitle them to have the certificate of the surveyor that the work had been duly and efficiently performed and completed to his satisfaction, but that the said surveyor had not given such certificate, but *had wrongfully and improperly neglected and refused so to do. &c.*,—Held, on demurrer that, in the absence of collusion, the plaintiffs were not entitled to recover, without producing the surveyor's certificate, nor were the defendants responsible for the refusal of the surveyor to give one.

The first count of the declaration stated that, theretofore, and before the said Francis Ayers became bankrupt, to wit, on the 9th of October, 1862, by an agreement in writing then made and entered into between the said Francis Ayers, William Mallows, and William Johnson, therein called "the contractors," of the one part, and the defendants of the other part, the said contractors agreed with the defendants to do certain works therein mentioned, in conformity with certain plans, drawings, and sections therein mentioned, and also in conformity with certain specifications therein mentioned, as well as to the satisfaction and approval of the engineer to a certain board of health for the time, should such be found necessary, at or for 312l. 15s., to be paid as follows, 156l. 7s. 6d. on production by the contractors to the defendants, or one of them, of the certificate of William Lambert, or other the surveyor for the time of the defendants, that they the contractors had duly and efficiently performed and completed such portion of the work as according to the judgment of the said surveyor should not be less than three fourth parts thereof in extent and value ; 78l. 3s. 9d. on the production by the said contractors to the defendants, or to one of them, of the certificate of the said surveyor as aforesaid that the whole of the works mentioned and referred to in the said plans, [279] drawings, and specifications, had been duly and efficiently performed and completely finished to his satisfaction, and also to the satisfaction of the said engineer for the time being of the local board of health, if necessary ; and the balance of 78l. 3s. 9d. at the expiration of four months from the date of the said surveyor's certificate of completion ; provided the therein-mentioned roads, pathways, drains, and culverts, and every part thereof, should be certified by the said surveyor to be in good repair and in perfect and sound condition in all respects,—it being thereby intended and agreed that all the said works and materials should be so put and kept in good repair until the expiration of such four months from completion, by and at the sole cost and expense of the said contractors ; and the defendants thereby agreed with the said Francis Ayers, William Mallows, and William Johnson, in consideration of the due performance of the said agreements therein contained on their part, to pay to them the sum of 312l. 15s. at the times and in the manner thereinbefore mentioned : Averment that, although 156l. 7s. 6d., part of the said sum of 312l. 15s., had been paid, and all things necessary on the part of the said contractors to entitle them to have the certificate of the surveyor of the defendants that the whole of the works in the said plans, drawings, and specifications had been duly and efficiently performed and completed to his satisfaction, and also to the satisfaction of the engineer of the said local board of health, had been done and performed by them : yet the said surveyor had not given such certificate, but had wrongfully and improperly neglected and refused so to do, nor had the defendants paid the said sum of 78l. 3s. 9d. payable on such certificate : and that, although more than four months since the said surveyor ought to have given such certificate had elapsed, and although all things [280] had been done by the said contractors on their part to entitle them to a certificate by the said surveyor that the said roads, pathways, drains, culverts, and every part thereof, were at the expiration of the said four months

in good repair, and in perfect and sound condition in all respects, yet the said surveyor had not granted such certificate, but had wrongfully and improperly neglected and refused to do so, and the defendants had not yet paid the said balance of 78l. 3s. 9d.

The defendants demurred to this count: and the plaintiffs joined in demurrer.

Henry James, in support of the demurrer (*a*). Two breaches are alleged in the declaration. The first is, that the defendants have not paid the 78l. 3s. 9d. The answer to that is that, by the terms of the contract, it was payable only upon production of the surveyor's certificate, which has not been produced. The second breach is that the surveyor has wrongfully and improperly withheld his certificate. No fraud, however, or collusion, is charged. It is not even alleged that the conduct of the surveyor was fraudulent: the allegation that he wrongfully and improperly neglected and refused to grant his certificate, would be satisfied by shewing that he had been guilty of a mere error in judgment. *Scott v. The Corporation of Liverpool*, 1 Giffard, 216, is precisely in point. That was a bill for an account of certain works constructed by Scott for [281] the corporation of Liverpool, —the contract providing that, "if the contractors should fail in performing their contract, or, in the opinion of the engineer, not make due progress, it should be lawful for the corporation to seize the plant, and, in case any dispute should arise, the decision of the engineers should be final at law and in equity." The case was heard before Vice-Chancellor Stuart, assisted by Erle, J., and the bill was dismissed with costs, no case of fraud, misconduct, incapacity, or refusal to act being established against the engineer. In delivering his opinion there, Erle, J., says: "By the contract it appears to me that the engineer is interposed between the corporation and the contractors, and made the absolute judge of the performance of the works, and that there is no right in the contractors to demand payment, and no liability on the company to pay, throughout the contract, unless the condition of obtaining a valuation by the engineer, and his certificate, has been fulfilled." "The law can only enforce rights under a contract according to that contract. It is not necessary to cite authorities on such a subject. I refer only to some of those cited in the argument. In *Grafton v. The Eastern Counties Railway Company*, 8 Exch. 699, the contract was, to deliver to the satisfaction of the agent of the defendants. It was held that the promise was on condition that the agent was satisfied, and that no action lay for the price of coke, unless the condition was fulfilled. So, in *Milner v. Field*, 5 Exch. 829, the same point prevailed. In *Panzer v. The Great Western Railway Company*, 5 House of Lords Cases, 72, the stipulation that the engineer should be the absolute judge during the progress of the works of the mode in which the contractor was discharging his duties, was recognised as both valid and reasonable, though the engineer was a shareholder in the company: and in [282] pp. 106, 107, of the report, the notion that accounts of the work done under a similar contract to this might be taken by the Master in Chancery, instead of the engineer, on the ground that the contract has been abandoned, was repudiated as erroneous. The stipulation is of great importance, for, if the contractors can open this contract on account of alterations and additions with mutual disputes, and can insist that an account should now be taken before a stranger of the entire works, which can ill be examined after complete, they may inflict litigation, complicated, expensive, and doubtful in the extreme,—an evil which the stipulation is framed to avert. The question remains, whether the conduct of the parties affords any evidence of a right of action, either on the ground of waiving the conditions, or departing from the original contract, and substituting another, either expressed or implied, or on the ground of a wrong. My answer is in the negative. I am not aware that the defendants are shewn to have committed any wrong, or any breach of their contract, or any departure from it." "I cannot discover that the corporation have by their conduct created a liability at law not imposed on them by the terms of the contract." And Vice-Chancellor Stuart, at p. 228, says,—“This court has no right or power to impose upon either of the

(*a*) The points marked for argument on the part of the defendants were as follows:—

“1. That the first count discloses no cause of action against the defendants:

“2. That the plaintiffs are not entitled to recover, without obtaining the several certificates of the surveyor:

“3. That the defendants are not liable for the surveyor not giving such certificates: and that, in the absence of such certificates, no breach of the agreement is shewn.”

parties to the contract any other terms than those which have been prescribed by themselves, and by which they have agreed to be bound. It is the very essence of the contract, that no sum should be considered due and owing to the plaintiffs on account of any of the works executed by them, unless the engineer shall certify the amounts."

Parry, Serjt., contra (*a*). Substantially, this is an [283] action for a tort. The plaintiff complains of a wrong done by the agent of the defendants. Lambert was not acting for the plaintiffs, but for the defendants alone, to protect them against overcharges by the contractors. The contract in effect is that the defendants will employ Lambert, "or other their surveyor for the time," to perform the duties of surveyor rightfully and honestly: and the defendants are responsible if the person so employed shall wrongfully or improperly withhold his certificate. [Willes, J. The declaration states that the work was done to the satisfaction of the surveyor.] Yes. In *Pawley v. Turnbull*, 7 Jurist, N. S. 792, Vice-Chancellor Stuart held the conduct of the architect in withholding certificates to amount to improper conduct, and decreed payment of the money notwithstanding their absence. The defendants must be held to have dispensed with the condition of an engineer's or surveyor's certificate, if they appoint a man who wrongfully abstains from acting. [Willes, J., referred to *Harrison v. The Great Northern Railway Company*, 11 C. B. 815, and *The Great Northern Railway Company v. Harrison*, 12 C. B. 576.] In *Milner v. Field*, 5 Exch. 829, there were negative words in the contract: the proviso was that, "no instalment should be paid unless the plaintiff delivered to the defendant a certificate signed by the surveyor of the defendant that the works were performed according to the specifications." *Bathurst v. Foss*, 2 Hurslt. [284] & Colt. 42, is in reality an authority for the plaintiff, though the declaration alleged that the surveyor, in neglecting to certify, acted in collusion with the defendant and by his procurement. The point marked for argument on the part of the plaintiff there was, "that the defendant who employs the architect does contract with the plaintiff that he will do his duty and act fairly."

James was not called upon to reply.

ERLE, C. J. I am of opinion that the judgment in this case ought to be for the defendants. The contract which they entered into was, to pay to the contractors, the plaintiffs, certain sums on production by them to the defendants, or one of them, of the certificate of William Lambert or other the surveyor for the time of the defendants. Many contracts are so made. Every man is the master of the contract he may choose to make: and it is of the highest importance that every contract should be construed according to the intention of the contracting parties. And it is important in a case of this description that the person for whom the work has been done, should not be called upon to pay for it until some competent person shall have certified that the work has been properly done according to the contract and specification. Here, the contract is that the money shall become payable on production by the plaintiffs to the defendants of the certificate of their (the defendants') surveyor, that the contractors have duly and efficiently performed and completed the work to his satisfaction. No such certificate has been produced. But it is said that the plaintiffs have done all things necessary to entitle them to have the certificate of the surveyor that the works had been duly performed and completed to his [285] satisfaction, and that the said surveyor had "wrongfully and improperly" neglected and refused so to do. That in my opinion is not sufficient. If it had been alleged that the defendants wrongfully colluded with the surveyor to cause the certificate to be withheld, they could not have sheltered themselves by their own wrongful act. But the word "wrongfully," as used here, does not intimate anything of that sort. If the plaintiffs had intended to rely on the withholding of the certificate as a wrongful act on the part of the defendants, they should have stated how it was wrongful. This is in effect an attempt on the part

(*a*) The points marked for argument on the part of the plaintiffs were as follows:—

"1. That the surveyor is the agent of the defendants: and they are bound to employ him to certify according to the said agreement:

"2. That the surveyor is responsible to the defendants for improperly certifying or omitting to certify; and they are responsible to the plaintiffs:

"3. That the wrongful refusal of the defendants' agent to certify, is a dispensation of the condition precedent, and equivalent to the defendants' preventing the certificate being granted."

of the plaintiff to take from the defendants the protection of their surveyor, and to substitute for it the opinion of a jury. That is not the contract which the defendants have entered into. The allegations on the part of the plaintiffs are not in my judgment such as to entitle them to succeed.

WILLIAMS, J. I am of the same opinion. Notwithstanding the surveyor may have been wrong in withholding his certificate, the money is not due.

WILLES, J. I am of the same opinion. Consistently with the allegations in this declaration, the only wrong the surveyor has been guilty of may be an error in judgment; or he may have refused to exercise any judgment; in which case, the proper course would have been to call upon the defendants to appoint some other surveyor who will do his duty.

KEATING, J., concurred.

Judgment for the defendants.

[286] FESSARD v. MUGNIER. Jan. 23rd, 1865.

[34 L. J. C. P. 126; 11 L. T. 635; 11 Jur. N. S. 283.]

1. The plaintiff declared upon a bill drawn by him in Paris upon and accepted by the defendant.—The defendant pleaded a deed of composition under the Bankruptcy Act, 1861, whereby, in consideration of 5s. in the pound to be paid to them by him on the 8th of May, 1863, they released him from their several claims, saving their rights upon securities held by them. The plea contained an averment “that the defendant had always been and still was ready and willing to pay to the plaintiff the said composition or sum of 5s. in the pound on the amount of the said sum herein pleaded to, according to the provisions of the said deed of composition,” and also an averment, “that, all conditions having been performed, and all things having happened necessary in that behalf, the plaintiff became and was and is bound by the said deed of composition, as if he had been a party thereto, and had duly executed the same”—Replication, that the defendant made default in payment of the composition on the said 8th of May, 1863, and the said composition remained unpaid to the plaintiff for more than fourteen days after that day, and still remained unpaid, and never had been paid or tendered to the plaintiff.—Rejoinder, that the plaintiff was not on and during the said 8th of May, and for the space of fourteen days next after that day, within the realm of England.—Surrejoinder, that the plaintiff was a native of France, and had always resided and carried on his business there, that the contract declared on was made in France, that the plaintiff was not in England at the time of the making of the deed, and that he had not notice of the making thereof at the time of the making or on the said 8th of May, or within fourteen days after that day:—Held, on demurrer to the plea and surrejoinder respectively, that the absence of an averment of payment or tender of the composition at the time named in the deed, was not cured by the averment of readiness and willingness, notwithstanding the plaintiff’s absence from England; and that the general averment of performance at the end of the plea did not help.—
2. Absence of the creditor from England affords an excuse for the want of an averment of tender or payment by the debtor only where the former has gone abroad after the making of the contract.

The first count of the declaration stated that the plaintiff, on the 1st of August, 1862, by his foreign bill of exchange, made at Paris, in the empire of France, now overdue, directed to the defendant, required the defendant to pay to the plaintiff 27l. 10s. three months after date; and the defendant accepted the said bill, but did not pay the same.

There was also a count for money payable by the defendant to the plaintiff for goods sold and delivered by the plaintiff to the defendant, and for interest upon and for the forbearance at interest by the plaintiff to the defendant, at the defendant’s request, of moneys owing from the defendant to the plaintiff, and for money found to be due from the defendant to the plaintiff on accounts stated between. Claim, 35l.

Second plea,—that, after the accrual of the plaintiff’s claim in the declaration mentioned, and before [287] this action, the defendant became and was adjudicated to be bankrupt within the meaning of the statute in force concerning bankrupts; and

that, at the first meeting of creditors duly held after such adjudication, three-fourths in number and value of such creditors present and represented at such meeting duly resolved that a proposal of the defendant then and there made to pay a composition of 5s. in the pound on the 8th day of May, 1863, in discharge of his creditors' claims, should be accepted, and that the estate of the said defendant ought to be wound up under a deed of composition in the terms of the said proposal, and that an application should be made by the defendant to the court to stay the proceedings in the said bankruptcy until the said 8th day of the said last-mentioned month of May at 11 o'clock in the forenoon precisely: that the registrar of the said court of Bankruptcy did duly report such resolution to the said court, and such court did afterwards, on the 14th of April, in the year last aforesaid, after finding that the said resolution had been duly carried, and that its terms were reasonable and calculated to benefit the general body of the creditors under the said estate, confirm the said resolution, and make order accordingly, and also that all further proceedings in the defendant's said bankruptcy should be and the same were thereby stayed and suspended for one month from the said last-mentioned day; that he the defendant, afterwards duly produced to the said court for its consideration a deed of composition signed by and on behalf of three-fourths in number and value of all his said creditors, and which said deed, with a schedule thereto, was in the words and figures following, that is to say,—“This indenture, made the 2nd day of April, 1863, Between James Julius Mugnier, of 10 Westbourne Grove, Bayswater, in the county of Middlesex, watch and clock-maker, a bankrupt, of the [288] one part, and the several persons whose names and seals are hereunto subscribed and set, and all other persons who at the date hereof are respectively creditors of the said James Julius Mugnier, a bankrupt, of the other part: Whereas the said James Julius Mugnier was on the 19th of March last duly adjudged a bankrupt: and whereas the estate of the said James Julius Mugnier is not sufficient to pay the debts and liabilities in full: and whereas the said James Julius Mugnier has proposed to pay his creditors a composition of 5s. in the pound on the amount of their respective debts, to be paid on the 8th day of May next, and three-fourths in number and value of the creditors of the said James Julius Mugnier have agreed to accept the said proposal and to execute the release hereinafter contained, and have agreed to sign a resolution to be passed at a meeting of creditors of the said James Julius Mugnier that the estate of the said James Julius Mugnier ought to be wound up under a deed of composition, and to consent to an application to the court of Bankruptcy to stay all further proceedings under the said adjudication: Now this indenture witnesseth that, in consideration of the release hereinafter contained, he the said James Julius Mugnier doth hereby, for himself, his heirs, executors, and administrators, covenant with the parties hereto of the second part, and each and every of them, their and each and every of their heirs, executors, and administrators, that he the said James Julius Mugnier will on or before the 8th day of May next pay unto each and every of them the said parties hereto of the second part a composition of 5s. in the pound on the amount and in full discharge of their respective debts and claims: And this indenture also witnesseth that, in consideration of the said covenant, they the said several creditors parties hereto of the second part, do, and each and [289] every of them doth by these presents, acquit, release, and for ever discharge the said James Julius Mugnier, his executors and administrators, and his estate and effects, of and from all actions, suits, claims, and demands whatsoever, which the said parties hereto of the second part, or either of them, now have against the said James Julius Mugnier: Provided always, and it is hereby agreed and declared, that these presents shall not extend to invalidate, prejudice, or in any manner affect any mortgages, charges, or other securities or liens which any of the said parties hereto of the second part may have upon any of the real or personal estate of the said James Julius Mugnier, or any bonds, bills, notes, or other securities given or payable by any other person by way of security for any debt due and owing by the said James Julius Mugnier to either of the said parties hereto of the second part; but that all such several mortgages, charges, securities, liens, and also all such bonds, bills, notes, and other securities from third parties, shall be and continue available in the hands of the several creditors parties hereto holding the same, in the same manner to all intents and purposes as if these presents had not been made: Provided always that, if the said James Julius Mugnier shall make default in payment of the said composition on the said 8th day of May next, and such composition shall remain unpaid for the space

of fourteen days next after that day, the release hereinbefore contained shall be void and of none effect. In witness," &c. [Then followed the schedule of creditors with the amount of their respective debts.] Averment that the said court of Bankruptcy, after the said production and after the reading of the said deed, and after hearing the defendant, and upon reading the affidavit of the defendant verifying the execution thereof, duly considered the said deed, and, being satisfied that it [290] had been duly entered into and executed, and that its terms were reasonable and calculated to benefit the general body of creditors under the said estate, did order and declare that such deed had been completely executed, and also directed that the same be, and it was thereupon, registered with the chief registrar of the said court of Bankruptcy: That all the matters aforesaid happened before this suit, and that, before and at the time of the happening thereof, the plaintiff was a creditor of the defendant in respect of the sums of money and causes of action herein pleaded to, within the meaning of the Bankruptcy Act, 1861: *And that he, the defendant, had always been and still was ready and willing to pay to the plaintiff the said composition or sum of 5s. in the pound on the amount of the said sum herein pleaded to, according to the provisions of the said deed of composition: And that, all conditions having been performed and all things having happened necessary in that behalf, the plaintiff became and was and is bound by the said deed of composition, as if he had been a party thereto, and had duly executed the same.*

The plaintiff demurred to this plea: the ground of demurrer stated in the margin being,—“that the plea shews no tender or payment of the composition to the plaintiff at or before the time appointed.” Joinder.

Replication to the second plea,—that the defendant made default in payment of the said composition on the said 8th day of May, 1863, and the said composition remained unpaid to the plaintiff for more than fourteen days next after that day; and that the said composition still remains unpaid to the plaintiff, and that the same never has been paid or tendered to the plaintiff.

Rejoinder to the replication to the second plea,—that the plaintiff was not on and during the said 8th [291] day of May in the replication mentioned, and for the space of fourteen days next after that day, within the realm of England, but was out of the realm of England.

To this rejoinder, the plaintiff surrejoined,—that he, the plaintiff, was a native of the empire of France, and, long before the accruing of the said debt in the declaration mentioned, was, and had always thence hitherto been, resident and carried on his business at Paris, in the said empire, and not in England; and that the plaintiff was not in England at the time of the contracting or accruing of the said causes of action, and that the said bill of exchange in the declaration mentioned was drawn by the plaintiff at Paris aforesaid, and was given by the defendant, and that the said accounts were stated for and in respect of the price of certain goods which were supplied by the plaintiff to the defendant, and the said goods mentioned as sold and delivered in the second count were also supplied and sent by the plaintiff from his said place of business at Paris to the defendant; and that the plaintiff was not in England at the time of the making of the said deed by the defendant,—of all which premises the defendant had notice at the time of the executing of the said deed by him; and that the plaintiff had not notice of the making thereof at the time of the making or on the said 8th day of May, 1863, or within fourteen days after that day.

The defendant demurred to this surrejoinder: the grounds alleged in the margin being,—“1. That, notwithstanding the allegations of fact in the said surrejoinder alleged, yet the defendant was not bound in law to seek out the plaintiff in Paris, or elsewhere out of England, to pay or tender to him the composition. 2. That the surrejoinder does not allege that a reasonable time elapsed between the time of payment in the [292] composition-deed mentioned and the commencement of this suit, within which the defendant could seek out the plaintiff in Paris, or elsewhere out of England, and pay to him the said composition. 3. That it is consistent with the said surrejoinder, that the said composition was not paid by the defendant to or received by the plaintiff, through his own default.” Joinder.

Dowdeswell, for the plaintiff (a). Three principal questions present themselves in

(a) The points marked for argument on the part of the plaintiff were as follows:—

Under the first demurrer,—“1. That the plea shews no fulfilment of the terms of

this case,—first, whether the deed set out in the second plea operates as a release or only as a covenant not to sue,—secondly, whether the whole scope of the deed does not shew that it was the payment of the composition which was to be the act to discharge the defendant, and whether the plea is not bad for not alleging payment or a tender,—thirdly, whether, where a man contracts with another in a foreign country to pay a debt on a given day, the creditor is bound to come to this country to demand payment.

1. The deed contains a covenant on the part of the defendant to pay the composition; and, in consideration of that payment, the parties of the second part (the creditors executing it) covenant to release the debtor from all claims,—saving their remedy on securities. This, though in terms a release, in effect amounts only to a covenant not to sue; *Solby v. Forbes*, 2 Brod. & B. 38, 4 J. B. Moore, 448; *Willis v. De Castro*, 4 C. B. (N. S.) 216; *Price v. Barker*, 4 Ellis & B. 760. The court will look at the general intent, rather [294] than at the particular words of the instrument. Coleridge, J., in delivering the judgment of the court of Queen's Bench in the last-mentioned case, says: "We quite agree with the doctrine laid down by Lord Denman in *Nicholson v. Perill*, 4 Ad. & E. 675, 6 N. & M. 192, as explained by Baron Parke in *Kearsey v. Cole*, 16 M. & W. 136, that, if the deed is taken to operate as a release, the right against a party jointly liable cannot be preserved; and we think that we are bound by modern authorities (see *Solby v. Forbes*, 2 Brod. & B. 38, 4 J. B. Moore, 448, *Thompson v. Lark*, 3 C. B. 540, and *Payler v. Hammersham*, 4 M. & Selw. 423) to carry out the whole intention of the parties as far as possible, by holding the present to be a covenant not to sue, and not a release." [Willes, J. It does not appear upon this record that there are any securities.] That is a matter which is exclusively in the defendant's knowledge. [Williams, J. All these authorities are very fully commented upon by Vice-Chancellor Turner, in *Squire v. Ford*, 9 Hare, 47.]

2. Then, as to the effect of the last proviso in the deed. It is the payment, and not the mere covenant to pay, that is to operate to discharge the debtor, and therefore the defendant was bound to aver either payment, or that he tendered the money. In

the deed so far as the plaintiff is concerned: on the contrary, it only states a readiness and willingness to pay, but no tender:

"2. That the deed is not a composition-deed binding on non-executing or assenting parties, within the terms of the Bankruptcy Act:

"3. That the second rejoinder is bad, because the facts therein stated are wholly irrelevant, and that it was the duty of the defendant to have sought out the plaintiff and tendered to him the composition; that it differs widely from the case of an ordinary debt, where the parties creditors are or may be presumed to be cognizant of the time of the debt becoming due, and the debtor may reasonably be excused from tendering the debt or paying it on a stipulated day, but here the deed is executed behind the plaintiff's back, without his knowledge that any particular day was fixed for the payment; that here the party executing the deed, and seeking to avail himself of it, bound himself to pay on a given day, and he ought to have complied with the terms of that obligation, in order to enable him to avail himself of its protection; and that the facts stated in the replication, even if true, would afford no answer."

Under the second demurrer,—"That the facts stated in the surrejoinder afford no answer, if answer be necessary, to the rejoinder; that they shew that the plaintiff did not voluntarily absent himself, and the defendant, when he executed the deed, ought to have known or ascertained that the plaintiff was in England, or at all events to have tendered the composition to the plaintiff; that, although a creditor absenting himself from England on the day on which a payment becomes due, may in ordinary cases absolve the debtor from tendering it, yet that rule does not apply where the creditor is a foreigner and abroad when the debt arises and becomes due, and the debtor contracted with him while residing abroad; that, at all events, the debtor is not absolved from tendering a debt under such a deed as the present, when he knew his creditor was a foreigner resident abroad; that it was the defendant's own act to bind himself to pay or tender the money to his creditor, and he cannot avail himself of the protection of his own deed, without compliance with its terms, when he had notice at the time that his creditor was not in England; and that it is no answer to a debt contracted abroad, or on a bill drawn abroad, to allege that the plaintiff was not in England when it became due, and the defendant was then ready to pay."

the notes to *Cumber v. Wane* (1 Stra. 426), in 1 Smith's Leading Cases, 5th edit. 294, treating of a class of cases which are exempted from the doctrine laid down in the principal case, viz. "those in which a debtor has induced a number of his creditors to accept a composition amounting to less than their entire demand," the learned editors say: "Such an agreement, if entered into with the debtor by a number of creditors, each acting on the faith of the engagement of the others, will be binding upon them; for, each in that case has the undertakings of the rest as a consideration for his [295] own undertaking: *Reay v. Wile*, 3 Tyrwh. 596, 1 C. & M. 748 [See the judgment in *Boul v. Houl*, Cam. Scac. 1 Hurlst. & N. 938, where the plaintiff's agreement, if any, was not with the debtor, but only with another of the creditors.] And so of an agreement to give time: *Goode v. Chessman*, 2 B. & Ad. 328. But, if one of the creditors be afterwards refused the benefit held out to him by the arrangement, it will cease to be binding on him: *Gerard v. Woolmer*, 8 Bingh. 258, 1 M. & Scott, 327. So, if the consideration in any manner fails, the agreement is at an end. Thus, if some creditors sign, on the faith that others will do so, if the others hold out, those who have subscribed already are not bound: *Reay v. Richardson*, 2 C. M. & R. 422. So, if it purport to pass an interest in lands, but want the formalities required by the Statute of Frauds, it will not bind the creditors: *Abdon v. Hopkins*, 1 N. C. 99, 4 M. & Scott, 615. Nor will the debtor be entitled to the benefit of it, if he neglect to perform accurately what is to be done on his part. Thus, he must tender the composition-money on the appointed day; for, as Lord Ellenborough said, in *Cranley v. Hubbard*, 2 M. & Selw. 120, the party to be discharged is bound to do the act which is to discharge him: accord, *Shipton v. Casson*, 5 B. & C. 378, s D. & R. 130; *Wenham v. Fawc*, 3 Dowl. P. C. 43; *Reeling v. Muggersidge*, 16 M. & W. 181; *Evans v. Powis*, 1 Exch. 691." It was clearly incumbent on the debtor to tender the amount: readiness and willingness will not suffice: *Hazard v. Ware*, 6 Hurlst. & N. 434. In that case, to an action of debt, the defendant pleaded that, after the accruing of the debt he became bankrupt, and that, after the bankruptcy, he and P. R., in pursuance of the 230th section of the Bankrupt Law Consolidation Act, 1849, made an offer of composition, which was accepted by nine tenths in number and [296] value of the creditors, the offer being to pay 4s. in the pound in full satisfaction of his debts, such composition to be paid to all the creditors in cash within fourteen days after the second sitting to be appointed under the 230th section; that the court ordered the adjudication to be annulled; that P. R. joined in making the offer of composition, in consideration of all the effects of the defendant being assigned to him by the defendant; that the defendant and P. R. paid the composition to the other creditors; and that the defendant had always been ready and willing to pay, and brought into court the amount of the composition on the plaintiff's debt, ready to be paid to him: and it was held that the plea was bad, for not shewing a payment or tender within the fourteen days. "If," said Pollock, C. B., "this had been a mere voluntary agreement by all creditors, it is clear that payment or tender, or attempt to pay or tender, would have been necessary to make a defence to the original claim. The agreement set forth in the plea is distinct, that the *sum* agreed to be paid, and not the *agreement* to pay it, was to be taken in satisfaction of the original debt. Then, *Evans v. Powis*, 1 Exch. 691, is in point against the defendant. It is said this leaves the debtor at the mercy of a recusant creditor, whose abode is not known, and who avoids a tender. Even if so, we think we ought not to construe the act of parliament otherwise than we do. But the objection is imaginary: practically, such difficulties will not occur. Debtors generally know where their creditors live: and we incline to think that a formal tender might not be required, if a reasonable effort to pay were made."

3. Upon the third point, very little authority is to be found. Littleton in § 340 says: "Also, upon such case of feoffment in mortgage, a question hath been [297] demanded in what place the feoffor is bound to tender the money to the feoffee at the day appointed, &c. And some have said, upon the land so holden in mortgage, because the condition is depending upon the land. And they have said that if the feoffor be upon the land there ready to pay the money to the feoffee at the day set, and the feoffee be not then there, then the feoffor is quit and excused of the payment of the money, for that no default is in him. But it seemeth to some that the law is contrary, and that default is in him: for he is bound to seek the feoffee if he be then in any other place within the realm of England. As, if a man be bound in an obligation of 20l. upon condition indorsed upon the same obligation that, if he pay to him

to whom the obligation is made at such a day 10l., then the obligation of 20l. shall lose his force, and be holden for nothing: in this case it behoveth him that made the obligation to seek him to whom the obligation is made, if he be in England, and at the day set to tender unto him the said 10l., otherwise he shall forfeit the sum of 20l. comprised within the obligation, &c. And so it seemeth in the other case, &c. And albeit that some have said that the condition is depending upon the land, yet this proves not that the making of the condition to be performed ought to be made upon the land, &c., no more than if the condition were that if the feoffor at such a day shall do some special corporal service to the feoffee, not naming the place where such corporal service shall be done. In this case the feoffor ought to do such corporal service at the day limited to the feoffee, in what place soever of England that the feoffee be, if he will have advantage of the condition, &c. So it seemeth in the other case. And it seems to them that it shall be more properly said that the estate of the land is depending upon the condition, than to say that the [298] condition is depending upon the land, &c. *Sed quare, &c.*" Lord Coke, commenting upon the words "within the realm of England," says, *Co. Litt.* 210 b.: "For, if he be out of the realm of England, he is not bound to seek him, or to go out of the realm unto him. And for that the feoffee is the cause that the feoffor cannot tender the money, the feoffor shall enter into the land as if he had duly tendered it according to the condition." [Willes, J. That applies only to the case of one who was in England at the time the obligation is made, and who afterwards goes out of the realm.] Precisely so. It may be conceded that, if this had been the case of a contract entered into in England, and the plaintiff had by going out of England prevented the defendant from paying or tendering the money, the latter might have been discharged. But here the contract was made in Paris. Paris, therefore, is the *locus solutionis*.

Tapping, *contra* (a). 1 The deed set out in the second plea operates as a release,

(a) The points marked for argument on the part of the defendant were as follows:—

As to the demurrer to the second plea,—"1. That the deed of arrangement and composition set forth in the second plea is a good and valid deed, and released the defendant from his then debts, by virtue of the Bankruptcy Act, 1861 (24 & 25 Vict. c. 134, ss. 185-191); and such deed, registered in bankruptcy, is, although the plaintiff has not executed it, binding on him in all respects as if he had executed it:

"2. That the court will not review the terms of the deed set out in such second plea, because it appears by such plea that the court of Bankruptcy, acting under s. 187 of such act, was duly satisfied that the terms of such deed were reasonable and calculated to benefit the general body of the defendant's creditors:

"3. That the alleged deed is one which this court will adjudge to be reasonable in its terms, and calculated to benefit the general body of the defendant's creditors:

"4. That the consideration for the release contained in such alleged deed was, the defendant's covenant and agreement to pay a composition of 5s. in the pound, and not the actual payment thereof:

"5. That the last proviso in such deed, purporting to avoid the preceding release in case of default made in payment of the composition, does not legally limit or derogate from the absolute and unconditional character of such release:

"6. That it is not necessary for the defendant to specifically aver in his said third plea a tender or payment of the said composition to the plaintiff before or at the time appointed for payment, because the said plea, according to the Common Law Procedure Act, 1852, s. 57, avers generally the performance of all conditions precedent, which averment includes by implication an allegation of such tender or payment:

"7. And that the said third plea is in all other respects a good and perfect plea, answer, and defence in law to the plaintiff's claim."

As to the demurrer to the surrejoinder,—"1. That, notwithstanding the allegations of fact in the plaintiff's second surrejoinder, yet they do not shew any legal obligation on the defendant to seek out the plaintiff in Paris, or elsewhere out of England, in order to pay or tender to him the said composition:

"2. That, according to the terms of the defendant's covenant to pay the composition, the defendant was not bound to seek out the plaintiff in Paris or elsewhere out of England, and to tender to him the amount of such composition: *Co. Litt.* § 340, 211 b., and Hargrave and Butler's notes thereto; *Shep. Touchst.* 378:

"3. That such second surrejoinder does not allege that a reasonable time elapsed

and not merely as a [299] covenant not to sue. All the cases cited were cases of joint-contractors, where the release of one was sought to be set up as a release of all. But there is nothing upon this record to bring the case within that category. The deed contains a clear and unambiguous [300] release, which is wholly unaffected by the provision in the subsequent clause saving the remedies of the creditors against third persons. There was a similar reservation of rights in the deed which in *Kings v. Ellins*, 33 Law J., Q. B. 25, was held to be well pleaded as a release. The replication there raised the very point here taken. Cockburn, C. J., there says: "It is not necessary that we should say what would be the effect of the clauses in the Bankruptcy Act in cases of deeds in which there was no release,—whether the effect would be to give the debtor a remedy by having [301] recourse to the court of Bankruptcy, or whether he would be able to plead the deed in bar to the action. In the case before us, we have matter which was not present in the case referred to (a): we have a release by the creditors: and, for the purpose of considering Mr. Cleasby's argument, a release which is qualified by the reservation of the right of the creditors in proceeding against the sureties. Now, Mr. Cleasby says that, according to legal principles, such a release of the debtor would not operate as a release absolutely, but only as a covenant not to sue: but he seems to admit that the effect of such a release might be pleaded in bar to an action brought by a person who was a party to the deed: though he contends that it could not be so pleaded to an action by a person who is only a party to the deed by reason of the provisions of the Bankruptcy Act, 1861, in s. 192. But I find that those provisions amount to a statutory enactment that, with regard to a creditor who does not execute the deed, the release shall, if the requirements of the section are carried out, be as valid and effectual and binding on him as if he had been a party to and had duly executed the same. The execution by the necessary proportion of the creditors is therefore considered as the execution of all the others, and the creditor who does not execute must be taken as being bound by the deed. But I feel, after what Mr. Mellish has said, that we need not decide the case upon that ground: for it seems to me that there is here a good release to the debtor, and not merely a covenant not to sue. Mr. Mellish says that it is an absolute release by all the creditors, with the exception of those who have sureties, in which case they reserve to themselves the right to proceed against them. Now, the plaintiff [302] has no person in the position of a co-debtor, and therefore he has absolutely released the debtor; the only way the objection could prevail would be by reason of producing inequality among the creditors: but the statute says that the deed shall be binding unless it contains something unreasonable. Now, to make it unreasonable on the ground of inequality among the creditors, there ought to

between the time for payment in the composition-deed mentioned and the commencement of this suit, within which the defendant could or was obliged to seek out the plaintiff in Paris or elsewhere out of England, and pay to him the said composition:

"4. That it is consistent with all the allegations of the said second surrejoinder that the said composition was not paid by the defendant to or received by the plaintiff, through the plaintiff's own and sole default:

"5. That the only allegation in the second surrejoinder, of notice to the defendant of the facts in such surrejoinder contained, is a notice of facts at the time of the executing of the composition-deed, which manifestly cannot operate as notice of such facts as are alleged by the said surrejoinder to have occurred subsequently to the execution of such composition-deed, i.e. that the plaintiff thence hitherto continued resident in Paris, and carried on his business there:

"6. That the plaintiff being resident and carrying on business out of England, should, in order to take advantage of the last proviso in the composition-deed, have given before action due notice to the defendant of some place in England where he might perform his covenant to pay, by paying or tendering the amount of such composition, which is not alleged:

"7. That the plaintiff had notice of the making of the said composition-deed, because it appears by the defendant's third plea that the arrangement meeting was duly held, which implies a publication thereof in the *London Gazette*:

"8. That such second surrejoinder is in other respects bad in substance, and does not allege facts which constitute a legal answer to the defendant's pleadings."

(a) *Ipsstones Park Iron Ore Company v. Pattinson*, 2 Hurlst. & Colt. 828, 33 Law J., Exch. 193.

be some substantial inequality. In substance and essence, whether it be a release or a covenant not to sue, the deed may be set up to prevent an action being brought against the debtor. I cannot see any real effectual inequality, or anything to shew that it is unreasonable: and therefore I hold it a good deed under s. 192, and that the plaintiff is bound by it." And Crompton, J., intimated an opinion that *Clapham v. Atkinson*, 4 Best & Smith, 722, 730, was practically the same as the case then before the court, and that the plea was good as shewing an equitable defence to the action. [Willes, J. That case is very much in point in your favour.]

2. It must be conceded that the plea would be insufficient as a plea of tender: *Roberts v. Brett*, 6 C. B. (N. S.) 611. But there is a general allegation of the performance of all things necessary to make the deed valid and binding upon the plaintiff, under the 57th section of the Common Law Procedure Act, 1852. In *Bentley v. Davies*, 9 Exch. 666, the declaration stated that the defendant had contracted to sell, and the plaintiff to purchase and accept from the defendant, a large quantity of iron, &c., and "the plaintiff averred performance of all conditions precedent, and that all things had been done and happened to entitle the plaintiff to have and receive the whole of the said quantity of iron," and that, although the defendant had delivered a part of the said iron, and although a reasonable time had elapsed, and although the plaintiff [303] was ready and willing to accept and receive the residue of the iron, of which the defendant had due notice, yet the defendant had not delivered the residue of the said iron in pursuance of the said contract: and it was held, on demurrer, that the general allegation of performance, and of all things having happened to entitle the plaintiff to receive the whole of the iron, contained a sufficient statement that the plaintiff was ready and willing to pay for the residue of the iron on delivery. Upon the authority of that case, it is submitted that this averment is sufficient to cast upon the plaintiff the onus of shewing by his replication that no tender has been made.

3. Upon the authority of Co. Litt. § 340, Shep. Touchst. 378, and the dictum of Dampier, J., in *Cranley v. Hillary*, 2 M. & Selw. 120, the rejoinder is a good answer to the replication. In Sheppard, it is said that, "if the condition of an obligation be to pay money or do any like transitory act to the obligee on a day certain, but no place is set down where it shall be done, in this case it must be done to the person of the obligee, wheresoever he be; and for this purpose the obligor must at his peril seek out the obligee, if he be intra quatuor maria, otherwise the obligation is forfeit: but, if the obligee be not within the kingdom at the time when the thing is to be done, he is not bound to seek him, so neither is the obligation forfeit for not doing of the thing." And Dampier, J., in *Cranley v. Hillary*, says: "It is laid down in Littleton, § 340, that the obligor of a bond conditioned for the payment of money at a particular day, is bound to seek the obligee if he be in England, and at the set day to tender him the money, otherwise he shall forfeit the bond." [Willes, J. That supposes the obligation made in England. But how if it were made abroad?] There is nothing but the first count to shew that the [304] bill here sued upon was a foreign bill: the plea and replication are to the whole cause of action. The place where a bill is made payable is the test whether it is an English or a foreign bill: *Rothschild v. Currie*, 1 Q. B. 43. [Willes, J. Is the obligation for ever gone? or the feoffment for ever valid?] The duty of demanding the money or the land again is cast upon the obligee or feoffee. The same law is laid down in *Habham v. Johnson*, 8 Exch. 689, where all the authorities are reviewed by Baron Martin. Is the debtor to dodge his creditor all over the world?

The surrejoinder is altogether informal. The material time is not "the time of the accruing of the causes of action," but the 8th of May, 1864, the day on which the composition was payable: 24 & 25 Vict. c. 134, s. 187.

Dowdeswell, in reply. Upon general principles, this deed cannot operate as a release: it amounts only to a covenant not to sue. It cannot be so construed as to have one operation as to some of the parties and another as to others. *Keyes v. Elkins*, 34 Law J., Q. B. 25, is at variance with *Prior v. Barber*, 4 Ellis & B. 760. If the creditor's remedy be suspended for an instant, it is gone altogether. The defendant was bound to plead performance: readiness and willingness alone will not do: *The London Dock Company v. Sinnott*, 8 Ellis & B. 347.

ERLE, C. J. I think our judgment in this case should be for the plaintiff. It is unnecessary to decide whether the deed set out in the plea amounts to a release or operates only as a covenant not to sue, because I hold the plea to be bad for not averring payment or a tender or the composition. The covenant is, that Mugnier will

on or before the 8th of May next pay [305] unto each of the parties of the second part, his creditors, a composition of 5s. in the pound on the amount and in full discharge of their respective debts and claims. And at the end of the deed is a proviso that, if Mugnier shall make default in payment of the said composition on the said 8th of May next, and such composition shall remain unpaid for the space of fourteen days next after that day, the release thereinbefore contained shall be void and of none effect. Now, the plea contains no averment that the composition was paid or tendered or offered to the plaintiff. All that is averred is, that the defendant had always been and still was ready and willing to pay. I think that is not enough. And the general averment at the end of the plea that, all things having happened necessary in that behalf, the plaintiff became and was bound by the deed as if he had been a party thereto and had duly executed the same, only relates to such conditions as are essential to make the deed binding upon the plaintiff as a non-executing creditor, but not to conditions to be performed subsequently by the debtor. Then, as to the excuse for not paying or tendering the money, set up in the rejoinder, viz. that the plaintiff was not on and during the said 8th day of May, in the replication mentioned, and for the space of fourteen days next after that day, within the realm of England, but was out of the realm of England,—the authorities seem to me to establish this distinction that, if the plaintiff was in England when the contract was made, and went beyond the seas afterwards, the law would not cast upon the defendant the duty of following him for the purpose of paying or tendering the money. The contract in that case would be construed to mean that the debtor would on the day named pay the creditor the money, provided he was then in England ready to receive it. But where, [306] as here, the contract was made in Paris, and the plaintiff was residing in Paris at the time of the execution of the deed, and at the time of its registration, his absence abroad affords no excuse for the defendant's not tendering him the money.

WILLIAMS, J., WILLES, J., and KEATING, J., concurring,
Judgment for the plaintiff.

CALVERT v. THE SCINDE RAILWAY COMPANY. Jan. 31st, 1865.

[11 Jur. N. S. 245; 13 W. R. 430.]

In an action by an engineer against an Indian railway company, for wrongfully dismissing him from their service without notice, the defendants at the trial consented to a verdict being entered for the plaintiff for 350l., being 200l. for a quarter's salary, and 150l. for the plaintiff's passage home to England: and, on taxing his costs, the Master allowed the plaintiff (who was a material and necessary witness) subsistence-money during his stay in England waiting for the trial (a year and a half), at the rate of 300l. a year and also 150l. for his passage out to India,—it appearing that the company justified their dismissal of the plaintiff, on the ground of alleged improper conduct, and that the trial had been delayed for twelve months in consequence of the defendants' having obtained a commission for the examination of witnesses at Lahore, the execution of which had been unreasonably delayed: and the plaintiff swearing that he was going back to India, where he had left his wife and family:—Held, that the allowances were not excessive.

This was an action brought by the plaintiff to recover from the defendants damages in respect of his wrongful dismissal from their service, and for not providing him with a passage from Lahore to England, pursuant to their contract.

The first count of the declaration stated that it was agreed by and between the plaintiff of the one part and the defendant of the other part, that the plaintiff should engage himself in the service of the defendants, and serve them as district-engineer in India, and that the defendants would retain and employ the plaintiff in the said capacity, in India, *for the term of three years from the 27th of January, 1862*, on the terms following, that is to say, that the plaintiff should reside [307] in such place, and remove from time to time to such place or places in India, and occupy and employ himself, as should be required by the agent or chief engineer of the defendants in India; and that the plaintiff should faithfully and diligently employ himself in the service of the said defendants as district-engineer in such other manner and at such place or places as the agent or chief engineer of the defendants should require, and devote the whole of his the

plaintiff's time and attention to the service of the said defendants; and that the plaintiff should render and perform due, faithful, and exclusive services to the said defendants for the said three years as aforesaid; and that the defendants should, in consideration thereof, pay to the plaintiff during the continuance of his said services the sum of 800*l.* per annum, in India: that, if the plaintiff should at any time omit, neglect, or refuse to perform any of the duties required of him, or all or any of the orders of the said agent or chief engineer of the said defendants, or should in any manner misconduct himself, it should be competent to the defendants or their agent at Lahore to declare the employment of the plaintiff at an end, and in such case the said defendants should not be under any obligation to provide the plaintiff with a passage to England, or to pay any travelling expenses connected therewith; that, in the event of the defendants' becoming desirous to terminate the engagement of the plaintiff at an earlier period than three years from the commencement thereof, they should be at liberty to do so, on giving him six calendar months' notice, determinable at any period of the year, signed by the secretary or agent or other person authorized in that behalf, by leaving such notice at the last or last-known place of residence of the plaintiff in the East Indies, but in that case the defendants should, provided the engage-^[308]ment should have been terminated, provide the plaintiff with a passage to England, and pay the travelling expenses of the plaintiff at the expiration of the said term of three years, if the conduct of the plaintiff should have been satisfactory to the defendants, or in the event of his being under the necessity from illness of returning home, provided that it should be satisfactorily established that such necessity existed, and that it was not occasioned by any impropriety on the part of the plaintiff, and that he should be provided with a certificate of good conduct from the proper officer of the defendants in that behalf: that the plaintiff accordingly engaged himself in the service of the defendants in the capacity and on the terms aforesaid; and that, although all conditions were performed and all things done and happened, and all times elapsed necessary to entitle, and nothing happened to disentitle, the plaintiff to have the said agreement performed by the defendants, and to maintain this action for the breach thereof thereafter alleged, and although the plaintiff entered into the said service in the capacity and on the terms aforesaid, and served the defendants for a portion of the said three years, and was always ready and willing to continue in the said service in the capacity and on the terms aforesaid during the remainder of the said three years, whereof the defendants always had due notice,—yet the defendants, before the expiration of the said three years, and without any such notice as in the said agreement provided, wrongfully dismissed the plaintiff from the said service in India, whereby he lost all the salary and profits which he would have derived from being retained therein, and was forced and obliged to remove himself and his family at a great expense from that part of India in which he had resided whilst in the defendants' employment, and to sell off his goods, ^[309] chattels, and household effects, at a great loss, and was for want of funds, and by reason of the premises, forced and obliged to remain in India, and disabled from returning home to England with his family, to his great loss and detriment.

There was also a count for work and labour, money paid, and money found due upon accounts stated.

The defendants pleaded, amongst other pleas, as follows:—That, before the dismissal of the plaintiff, the plaintiff, in breach of the terms of the said agreement, omitted neglected, and refused to perform divers duties required of him, and divers orders of the said agent and chief engineer of the defendants, and otherwise misconducted himself, to wit, by an open defiance of the orders of the said chief engineer, instead of transferring the temporary charge of his district to one Phillips, during the plaintiff's absence on leave, instructing the same to a native moonshee, with instructions not to attend to any directions he might receive from the defendants' engineers in the district; and also by wrongfully, improperly, and in breach of his duty, charging the defendants with the salary of a baboo; and also by improperly attempting to intimidate one Strong into attaching his name to a false statement, with the object of injuring Mr. Phillips one of the defendants' servants; and also by vexatiously and without any probable cause making a false and unfounded accusation seriously affecting the integrity of Mr. Strong, one of the defendants' servants; and also by omitting to refer to the defendant's chief engineer (as the plaintiff was bound to do) a matter relating to one of the defendants' officers, and in lieu thereof applying to the deputy-commissioner of Gorgavia

to take proceedings against such officer, in breach and violation of the duty which the plaintiff then owed to the defendants; wherefore the defend-[310]-ants, agreeably to the power given them by the said agreement, declared the employment of the plaintiff at an end, and dismissed him from the defendants' said service.

The cause being at issue, notice of trial was given for the sittings after Michaelmas Term, 1863, and it would have been tried at those sittings, but the defendants on the 7th of December obtained an order for the examination of witnesses at Lahore under a commission. The commission was not sent out until the 26th of July, 1864, and was not returned until the 8th of December, 1864. The cause came on for trial on the 20th of December, when the defendants by their counsel consented to a verdict being entered for the plaintiff for 350*l.*,—being 200*l.* in lieu of a quarter's salary under the agreement, and 150*l.* for his passage-money and travelling-expenses to England.

On the taxation of costs, the plaintiff claimed and was allowed by the Master, besides the general costs of the cause, subsistence-money at the rate of 300*l.* per annum for a year and a half during which he was necessarily detained in this country for the purpose of attending and giving evidence at the trial, and also 150*l.* for his passage and expenses back to Lahore, where he swore that his wife and family were residing, and he intended to return.

Lush, Q. C., on a former day in this term moved for a rule nisi to review the taxation, on the ground that the allowance for subsistence-money was excessive, and that the passage-money and travelling-expenses to England had been included in the verdict. [The Master stated that he should, but for that circumstance, have allowed passage-money and expenses *both ways*.]

The rule was granted, subject to payment of the residue of the costs within four days.

[311] Bovill, Q. C. and Woollett, on a subsequent day, shewed cause. Subsistence-money has always been allowed where a witness is necessarily detained in this country to await the trial of a cause: and the reasonableness of the amount is for the discretion of the Master: *Platt v. Green*, 2 Dowl. 216. In *Evans v. Watson*, 3 C. B. 327, in an action for breach of a charterparty, the trial having been postponed at the instance of the defendants, the plaintiff detained the captain of the vessel in this country for a period of three hundred days, having been advised by counsel that he could not safely examine him under the 1 W. 4, c. 22, the defendants having intimated an intention to call witnesses to impugn his conduct: and it was held that, upon taxation of the costs, the plaintiff was entitled to subsistence-money for the witness during the whole period of his detention. "If," said Tindal, C. J., "the witness had been wantonly and unnecessarily kept here by the plaintiff, the case would have been very different. But I am of opinion he was under the circumstances very properly detained for examination *vivâ voce*, in consequence of the intimation from the defendants that they meant to impugn his conduct." And Coltman, J., said: "The court is bound to award to a successful plaintiff all costs reasonably and properly incurred by him in the prosecution of his suit. I think, after the notice that the defendants meant to attack him, the plaintiff was perfectly justified in detaining the witness for examination in open court." [Willes, J. If this gentleman had been a witness for any one else, there would have been nothing extraordinary in the allowance.] The circumstance of his being plaintiff in the cause makes no difference. In *Howes v. Barber*, 18 Q. B. 588, the plaintiff, a master-mariner, remained in England unemployed, from the issuing of the writ in Sep-[312]-tember, 1851, solely for the purpose of giving evidence in the cause, until January, 1852, when the trial took place: and it was held that the Master, on taxation, was justified in allowing him subsistence-money during that period. So, in *Dowdell v. The Australian Royal Mail Steam-Navigation Company*, 3 Ellis & B. 902, the plaintiff was allowed subsistence-money from the commencement of the action, before Michaelmas Term, till the disposal of a rule for a new trial in Easter Term, he being found by the Master to have been a material and necessary witness [Keating, J. What was there to prevent the plaintiff's being examined upon interrogatories in India?] The state of the record here abundantly shews that the presence of the plaintiff was essential if the cause had been tried out. The plea charged him with misconduct. [Erle, C. J. The allowance for the return voyage presents the greatest difficulty to my mind.] The plaintiff came from Lahore for the purpose of attending the trial. His family remained there; and he swore that he was about to return thither.

Lush, Q. C., and Sir G. Honyman, in support of the rule. The question is, whether

the Master has not somewhat exceeded the limits of discretion in allowing the plaintiff the expenses of his voyage back to India, and subsistence-money for so long a period as a year and a half, he having already been allowed 150l. for his voyage and expenses from India to England. He went out at first at the company's expense; and their contract with him was, to provide him with a passage home at the expiration of the period of his service. What more could he be entitled to?

Cur. adv. vult.

ERLE, C. J., now delivered the opinion of the court:—

[313] This was a motion to review the taxation of the plaintiff's costs. The plaintiff had been engaged to serve the defendants, an Indian Railway Company, in the capacity of district engineer, at a salary of 800l. per annum, and brought this action against the company to recover damages for dismissing him from their service contrary to the terms of the contract. At the trial before me at the sittings after last Michaelmas Term, the defendants consented to a verdict being taken against them for 350l., being 200l. for a quarter's salary, and 150l. for the plaintiff's passage home to England, which by the terms of the contract he was entitled to. Having brought his action, —which was delayed a year in consequence of an order obtained by the company for the examination of witnesses in India,—the plaintiff stayed in England, for the purpose of giving evidence at the trial, for about a year and a half: and the Master, on taxing his costs, has allowed him subsistence-money for that period at the rate of 300l. per annum, and a further sum of 150l. for his voyage back to Lahore. We have felt much impressed with the necessity of exercising great caution, in order to prevent a party residing abroad, who chooses to bring an action here, from putting his opponent to such heavy expenses as this. But we have come to the conclusion that the allowance which has been made in this case is within the principle of law which is applicable to this subject. At the same time, we think it is the bounden duty of the Master not to allow a wanton accumulation of costs, but to exercise the most scrupulous care in checking everything which has a tendency to aggravate the burthen which the law casts upon the unsuccessful party to the litigation. In the present case, I see no sign of an attempt on the part of the plaintiff needlessly to inflame the costs: but I do see something like signs of wilful delay on the [314] part of the defendants, for which I can find no excuse. The sum allowed in this case is undoubtedly very large. But I think it is authorized by the principle laid down by this court in *Reynolds v. Horns*, 3 C. B. (N. S.) 267, in the judgment of Cockburn, C. J. His Lordship says: "We should be sorry to admit it possible that there is any imperative rule of law or inveterate practice, by which we are compelled to order that the expense of unsuccessfully attempting to prove falsehoods, which we know by the information of the judge to have been found false by the jury, must nevertheless be paid for by the party who so far had truth on his side. We apprehend that we may, and if we may we ought, to prevent our proceedings from being abused and perverted; and that we ought not to abstain from doing so in a case where the truth appears, because there may arise many others in which we cannot arrive at it. *We apprehend that the court is bound not to allow a successful party all the expense he may have thought proper to incur, where we can see that part of it has been needless.* If a party were to insist upon calling fifty witnesses to prove a notorious fact formally involved in a disputed issue, we may doubt whether the judge could lawfully reject the evidence of any one of them: but we cannot doubt that the Master would not allow, and that the court would uphold the Master in not allowing, the expenses of them all. *Quite independent of statute and rule, a discretion ought to be, and is in practice, exercised as to the amount of costs; and useless expenditure ought to be, and is in practice, disallowed.*" The same principle was recognized in *Evans v. Watson*, 3 C. B. 327. We have carefully considered this matter; and, if we had not been perfectly satisfied that no injustice has been done, a review of the taxation would have been ordered. We think it right, though it is hardly neces-[315]-sary, to warn the Masters that great care and caution are to be observed in such cases as these. We think the rule must be discharged with costs.

Rule discharged, with costs.

LANGTON AND ANOTHER, Assignees of Hollway and Others, Bankrupts v. WARING AND OTHERS. Jan. 18th, 1865.

[S. C. 11 L. T. 633; 13 W. R. 347. Referred to, *Young v. Matthews*, 1866, L. R. 2 C. P. 129.]

A. & Co. contracted with B. & Co. for the purchase of a large quantity of railway sleepers, to be delivered at intervals at the wharf of A. & Co., and to be paid for on delivery. The sleepers arrived at the wharf of B. & Co. in timbers of length sufficient when sawn asunder to make each two sleepers. After several deliveries had taken place, one of the firm of B. & Co. called at the office of A. & Co., and obtained from A. an advance of 600l. "*on account of the last cargo of timber,*" which he represented to be and which then was at the wharf of B. & Co., and a portion of which had already been sawn into sleepers:—Held, that this was such a specific appropriation of the timber and sleepers to A. & Co. (who had possessed themselves of them) as to entitle them to retain them as against the assignees of B. & Co., who had become bankrupt after the advance.

This was an action brought by the assignees of Messrs. Hollway, Hart, & Co., bankrupts, against the defendants, for the conversion of a quantity of timber and railway-sleepers, under the circumstances hereinafter mentioned. By consent, and under a judge's order, the following case was stated for the opinion of the court, without pleadings:—

1. The bankrupts carried on business as timber-merchants, under the firm of Hollway, Hart, & Co., at King's Lynn, in the county of Norfolk. The defendants are, and were at the time of the transactions hereinafter detailed, railway-contractors, carrying on business in Victoria Street, Westminster, under the firm of Waring & Co., and were constructing the works of the Lynn and Sutton railway.

2. In the months of May and June, 1863, a correspondence took place between the defendants and the bankrupts relative to the supply by the bankrupts to the defendants of a quantity of sleepers for the said railway, and of which the following are the material parts:—

[316] May 16th, 1863. Waring & Co. to Hollway, Hart, & Co.

"We shall require about 17,000 or 18 000 sleepers for the Lynn and Sutton railway. They will be as follows (stating the sizes required). We shall be glad to receive your price for the above."

June 16th, 1863. Hollway, Hart, & Co. to Waring & Co.

"We beg to annex our price for foreign sleepers for the Lynn and Sutton railway. Should you not require them for two or three months, of course we can arrange the shipments accordingly.

"Delivered alongside wharf.

"10,000	8 × 4 at 1s. 8d each.
5,000	9 × 4½ at 1s 10d. „ „
2,500	11 × 5½ at 2s. 9d. „ „

June 8th, 1863. Waring & Co. to Hollway, Hart, & Co.

"Lynn and Sutton railway sleepers. Let me know whether you could supply a large number of the 9 × 4½ sleepers at the price quoted say,

"3,000	.	.	.	.	8 × 4
14,000	.	.	.	.	9 × 4½
3,000	.	.	.	.	11 × 5½

"Also say what is the port where they would be shipped from, and whether they are red wood, and well grown; as I should not take white Dantzic or soft grown timber. They must be good, sound, well-grown stuff. The prices will suit, if the article is really good. Payment, six months' bill, renewable, at our option, three months, at bank rate of interest."

June 9th, 1863. Hollway & Co. to Waring & Co.

"You can have your quantity of sleepers at the prices quoted, all good, sound,

well grown Dantzic red wood. Four months, and renewable for three months. Reply, post to-night."

[317] June 10th, 1863. Waring & Co. to Hollway & Co.

"I have received your telegram. You must take six months' bill, renewable for three months. Let me know if you agree to this, and the matter will be settled. The sleepers to be delivered as late in the season as will be practicable; say, October 1st."

3. Either by letter or telegram, the above terms were accepted by Hollway, Hart, & Co. In the following July, the terms were by letters between the parties modified so far as that the defendants agreed to pay cash instead of bills, on being allowed a certain discount, which is not at present material.

4. A large portion of the sleepers were delivered and paid for under the above contract: and, in the month of December, 1863, the last lot only remained to be delivered. Hollway, Hart, & Co. imported the timber from Dantzic in pieces each of which when sawn made two sleepers. The cargoes were discharged at the wharf and premises of Hollway, Hart, & Co., at Lynn, where the timbers were sawn into sleepers as just mentioned, and then delivered alongside the wharf of the defendants, also at Lynn, at a distance of about half a mile from Hollway, Hart, & Co.'s works,—that being the wharf mentioned in the letter of the 6th of June, 1863, already set forth. The defendants knew that the timber was imported in sizes double those of the sleepers required, and that they required to be sawn up by Hollway, Hart, & Co., before delivery.

5. The last cargo, consisting of the timber necessary to complete the contract, arrived from Dantzic at the wharf of Hollway, Hart, & Co. on the 14th of December, 1863: and, on the 16th of December, John Hart, the younger (one of the firm), called at the office of the defendants at Lynn, and, in manner detailed in the examination set out in the appendix, asked for an advance of 600*l.* on account of that cargo.

[318] Thereupon Mr. Annett, the clerk to the defendants at Lynn, communicated with his principals in London (the defendants), and on the 19th, Mr. Eckersley, one of the defendants, came to Lynn, and made the advance requested. The details of what passed between John Hart, the younger, and Mr. Annett, and Mr. Eckersley, appear in the examination of these gentlemen before the Bankruptcy court, copies of which were appended to, and formed part of the case (*a*).

(*a*) Mr. Eckersley's examination before the Bankruptcy court was as follows:—

"William Eckersley, of King's Lynn, in the county of Norfolk, contractor, being sworn and examined, &c., upon his oath saith, —I am a member of the firm of Waring Brothers, & Eckersley, of Victoria Street, Westminster, contractors. We are the contractors of the line between Lynn and Sutton. In May last, we entered into a correspondence with the bankrupts for the supply of sleepers for this line. The contract was for 20,000 sleepers, which was contained in several letters. We have a clerk named Annett, who was our cashier at Lynn. He was only cashier, and kept the books. We had a manager on the line. On the 17th of December last, I got the following letter;—

"'Contractors' Office, King's Lynn,

"'16th Dec. 1863.

"'Dear Sir, —Mr. Hart has just called in to know if you could oblige him with a cheque for 600*l.* on account of the cargo of sleepers now in: he gives as a reason for this application, that he is called upon by his people at Dantzic to pay for the whole lot of sleepers he has had from them, and had hoped to have been paid by us for the last lot long ago; but the vessel has been so long on the way that the time for settling with his Dantzic firm had expired. He also says that the whole lot when sawn and delivered will come to between 800*l.* and 900*l.* In case you consent to let him have it, I enclose a cheque filled up.

"'R. C. F. ANNETT.

"On receiving this letter. I did not send the cheque; but I wrote to Mr. Annett to say that I should be at Lynn the next day, and would give him the necessary cheques for the pay and Mr. Hart, &c. I went down on the 19th, and saw Mr. Hart, who called at our office. He said he had been pressed for money by the parties from whom he had the sleepers, and that the vessel had been delayed by the stormy weather

[319] 6. All previous deliveries under the contract had been settled for, and the account between the parties stands in the defendants' books in the manner set out in the following account :—

Dr.				Hollway, Hart, & Co.				Contra.				Cr.			
1863.				£				1863.				£			
				s.								s.			
				d.											
September	2.	To Cash	.	54	0	0		August	13.	By timber	.	54	0	0	
"	4.	"	.	274	0	0		"	24.	" sleepers	.	274	0	0	
"	15.	"	.	360	0	0		September	14.	" "	.	360	0	0	
"	21.	"	.	495	0	0		"	18.	" "	.	495	0	0	
October	7.	"	.	47	0	0		"	25.	" timber	.	47	0	0	
November	11.	"	.	83	0	0		October	31.	" "	.	83	0	0	
December	5.	"	.	27	0	0		November	30.	" "	.	27	0	0	
"	16.	"	.	600	0	0				Balance,	.	600	0	0	
				<u>£1,940</u>								<u>£1,940</u>			
				0								0			
				0								0			

So far as regards the balance, the same was struck by the defendants' clerk on or about the 15th of January, 1864.

and that it would be a great convenience to him if I would advance him *on account of this cargo*. I agreed to do so, and gave him a cheque. I did not hand him the cheque personally. I handed it to Mr. Annett, who handed it to Mr. Hart in my presence : but what I state represents the whole transaction. *He asked for the money on account of that cargo then being discharged, and I agreed to give it to him on account of that cargo.* No receipt was taken, so far as I know. He said nothing about security : but I considered the cargo as security, but repeated his request that I would make him an advance either *on cargo, or on account of the cargo.* I do not recollect which word he used. I had made other payments on account of the contract for sleepers, but, so far as I know, not by way of anticipation. Mr. Hart stated on the 19th that the sleepers would be cut up very soon, and would be delivered very soon. On the 5th of January, I first heard that Hart, jun., had absconded. Previously to this, I had asked why the sleepers had not been delivered, and had directed my foreman to press for delivery, as we wanted the sleepers on the line. The moment I heard that Hart had absconded, I became anxious to have the sleepers in my possession, as I considered I had bought and paid for them. and shortly afterwards I took advice, and, acting upon it, I gave instructions to my people to take possession. Before my men took the sleepers, I saw Mr. Beloe, and I told him of my intention to take the sleepers. As far as I remember, I said the sleepers were ours, and we should take them. On that occasion, I don't remember making use of the word mortgage. *I am prepared to state that I advanced the 600l. on account of the specific cargo."*

The examination of Mr. Annett was as follows :—

"Richard Charles Francis Annett, of King's Lynn, in the county of Norfolk, cashier and clerk to Messrs. Waring, Brothers, & Eckersley, the contractors for the Lynn and Sutton line, being sworn and examined, &c., upon his oath saith. On the 16th of December last, Hart, jun., called on me and said, 'I have just called in to know if you think Mr. Eckersley would object to let us have (referring to the firm) 500l. or 600l. *on account of the cargo of sleepers now in.*' I replied, 'Well, you know that Mr. Eckersley is at present in London ; but there will be no harm done if I write telling him of your application : and I can let you have an answer by Friday morning.' He replied, 'I want it by to-morrow.' He stood thinking for a few moments, and then said, '*Well, Friday will do : will you write him by this post?*' I wrote the letter in his presence to Mr. Eckersley : he did not read the letter that I wrote : but he answered my questions whilst I was writing the application to Mr. Eckersley, and I therefore felt satisfied that I was giving a correct version of the application. I made a note in my diary, 'Hart called to know if we could let him have 600l. on account of cargo now in : told him I would write Mr. E. by this post.' On the Friday, the 18th, Mr. John Hart, jun., called again just after post-time to know what reply Mr. Eckersley had sent. I replied 'I have received no letter from Mr. Eckersley this morning, and therefore I am afraid he is away from London.' Later in the day, I received a telegram from Mr. Eckersley, that he would be at Lynn on Saturday, at 12. I then sent word

[320] The balance of 600l. in that account represents the state of the account when that sum had been advanced; but the price of the whole of the sleepers remaining to be delivered under the contract was between 800l. and 900l.

[321] 7. On the 29th of December, and before any of the sleepers were delivered, John Hart the younger committed an act of bankruptcy, by absconding, taking with him, amongst other moneys belonging to the firm, the proceeds of the cheque for 600l. handed to him by Mr. Eckersley.

[322] 8. On the 5th of January, 1864, Mr. Eckersley saw Mr. Beloe, then the attorney for John Hart, the younger, and Mr. Hollway, and claimed the sleepers, as mentioned in his examination.

9. On the 9th of January, however, the defendants sent about two hundred men to the works of Hollway, Hart, & Co., and took away 971 sleepers sawn up and ready for delivery, and 539 pieces of timber not then sawn up or converted into sleepers. The seizure and [323] taking away were against the will and without the consent of Hollway, Hart, & Co., who had not then been adjudicated bankrupts. The sleepers

to that effect to Hart, jun., and advised him to be in the way on Saturday. On Saturday, the 19th, I received a letter from Mr. Eckersley, repeating his telegram, that he would be at Lynn at 12, and adding, 'I will then give you the necessary cheques for the pay, and Mr. Hart, &c.' Mr. Hart came in some time during the morning, and I then told him it was certain Mr. Eckersley would be here, and that he had better be in the way to answer any questions Mr. Eckersley might wish to put to him as regarded a reason for the application. At 3 o'clock that afternoon, Hart, jun., called, and saw Mr. Eckersley and myself; when Mr. Eckersley said to him, 'I did not send your cheque, as I was coming down. I have no objection to your having the cheque, but tell us when the sleepers are likely to be delivered.' He replied, '*They are sawing away at them now, so that in a few days the whole cargo will be delivered.*' The cheque was then signed by Mr. Eckersley, who handed it to me, and I handed it to Hart, jun., at the same time saying, 'I must have some kind of receipt for this cheque, or I shall have nothing to shew for it.' He replied, 'Oh, look here: I will indorse it in your presence; for, *you will receive the account for the whole cargo next week, and then I shall have to trouble you for 200l. or 300l. more.*' Nothing was said by Mr. Eckersley or myself against this arrangement, the matter being treated in good faith, and not a doubt cast on either side. I subsequently made a note in the afore-said diary of his calling, which, as far as I can recollect, was, 'John Hart called and received his cheque; and, when entering up my cash book, I made a note on a slip of paper for the voucher-book, to the following effect:—'King's Lynn, 19th December, 1863. Memorandum. Paid Mr. John Hart, for Hollway and Hart, 600l., by cheque, on account of cargo per "Mare," per pro. Waring, Brothers, & Eckersley, R. C. F. Annett: and, when hearing of John Hart's absconding, I went to the bank and got the cheque bearing his signature for the 600l. I omitted to mention that, when Hart, jun., called on me on the 16th of December, I told him, 'I must give some reason in my letter to Mr. Eckersley for your application, or I don't think that you will have it.' He replied, '*This cargo, when sawn and delivered, will come to between 800l. and 900l., so that I shall have to trouble you for 200l. or 300l. more if he lets me have the 600l.*' I first heard about Hart, jun., having absconded on Monday, the 4th of January last. I have a note in my diary of the 2nd of January, which is as follows,—'Mr. Beloe called to know if I could tell him what moneys had been lately paid to Messrs. Hollway & Hart, and also to know if we did not owe them 200l. or 300l. on some contract. I told him that he must be referring to the present cargo of sleepers now in, on which Mr. John Hart, jun., had already asked and been paid 600l. on account of, and which he stated at the time would come to between 800l. and 900l., thus leaving 200l. or 300l. for us to pay when they were all delivered.' On Tuesday, the 5th of January, I saw Hart, sen., to whom I had written intimating my intention to take away the sleepers. We took possession on the 9th, of

"Sawn	.	.	.	971	9 × 4½
Not sawn	.	.	.	539	11 × 5½

"I entered the 600l. in the ordinary way to their debit in the ledger. I do not remember ever having stated that Mr. Hart, jun., had given the firm a mortgage on the sleepers."

seized were all made from timber which had formed part of the cargo which had arrived as before mentioned on the 14th of December. The timber seized was part of such cargo.

10. Messrs. Hollway, Hart, & Co. were adjudicated bankrupts on the 19th of January, 1864, on a joint petition by a creditor. The acts of bankruptcy on which the adjudication took place, were, as regards Henry Hollway, and John Hart, the elder, declarations of insolvency filed by them on the said 19th of January, 1864, and, as regards John Hart the younger, his absconding on the said 29th of December, 1863.

11. The plaintiffs were duly appointed assignees of Hollway, Hart, & Co.

12. It was admitted that before action the assignees made a demand of the sleepers and timber, which was met by a refusal on the part of the defendants.

13. It was agreed that the court should draw any inferences of fact which a jury ought to have drawn.

14. The question for the decision of the court was, whether, under the circumstances, the plaintiffs were entitled to succeed in the action, in respect of the sleepers and timber seized and taken by the defendants, or either of them.

15. If the court should be of opinion that the plaintiffs were entitled to succeed in respect of both or either of the said claims, judgment was to be entered up for the plaintiffs for a sum to be agreed upon by the parties, or, in case of their difference, to be settled by the Master, together with costs of suit.

16. If the court should be of opinion that the plaintiffs were not entitled to succeed in the action, judgment was to be given for the defendants, with costs.

[324] Field, Q. C. with whom was A. Wills, for the plaintiffs. The question is, whether the sleepers or the unsawn timber, the subject of this action, passed to the defendants under the circumstances stated in the case. [Willes, J. Or, rather, whether the defendants are to lose the goods and their price.] By the original contract, it is clear that no property passed to the purchasers until the timbers had been sawn into sleepers by the vendors, and delivered at the purchasers' wharf. If the timber or the sleepers had been destroyed by fire whilst upon the premises of the vendors, the purchasers could not have been charged, neither would the vendors have been absolved from delivering other sleepers pursuant to their contract. [Keane, Q. C., contra, assented to this. Erle, C. J. The question is, whether by the transaction of the 19th of December, 1863, the goods did not become a pledge or security for the 600l. advanced.] What passed upon that occasion, it is submitted, did not convey the property, or give the defendants any equitable claim upon it: all it amounted to, was a pre-payment on account of the contract. [Erle, C. J. Was it not an agreement that the property should stand charged with the sum advanced?] To operate as a valid charge, there must be a contract of hypothecation or mortgage. [Willes, J. Or a pledge.] To enure as a pledge, there must be a change of possession. [Willes, J. It has been held that there may be a pledge without actual possession: *Rees v. Capper*, 5 N. C. 136, 6 Scott, 877: *Martin v. Reid*, 11 C. B. (N. S.) 730.] There must be some positive contract that the timber was to become thenceforth the property of Messrs. Waring, in consideration of a pre-payment of 600l. Of that there is no evidence whatever. There was not even an appropriation of the cargo by the vendors and an assent thereto by the purchasers: the pro-[325]-perty remained just where it was. It cannot be denied that it was the intention of Hollway, Hart, & Co. to appropriate the particular timber to the formation of sleepers to satisfy their contract with Messrs. Waring. But, until it had been specifically appropriated, and sawn, and delivered at their wharf, there was nothing done which bound Hollway, Hart, & Co. to deliver or Messrs. Waring to receive these particular goods. [Willes, J. When was the timber cut into sleepers?] The timber arrived at the wharf of the bankrupts on the 14th of December: it does not appear when it was cut into sleepers. [Erle, C. J., referred to *Mogg v. Baker*, 3 M. & W. 195.] There, A. agreed to assign to B. certain specific goods by way of security for money advanced by B. for the purchase of them, and afterwards, in pursuance of such agreement, actually assigned them: and it was held that, although the assignment itself was made under such circumstances as would have rendered it void under the Insolvent Debtor's Act (7 G. 4, c. 57), and A. subsequently took the benefit of that act, his assignees were not entitled to the goods. The transaction there was of a totally different character from this. There, Baker had no interest in the goods: he was under no liability to pay. What he said was, I will

assist you to get the furniture, if you will give me a security upon it. The advance was made upon that specific security. [Willes, J. There is a recent case in the House of Lords where this matter was very fully gone into.] That was a case of *Holcroft v. Marshall*, 33 Law J., Chan. 193. There, A. by deed assigned to B. all the machinery in and about a certain mill, upon trust for securing a sum of money; and it was thereby provided that all the machinery which during the continuance of the security should be fixed or placed in the mill in addition to or in substitution for the former machinery, should be [326] subject to the trusts of the assignment, and A. undertook to do all that was necessary to vest the substituted and added machinery in B. The assignment was duly registered as a bill of sale, and, after the date of it, A. placed other machinery in the mill in addition to that which was there at the date of the assignment, and gave notice to B. of such substitution and addition. A. continued in possession according to the terms of the assignment. Vice-Chancellor Stuart held that, *the machinery being in A.'s possession as agent of B.*, B. was entitled, as against a judgment-creditor of A. who had sued out execution against A., to the additional machinery. This decision was reversed by Lord Campbell, C., on the ground of A.'s possession not being sufficient to support B.'s claim, and on the ground that, to give B. the complete title to the substituted and added machinery, it was necessary that there should be a *novus actus interveniens*. The House, on appeal, reversed Lord Campbell's judgment, and restored that of Vice-Chancellor Stuart. Lord Westbury, C., in delivering his opinion,—after stating the facts,—said: "The question might be easily decided by the application of a few elementary principles long settled in courts of equity. In equity, it was not necessary for the alienation of property that there should be a formal deed of conveyance. A contract for valuable consideration, by which it was agreed to make a present transfer of property, passed at once the beneficial interest, provided the contract was one of which a court of equity would decree specific performance." What contract is there here, of which specific performance would be decreed? "In the language of Lord Hardwicke," continues his Lordship, "the vendor became a trustee for the vendee, subject of course to the contract being one to be specifically performed. And this was true, not only of con-[327]-tracts relating to real estate, but also of contracts relating to personal property, provided that the latter were such as a court of equity would direct to be specifically performed. A contract for the sale of goods, as, for example, of five hundred chests of tea, was not a contract which would be specifically performed, because it did not relate to any chests of tea in particular; but a contract to sell the five hundred chests of a particular kind of tea which 'are now in my warehouse in Gloucester,' was a contract relating to specific property, and which would be specifically performed. The buyer might maintain a suit in equity for the delivery of a specific chattel, when it was the subject of a contract, and for an injunction (if necessary), to restrain the seller from delivering it to any other person." Speaking of *Mogg v. Baker*, his Lordship added: "Some use was made at the Bar, and in the court below, of the language attributed to Mr. Baron Parke, in the case of *Mogg v. Baker*. That learned judge appeared to have given, not his own opinion, but what he understood would have been the decision of a court of equity upon the case. He was represented as speaking upon the authority of one of the judges of the court of Chancery. Any communication so made was of course extra-judicial: and there was much danger in making communications of such a nature the ground of judicial decision. But what appeared to have been the principle intended to be stated was correct; for, Mr. Baron Parke, speaking of the agreement in the case, said 'It would cover no specific furniture, and would confer no right in equity.' It had been already explained that a contract relating to goods, but not to any specific goods, would not be the subject of a decree for specific performance, and that a contract that could not be specifically performed would not avail to transfer any estate or interest. If, [328] therefore, the contract in *Mogg v. Baker* related to no specific furniture, it was true that it would not *at the time of its execution*, confer any right in equity: but it was equally true that it would attach on furniture answering the contract when acquired, provided the contract remained in force at the time of such acquisition. Whether a right construction was put upon the agreement in *Mogg v. Baker* was a different question, and one which it was needless to consider, as the proposition stated by the learned judge was quite consistent with the principles on which this case ought to be decided." [Williams, J. I do not see how those principles are to be brought to bear upon this case.] The real

question is, whether there is a contract sufficient to pass the property either in the timber or the sleepers. The contract was for a certain number of sleepers. There was no specific appropriation, and no settlement of account. The parties met: prepayment was asked, and 600*l.* was advanced to the sellers in part-payment of a sum which it was believed would become due from the buyers. Was that enough to give the latter a right to any specific timber or any specific sleepers? Clearly it was not. [Williams, J. Suppose the bankrupts had said to Eckersley, "If you will give us an advance of 600*l.*, we agree to appropriate to you those sleepers or this timber,"—would not equity consider that done which ought to have been done?] If there be a specific charge, it ought to be made out by clear and unambiguous language. Why should the defendants have exhibited so much anxiety for the delivery of the cargo, if they had a present security or charge upon it for their advance? [Keating, J. Hart's original application was, to have an advance "on account of the cargo now in."] That would not constitute a charge upon it, or anything of which a court of equity would decree specific performance.

[329] Keane, Q. C., *contra*, was not called upon.

ERLE, C. J. I think our judgment in this case ought to be for the defendants. The action is brought by the plaintiffs as assignees of Messrs. Hollway, Hart, & Co., bankrupts, to recover the value of certain timber and sleepers alleged to have been wrongfully converted by the defendants. It appears that early in 1863, the bankrupts entered into a contract to deliver a certain number of railway sleepers to Messrs. Waring, the defendants, and in performance of that contract delivered to them a considerable number, which were duly paid for. At last came the cargo upon which this question arises. The timber arrived from Dantzic at the wharf of the bankrupts on the 14th of December. It consisted of timbers of such length that when sawn asunder each would make two sleepers. On the 16th of December, John Hart, one of the bankrupts, called at the office of the defendants, and asked Annett, their clerk, if the firm would oblige him with a cheque for 600*l.* "on account of the cargo of sleepers now in," telling him that the whole lot, when sawn and delivered, would come to between 800*l.* and 900*l.* My judgment rests entirely upon what passed at the time that advance was made. It was agreed on all hands that it was an advance made specifically on account of the timber in question. The assignees now claim to keep both the money and the goods. The question is, whether, as against them, what passed between the defendants and John Hart at the time of making that advance did not constitute that 600*l.* a charge upon the timber, and make it an advance upon the security of that specific cargo, so as to prevent the assignees, who take all the legal and equitable rights of the bankrupts, from being entitled to claim it. I am of opinion that what passed upon that occasion did [330] amount to an agreement on the part of John Hart to appropriate this particular timber as a security for the advance he was asking. The argument on the part of the assignees in substance is, that this was a loan upon the personal security of John Hart. If that had been the intention of the parties, why should any reference have been made to the cargo of timber then at the wharf of the bankrupts? Judging of the transaction with the ordinary prudence of men of business, it is impossible to imagine that the defendants intended to advance, or that Hart hoped to obtain, the 600*l.* without the security of the timber. Upon every occasion that the money was spoken of,—as appears by the examinations of Eckersley and Annett,—it was spoken of as an advance to be made on account of the cargo of sleepers then arrived. If there had remained nothing to be done to the timber before delivery, the property in it would have passed at once. The only question is, whether the circumstance of its remaining in the possession of the seller for the purpose of being sawn asunder before actual delivery, negatives the defendant's claim. I am of opinion that it does not. *Martin v. Reid*, 11 C. B. (N. S.) 730, is a distinct authority to shew that, if it was the intention of the parties that the property should be charged, the circumstances of its remaining in the hands of the person to whom the advance is made will not prevent that intention from having that effect. I am there reported to have said, in giving judgment,—“The question is, whether, as between these parties, the words used constitute the premises of *Martin* the premises of *Bower* for this purpose. I am clearly of opinion that the intention of the parties will be carried out by holding them to be so. It has over and over again been decided that the words of an agreement are to have effect according to the mind and intention of the parties. Thus, a deli-[331]-very of goods in satisfaction of a debt

has been held to amount to payment: see *Cannan v. Hood*, 2 M. & W. 465. So, where goods have been purchased and left in the possession of the vendor for a special purpose of the vendee, that has been held to amount to a delivery: *Elmore v. Stone*, 1 Taunt. 458. So, where a horse was sold, but left in the stable of the seller, being only removed to another stall, that was held to amount as between the buyer and the seller to a delivery. And in many instances the warehouse of the vendor has been held to be the warehouse of the purchaser, in order to carry out the intention of the parties." That clearly was the intention of the parties here. I am therefore of opinion that the defendants are entitled to retain the goods.

WILLIAMS, J. I am of the same opinion. Upon this special case we are to draw inferences of fact such as a jury would be warranted in drawing. From the facts stated, the only inference I can draw is, that there was an agreement between the contracting parties that the cargo of timber then at the wharf of the bankrupts was to be specifically appropriated as a security for the 600l. advanced. If so, it would constitute a charge in equity, and the timber would not upon the bankruptcy of the sellers pass to their assignees so as to entitle them to maintain this action.

WILLES, J. I am of the same opinion. This action is founded upon property. The question before us is, whether upon the advance of the 600l. to John Hart, there was a contract between him and the defendants that these particular goods should stand as a security for that sum. That is a question of fact, upon which I can come to no other conclusion than in the affirmative.

[332] KEATING, J. I am of the same opinion. It was manifestly intended by all parties that the cargo of timber in question should be a security for the 600l. It is clear, then, that the assignees could not be entitled to it discharged of the defendants' claim.

Judgment for the defendants.

HODGSON v. MOULSON. Jan. 18th, 1865.

By a mining lease, the lessees covenanted, amongst other things, that they would "from time to time and at all times during the said term work the said pits, mines, and shafts in a workman-like manner, and leave pillars of the said stone of sufficient strength to support the roofs of the said mines, and get and clear the said stone in the usual and best way in which the same is done in other works of a like character in Clayton." It also contained covenants to pay for surface damage, and at the expiration of the term to fill up the pits and shafts, and restore the surface to a state fit for agricultural purposes:—Held, that the lessees were liable to the reversioner for damage done to the surface of the land by its cracking and subsiding in consequence of the want of sufficient pillars of stone being left to support the roofs of the mines,—notwithstanding they might have worked the mines in an usual and a workman-like manner.

The following case was stated (without pleadings) for the opinion of the court:—

1. By indenture of lease, bearing date the 1st of December, 1853, John Bower granted and demised to the defendant and others for a term of twelve years from the 1st of July then last past, all the stone, slate, and flag lying and being in and under a certain part of certain closes of land situate at Legrams, in the township of Horton, in the parish of Bradford, in the county of York, with full and free liberty, power, and authority for the lessees and their and every of their agents, servants, and workmen, at all times during the continuance of the said demise, at their own costs, charges, and expenses, to enter into and upon the said thereby demised premises, or any part thereof, and there to dig, bore, delve, sink for, raise, get, and work the said stone, and for that purpose to sink such pits and shafts, and set up such engines, [333] whimsies, cranks, gins, and other machinery, and to make use of such devices, ways, and means as should be found necessary or expedient for working, raising, and getting the said stone in the best manner, or as had been usually practised in such cases in the township of Clayton, in the parish of Bradford aforesaid; and each of the said lessees in and by the said indenture of lease, a copy whereof was annexed to and was to be taken as part of the case (a), thereby for himself [334] covenanted with

(a) The indenture was dated the 1st of December, 1853, and was made between John Bower (through whom the plaintiff claimed) of the one part, and Miles Moulson,

the said John Bower, his heirs and assigns, that they the said lessees should and would from time to time and at all times during the said term work the said pits, mines, and shafts in a workman-like manner, and leave pillars of the solid stone of [335] sufficient strength to support the roofs of the said mines, and get and clear the said stone in the usual and best way in which the same was then done in other works of like character in Clayton aforesaid, and should and would on the expiration or other [336] sooner determination of the said term (amongst other things) remove all the stone, spoil, or rubbish which should have been brought out of the said pits or shafts, and convert the land which should have been used by them for any of the purposes in the said lease into good arable land, or, in default thereof, should and would pay or cause to be paid unto the said John Bower, his heirs or assigns, the sum of 100l. for every acre, and so in proportion for every quarter or less quantity than an acre, of such land not converted into arable land, as and for liquidated damages.

2. By another indenture of lease, dated the 11th of December, 1857, the said John Bower granted and demised to the defendant and the said other lessees, for a term of ten years from the 1st of January then next, [337] all the residue of the stone, slate, and flag lying and being within and under the said closes respectively, with the same liberties and powers, and subject to the same covenants on the part of each of the said lessees, as are contained in the said indenture of lease first above mentioned.

John Moulson, William Moulson, and David Moulson (the defendant) of the other part. It recited that the Moulsons had agreed with Bower to grant to them a lease of "the stone now lying and being within and under such part or parts of the closes of land hereinafter mentioned, as are hereinafter particularly described;" and that the stone under certain other parts of the said closes of land had been already partly wrought, gotten, and disposed of. It then witnessed that, in consideration of the premises, and of the rents, payments, covenants, and agreements thereafter reserved and contained, &c., Bower granted, demised, and leased unto the Moulsons, their executors, &c., "All the stone, slate, and flag lying and being in and under the surface of such part or parts of certain closes of land situate, &c., belonging to the said John Bower, and now occupied by John Diggles as his tenant and which part or parts is or are more particularly described in the plan or ground plot drawn upon those presents, and therein coloured green, and containing by admeasurement 14,520 square yards, with full and free liberty, power, and authority for the lessees, their executors, &c., and their and every of their agents, servants, and workmen, at all times during the continuance of this demise, at their own costs, charges, and expenses, to enter into and upon the said hereby demised premises, or any part thereof, and there to dig, bore, delve, sink for, raise, get, and work the said stone, and for that purpose to sink such pits and shafts and set up such engines, whimsies, cranks, gins, and other machinery, and to make use of such devices, ways, and means as shall be found necessary or expedient for working, raising, and getting the said stone *in the best manner, or as is usually practised in such cases in the township of Clayton*, in the parish of Bradford aforesaid, and to occupy from time to time so much of the said demised premises as may be necessary for placing, laying up, and dressing such stone, and for laying and stacking up the spoil or rubbish to be raised out of the said pits or shafts, and from time to time to take down the said engines, whimsies, cranks, gins, and other machines erected and set up for the purposes aforesaid, and the materials thereof, as to them the lessees, their executors, &c., shall seem meet, and to re-erect them on other parts of the said hereby-demised premises; and to have, take, and carry away at their own free will and pleasure, and to convert for and to their own proper use and benefit all such stone as shall be gotten or raised from the said pits and shafts:" with liberty to use all ways, watercourses, &c. Habendum for twelve years from the 1st of July then last, but determinable nevertheless as thereafter mentioned: Yielding and paying therefore during the said term unto the lessor, his heirs and assigns, 2s. 6d. per superficial square yard, to be paid as a yearly rent in two equal half-yearly payments, on the 1st of January and 1st of July in every year, and in no half-year to be less than 75l. 12s. 6d. (whether stone to that amount shall have been gotten or not), or such greater sum, after the rate of 2s. 6d. for each superficial square yard of stone which shall have been gotten during each half-year as may on an admeasurement thereof be found to be due. Then followed covenants by the lessees to pay rent and taxes, and from time to time and at all times during the term thereby granted to

3. By indenture of grant and release dated the 13th of January, 1858, the said John Bower (being then seised in his demesne as of fee of and in the said closes of land in the said indentures of lease respectively mentioned, subject to the said estates and interests therein of the said lessees in and by the said indentures of lease respectively created,) conveyed all his the said John Bower's said estate and interest of and in the said closes of land respectively to the plaintiff, who from that time until the commencement of this suit has continuously occupied the said closes respectively.

4. The said closes contained two beds or strata of stone,—one near to the surface, called the top stone,—and the other about thirty yards below the surface, called the bottom stone: the intervening soil between the said two beds or strata being of the depth of twenty yards or thereabouts. The top stone could not be got without removing the soil over it: but the bottom stone could be got without removing the soil intervening between the two beds or strata.

5. Prior to the granting of either of the said indentures of lease, the top stone under certain parts of the said closes had, to the knowledge of the said parties to the said leases, been quarried and worked out to the depth of thirty feet or thereabouts from such parts of the surface of the said closes respectively as are hereinafter stated

fence off the pits or shafts to be sunk in the demised premises, and also such portion of the same as should be occupied by them for the purposes aforesaid, and to keep the fences and gates in repair. Then followed the covenant upon which the action was founded: "And also shall and will from time to time and at all times during the said term work the said pits, mines, and shafts, in a workmanlike manner, and leave pillars of the solid stone of sufficient strength to support the roofs of the said mines, and get and clear the said stone in the usual and best way in which the same is done in other works of a like character in Clayton aforesaid." And also shall and will from time to time, on demand, pay to the occupier or occupiers for the time being of the said closes of land double the amount of rent paid by such occupier or occupiers for such portion of the surface of the said closes of land as they may use for the purpose of getting or working the stone, or for laying and stacking up the spoil or rubbish to be raised out of the said pits or shafts, and also reasonable satisfaction for any damage that may be committed or occasioned on the adjoining lands or the crops respectively growing thereon; and also make satisfaction to such occupier or occupiers for the time being as aforesaid for any damage which he or they may sustain by reason of his or their horses or other cattle receiving any damage by falling into any of the quarries, works, shafts, or pits to be made in the working of the said stone hereby demised, through the insufficiency of the fences thereof, or by leaving open any gate or gates, or by or through any other default or neglect of the said lessees, their executors, administrators, and assigns. Then followed a covenant on the part of the lessees not to grant, demise, let, assign, or set over or otherwise part with the stone or privileges thereby granted, or their estate, term, or interest in the same, without the consent in writing of the lessor, his heirs or assigns.

The reddendum was as follows,—“And also shall and will, on the expiration or other sooner determination of the said term hereby granted, peaceably and quietly leave, surrender, and yield up the same premises unto the said John Bower, his heirs and assigns, and, within two months after the expiration or other sooner determination of the said term, fill up the said pits and shafts, and remove and take up all engines, whimsies, cranks, gins, machines, and other erections which shall have been made or erected during the said term for the purpose of getting the said stone, and remove all the stone, spoil, or rubbish which shall have been brought out of the said pits or shafts, and convert the land which shall have been used by them for any of the purposes aforesaid into good arable land, or, in default thereof, shall and will pay or cause to be paid unto the said John Bower, his heirs or assigns, the sum of 100l. for every acre, and so in proportion for every quarter or less quantity than an acre of such land not converted into arable land, as and for liquidated damages.”

Then followed a power for the lessor to enter to view the condition of the mines, powers of distress and re-entry on non-payment of the rent and royalties or non-performance of the covenants, or in case of the bankruptcy of the lessees; and also a proviso for cesser of the term in case all the stone should be paid for and gotten and cleared off by the lessees before the expiration of twelve years, a covenant for quiet enjoyment by the lessees, and a proviso for reference of disputes to arbitration.

to have subsided, cracked, and given way, as hereinafter mentioned; and the surface of the said parts of the said closes respectively was after-[338]-wards and before the granting of the said indentures of lease respectively, or either of them, levelled, trenched, and restored, so as to render it fit for agricultural purposes, for which it had been used for upwards of forty years next before the said top stone was so quarried and worked out as aforesaid; and for which uses it has been used ever since the same was so levelled, trenched, and restored as aforesaid.

6. After the execution of the said indentures of lease respectively, the said lessees entered upon the said demised premises, and there sunk pits and shafts, and worked the said mines in a workman-like manner, and got and cleared thereout large quantities of the said stone so granted and demised as aforesaid, in the usual and best way in which stone was at the times of the granting of the said indentures of lease respectively got and cleared in works of a like character in the township of Clayton aforesaid; and, *in so getting and clearing the said stone as last aforesaid, the lessees left pillars of the solid stone of sufficient strength to support the roofs of the said mines so far as was requisite for the purposes of working the said mines themselves in a thorough and efficient manner, but neglected and omitted to leave any such pillars as aforesaid of sufficient strength to support the roofs of the said mines so as to prevent the subsidence, cracking, and giving way of the said parts of the surface of the said closes respectively*, which are hereinafter stated to have subsided, cracked, and given way, as hereinafter mentioned.

7. Previously to the commencement of this suit, divers parts of the surface of the said closes respectively had subsided, cracked, and given way, in such a manner and to such an extent as to materially interfere with the beneficial user of the surface of the said parts of the said closes respectively, solely by reason of the said lessees having so omitted and neglected as [339] aforesaid to leave any such pillars as aforesaid of sufficient strength to support the roofs of the said mines so as to prevent the said subsidence, cracking, and giving way of the said parts of the surface of the said closes respectively. In the township of Clayton it is usual to leave pillars of stone, but notwithstanding the roofs of the mines often fall in and the consequence is that a subsidence of the surface soil in that township often takes place when the bottom stone is being worked.

8. The question for the opinion of the court is,—whether, upon the facts above stated, and regard being had also to the provisions of the said indenture of lease a copy whereof was annexed to the case, the said lessees were bound either by the provisions of the said indentures of lease respectively, or otherwise, to have left pillars of solid stone of sufficient strength to have prevented the said subsidence, cracking, and giving way of the said parts of the surface of the said closes respectively, as above mentioned.

9. If the court should be of opinion in the affirmative, then judgment was to be entered up for the plaintiff for 352l. and costs of suit. If the court should be of opinion in the negative, then judgment of nol-pros., with costs of defence, was to be entered up for the defendant.

Quain, for the plaintiff (a)¹. The question is whether the defendant performed the covenant which he en-[340]tered into, to “leave pillars of the solid stone of sufficient strength to support the roofs of the mines,” so as to prevent the subsidence of the surface, or whether he satisfied the terms of his contract if he left sufficient for his own working of the mines. It is submitted that, even without this covenant, the surface being reserved to the owner of the soil, the facts stated in the case give the plaintiff a clear cause of action. The Court called on

Mellish, Q. C. (with whom was Kemplay), for the defendant (a)². The simple

(a)¹ The points marked for argument on the part of the plaintiff were as follows:—

“1. That the plaintiff is entitled to have pillars of solid stone left in the mine, of sufficient strength absolutely to support the roofs of the mine, and so to prevent the subsidence of the surface:

“2. That he is so entitled by virtue of the express words of the defendant's covenant; and that those words cannot be controlled by any usage or custom.”

(a)² The points marked for argument on the part of the plaintiff were as follows:—

“1. That, upon the facts stated in the case, and regard being had to the provisions of the leases, the lessees were not bound to have left pillars of solid stone of sufficient strength to have supported the roofs of the mines, so as to have prevented the sub-

question is, whether this covenant requires that the lessees shall leave pillars of stone sufficient to enable them to work the stone properly, or sufficient to prevent the surface being interfered with. The latter clearly could not have been intended. It appears from the special case that the demise embraces two separate strata of stone. The top stratum could only be quarried: it could not, therefore, have been contemplated that the surface was to be preserved uninjured. The object was, to compel the lessees to work the stone in a proper manner [341], so that the lessor might continue it after the expiration of the lease. The power given to the lessee is, to dig, delve, sink for, and work the said stone, &c., and to make use of such devices, ways, and means as should be found necessary or expedient for working, raising, and getting the said stone in the best manner, or has been usually practised in such cases in the township of Clayton." And the case expressly finds that, in the township of Clayton, it is usual to leave pillars of stone, but notwithstanding the roofs of the mines often fall in, and the consequence is that a subsidence of the surface soil in that township often takes place when the bottom stone is being worked.

Quain, in reply. The covenant in question only has reference to the lower stratum. The lease contemplated the working out by the lessees of the whole of the stone: it never could be intended that the lessees should be at liberty to let down the soil. And it was evidently the intention of the parties that the whole of the stone should be worked out by the lessees: for, it provides that, within two months after the expiration or other sooner determination of the term thereby granted, the lessees shall fill up the pits and shafts, and remove and take up all engines, whimsies, cranks, and other erections made or erected during the term for the purpose of working the said stone, &c., and remove all the rubbish, &c. [Willes, J. There is no proviso to protect the lessor against the sinking of the surface, unless this does it.] None.

ERLE, C. J. This is an action for breach of a covenant contained in a mining lease, to leave pillars of the solid stone of sufficient strength to support the roofs of the said mines, whereby damage was done to the surface of the land: and the question which has [342] been argued before us is, whether that covenant extends to compel the lessees to leave pillars of stone sufficient to prevent the subsidence of the surface, or is limited to such as might be sufficient to enable the lessees to work the mines in a proper, usual, and efficient manner. I am of opinion that it amounts to a covenant to leave pillars which shall be sufficient to support the roofs so as to prevent the sinking or subsiding of the surface. The indenture purports to be a demise of "all the stone, slate, or flag lying and being in and under the surface," &c. It clearly contemplates that the lessees will remove the whole of the stone, &c., during the term. Further there is a proviso for the determination of the lease when all the stone is exhausted. The whole frame of the instrument negatives the notion that the pillars were to be left in order that the lessor might continue the working of the mines, if the lessees gave them up before they were worked out. Why, then, should the lessor stipulate for pillars to be left to support the roofs? I see no reason, unless it be that the surface might be protected from subsidence. I am fortified in this construction by the part of the lease in which this covenant is found, and also by the covenant for filling up the pits and shafts and removing the engines and machinery, &c., and paying compensation for damage done to the surface when all the working shall have been discontinued. But there is no provision for indemnifying the lessor against injury to the surface by the falling in of the mines, unless it is provided for by this covenant. The injury is of a serious character, for the damage is estimated at 352l., and therefore it would naturally be provided for. Upon the whole, I have come to the conclusion that the lessees did bind themselves to get and to pay for the whole of the stone, and, having done so, to restore the surface of the land to a fit state to be used for agricultural purposes.

[343] WILLIAMS, J. I am of the same opinion. I must say I was much struck

subsidence, cracking, and giving way of parts of the surface of the closes as stated in the case:

"2. That, upon the facts stated in the case, it appears that all was done by or on the part of the lessees, which was necessary according to the terms of the leases: and that the defendant is not liable for the damages arising from the subsidence, cracking, and giving way of the surface of the closes, under the circumstances and in the manner stated in the case."

by the observation of Mr. Mellish, that the covenant in question is found amongst those which relate to the working of the mines in a proper manner, and therefore would seem more naturally to belong to the substrata, and not to the super-incumbent surface. The case finds that, in getting and clearing the stone, the lessees left pillars of the solid stone of sufficient strength to support the roofs of the said mines so far as was requisite for the purposes of working the said mines themselves in a thorough and efficient manner. It would seem, therefore, that they have done everything that could be required of them, provided the covenant is to be construed in the limited sense suggested by Mr. Mellish. But, for the reasons pointed out by my Lord, I have, though not without some hesitation, come to the conclusion that the covenant has been broken.

WILLES, J. I am of the same opinion. During Mr. Mellish's argument, I was inclined to take the same view as my Brother Williams at first took: but Mr. Quain's reply has satisfied me that the larger construction for which he has contended is that which we ought to put upon this covenant. It is to be observed that it is found amongst covenants which are framed carefully for the protection of the occupiers of the surface, requiring the lessees, when the mines are no longer worked, to fill up the pits and shafts, and to remove all incumbrances from the soil, so as to render it fit for being used for agricultural purposes. As the covenant is general in its terms, it must be construed generally. The lessor is not entitled to have the land restored to him with the surface intact; but he is entitled to have pillars of stone left of strength sufficient to sustain the roofs and to prevent the surface being rendered useless to him by subsidence.

[344] KEATING, J. I am of the same opinion. It was the clear intention of the contracting parties that sufficient pillars of stone should be left to protect the surface from the effects of subsidence. Mr. Mellish's construction would entirely deprive the lessor of the advantage of a covenant which was evidently inserted for his exclusive benefit. He says the object was that the mines should be left in such a state that the lessor might continue to work them if he thought fit. Mr. Quain effectually answered that by shewing that by the terms of the lease the whole of the stone was to be worked out by the lessees, and the pits and shafts to be filled up, and all obstructions removed from the surface. The intention of the covenant was, that the surface should be protected from being destroyed by the total removal of its natural support; and that covenant has clearly been violated by the defendant.

Judgment for the plaintiff.

CHARLES STACEY, *Appellant*: THOMAS TEECE WHITEHURST, *Respondent*.
Jan. 25th, 1865.

[S. C. 34 L. J. M. C. 94; 11 L. T. 710; 13 W. R. 384.]

A. and B. were passing in a trap along a highway. A. alighted, and with a dog and gun entered a field where he had no right to go, and there shot a hare, which he brought to the trap and handed to B. Both then departed:—Held that, upon this state of facts, the justices would be justified in inferring that both were engaged in the commission of a common offence; and that, one having been convicted for trespassing in pursuit of game, under the 1 & 2 W. 4, c. 32, s. 30, the other might have been convicted under the 11 & 12 Vict. c. 43, s. 5, for aiding and abetting his companion; or that both might have been convicted, upon an information properly framed, of a joint trespass under the former act.

This was a case stated by justices for the opinion of the court under the 20 & 21 Vict. c. 43.

At a petty session holden at Cruckton in and for the division of Ford, in the county of Salop, on the 28th of October, 1864, an information preferred by Charles [345] Stacey (hereinafter called the appellant) against Thomas Teece Whitehurst (hereinafter called the appellant), under s. 5 of the 11 & 12 Vict. c. 43, charging for "that John Whitehurst, on the 11th of October, 1864, at the parish of Pontesbury, in the county aforesaid, did unlawfully commit a certain trespass, by entering and being in the day-time of the same day upon a certain piece of land in the possession and occupation of Stephen Jones there in search or pursuit of game, to wit, a hare, there,

without the licence and consent of the owner of the land so trespassed upon, or of any person having the right of killing the game upon such land, or of any other person having any right to authorize the said John Whitehurst to enter or be upon the said land for the purpose aforesaid, contrary to the form of the statute in such case made and provided; and that Thomas Teece Whitehurst, of the Mount Shrewsbury, in the said county, was then and there present aiding and abetting the said John Whitehurst to do and commit the said offence." And upon the hearing the justices dismissed the said information against the said Thomas Teece Whitehurst, upon the grounds hereinafter stated.

The said John Whitehurst was before the hearing of the above information convicted of the trespass, and fined in the penalty of 2l. and costs.

Upon the hearing of the information, it was proved on the part of the appellant, that, on the 11th of October, 1864, at the parish of Pontesbury, in the county of Salop, the said John Whitehurst and the respondent were passing along the turnpike-road in a trap, on their way to shoot at the Oaks Farm, belonging to their sister, and, when near the Lea Cross, in the said parish of Pontesbury, the trap, which was driven by the said Thomas Teece Whitehurst, was stopped, and the said John Whitehurst got out of the trap, and entered a [346] field in the occupation of Stephen Jones, with a gun and dog, and shot a hare, which he picked up, and, on returning into the turnpike-road (where the trap had stopped for a minute or so), gave the hare to the respondent, according to the evidence of two witnesses at the distance of a hundred yards and a quarter of a mile respectively; and that the respondent then drove on along the road, and the said John Whitehurst walked about five or six yards behind the trap, to the public-house at Lea Cross.

It was contended, on the part of the respondent that he was not an aider and abetter in the trespass, inasmuch as he was passing along the turnpike-road for a lawful purpose on his way to shoot on his sister's farm at the Oaks (which was not denied or questioned); and that he was not there for the purpose of aiding and abetting in the commission of the trespass; that, not having left the trap, he could not be an aider and abetter; and that, so soon as the said John Whitehurst returned into the said turnpike-road, the trespass had been committed and completed.

The justices, being doubtful whether upon the evidence given before them the respondent was in law an aider and abetter, thought it right to dismiss the case as against the said respondent Thomas Teece Whitehurst.

The depositions, which accompanied and were to be taken as part of the case, were as follows:—

"Cruickton, 28th October, 1864.

"Depositions taken before H. Sandford, Esq., and F. Harris, Esq.

"Charles Stacey
v.
John Whitehurst. } Trespass. Game.

"Isaac Gittins Baldwin, sworn, saith,—I am the son of Mr. Baldwin. I recollect the 11th of October [347] last. I was brushing a hedge in the locality of the Lea Cross school. I saw two gentlemen come up in a trap, and saw the gig stop in the road. I saw one of the two get out of the trap. He had a gun in his hand, and a dog followed him: it was something of a pointer or a retriever. He went into Mr. Jones's Crab Tree leasow. He went about one hundred yards, a little further down the field. He shot a hare. He went and picked it up, and returned into the road with the hare. I heard one of them say 'It's a fine hare.' The one who shot the hare then walked up the road to the public-house, Mr. Hudson's, of the Lea Cross.

"Cross-examined,—I was about a hundred yards off when he gave it to the other man in the trap. I have seen a hare before, many a one. The gig stopped. I did not know any of the parties.

"H. D. Warter, Esq.—I have the right of sporting over Mr. Jones's ground at the Lea. Mr. Jones has no right to shoot there.

"David Jones,—I live at the Lea Cross, and am a blacksmith. I remember the 11th of October last. I heard the report of a gun, and saw a man in a field of Mr. Stephen Jones's. The man had a gun and a dog with him. I saw the dog catch a hare. I saw the man take the hare off the dog, and walk back to the road. He came

up the road to Mr. Hudson's public-house. Mr. Whitehurst was the person who came out of the field.

"Cross-examined,—I was in my shop. It might be a quarter of a mile off. The one walked behind the carriage,—about five or six yards behind.

"John Hudson,—On the 11th of October last, from half past eight to nine, John and Teece Whitehurst came to my house at the Lea Cross. Mr. Teece Whitehurst was in a phaeton. I went to him and spoke to [348] him, and then Mr. John Whitehurst came from the back of the house. There was a dog there, a pointer, a game dog. I saw a gun in the trap; it was out of the bag. The butt end of the gun was hanging over the side of the trap. John Whitehurst said, 'Anything that comes to our net will be fish to-day.'

"Isaac Gittins Baldwin, re-called, I saw the one who shot the hare give it to the one in the trap. I saw the trap go the whole of the distance from where the shot was fired to the public-house."

[Here followed a note of the fine and expenses.]

"Charles Stacey	{ Game trespass. Aiding and abetting
v.	
Thomas Teece Whitehurst.	

"Isaac Gittins Baldwin, On the 11th of October, 1864, I saw a person remain in the trap. The man who shot the hare on Mr. Jones's land at the parish of Pontesbury gave it to the one in the trap. The trap was standing at the time the hare was given to him. I was about one hundred yards off. The trap stopped opposite Mr. Jones's gate. The dog caught the hare. The man who shot the hare gave it to the other man in the trap.

"David Jones,—On the 11th of October, I saw a person going along in a trap. It was Mr. Whitehurst. I don't know his Christian name. I saw a man in a field take a hare from a dog. That same person walked up the road with the trap, not in the trap. I never lost sight of him till he got to the Lea Cross. The trap stopped opposite Mr. Jones's field for a minute or so. The gig was stopped there before the man came from the field.

"John Hudson,—On the 11th of October, between half-past eight and nine o'clock, two persons arrived at my house. John Whitehurst came from behind the house. Teece was in the trap, and getting out. I am [349] not aware of any other two persons stopping at my house with a trap that morning.

"Dismissed, on the ground that Mr. Thomas Teece Whitehurst was not in law aiding and abetting in the trespass."

The questions of law arising on the above statement for the opinion of the court were,—first, whether the said Thomas Teece Whitehurst was an aider and abetter in the commission of the trespass, within the meaning of the 11 & 12 Vict. c. 43, s. 5,—secondly, whether the said dismissal was valid or otherwise: and the court was prayed to remit the case to the justices with its opinion thereon, or to make such other order as to the court might seem fit.

H. James, for the appellant, was stopped by the court (a).

Raymond, for the respondent (b). The offence charged in this information is one created by the 30th section of the statute 1 & 2 W. 4, c. 32, which, after reciting that, "after the commencement of this act, game will become an article which may be legally bought and sold, and it is therefore just and reasonable to provide [350] some more summary means than now by law exist for protecting the same from trespassers,"

(a) The points marked for argument on the part of the appellant were as follows:—"That, by the evidence given before the justices, it was proved that the respondent had committed the offence with which he was charged; and that the dismissal of the said charge by the said justices upon the grounds stated by them in the said case was wrong in law."

(b) The points marked for argument on the part of the respondent were as follows:—"That, by the evidence given before the justices, it was not proved that the respondent had committed the offence with which he was charged; and that the dismissal of the said charge by the said justices upon the grounds stated by them in the said case was right in law."

enacts that, "if any person whatsoever shall commit any trespass by entering or being, in the day time, upon any land, in search or pursuit of game or woodcocks, &c., such person shall, on conviction thereof before a justice of the peace, forfeit and pay" not exceeding 2l. and costs: "Provided always that any person charged with any such trespass, shall be at liberty to prove, by way of defence, any matter which would have been a defence to an action at law for such trespass." There cannot be such thing as an aider and abetter under this statute: and the evidence shews that there was no complicity between the two Whitehursts until after the shooting of the hare. [Erle, C. J. The last point is not a very sperate one. The question is, were the two acting in the furtherance of a common purpose. If so, in an ordinary case, the respondent would be an aider and abetter.] If this respondent would not have been liable to an action of trespass upon the evidence given here, he is not chargeable under this statute. In *The Queen v. Scotton*, 5 Q. B. 493, the evidence was much stronger than in the present case. There the party did not himself go upon the land, but was in an adjoining close, employing, assisting, and in company with those who actually entered; and the court of Queen's Bench doubted whether he could be convicted of entering or being upon land for the purpose of poaching, under the 9 G. 4, c. 69, s. 9, or the 1 & 2 W. 4, c. 32, s. 30. And in *The Queen v. Pratt*, Dears. & P. C. C. 502, 24 Law J., M. C. 113, it was held, that, to shoot at a bird on the land of another, the party firing being at the time on the highway (or on his own land, or the land of a third person), though an actionable trespass, is not an offence within this statute (a)¹. [351] The conviction proceeds upon the 5th section of the 11 & 12 Vict. c. 43, which enacts that "every person who shall aid, abet, counsel, or procure the commission of any offence which is or hereafter shall be punishable on summary conviction, shall be liable to be proceeded against and convicted for the same, either together with the principal offender, or before or after his conviction, and shall be liable on conviction to the same forfeiture and punishment as such principal offender is or shall be by law liable, and may be proceeded against and convicted either in the county, riding, division, liberty, city, borough, or place where such principal offender may be convicted, or in that in which such offence of aiding, abetting, counselling, or procuring may have been committed" (a)². It is said that this statute creates an offence. That, however, is a fallacy. It is merely addressed to the difficulty that formerly you could not have convicted an accessory until you had convicted the original offender. [Willes, J. This is purely a question of pleading. It is, in effect, a question whether this information with the facts stated in the depositions would make a good count in an indictment if it were an indictable offence, or in a declaration if it were an actionable matter. Pleading evidence is objectionable, unless the evidence is conclusive. But, is there not the most conclusive evidence here of a trespass by the respondent? I think you must contend that this does not amount to an averment that he did trespass in pursuit of game.] [352] There is no evidence of a trespass committed by this respondent. He never left the trap. And it is perfectly consistent with all the evidence, that he was ignorant of the intention of his companion, until after the offence had been committed.

ERLE, C. J. It is not for the court to draw inferences from the facts: but I think the case should be sent back to the magistrates with an intimation of our opinion that the facts were in our judgment sufficient to warrant them in inferring that the respondent was guilty of the offence he was charged with. The question of law submitted to us I take to be, whether or not there was any evidence which would justify the magistrates in finding that the respondent had been guilty of a trespass. I think there was abundant evidence for that purpose. I do not say that they were bound in law to convict; but I think the matter should go back to them in order that they may if they choose draw an inference unfavorable to the respondent. The short facts are, that two persons were passing along the turnpike-road in a trap, and one of them got out, and went into the field with a dog and a gun, and shot a hare, and picked it up

(a)¹ In *Osmond, App., Meadows, Resp.*, 13 C. B. (N. S.) 10, A., being upon his own land (or land upon which he was privileged to shoot), fired at and killed a pheasant in the land of B., and went upon B.'s land (without leave) and picked it up: and it was held that this was a trespass "in search or pursuit of game," within the 1 & 2 W. 4, c. 32, s. 30,—the whole being one continuous act.

(a)² As to what is an "aiding and abetting" within the statute, see *Howells, App., Winnu, Resp.*, 15 C. B. (N. S.) 3.

and brought it to his companion, who had remained in the trap. If the magistrates find that these two persons were engaged in one common purpose,—the one shooting, the other watching,—the latter would clearly be aiding and abetting the former in the commission of the offence, and both might be found guilty. The evidence was pregnant to a strong degree that the two were acting in furtherance of a common purpose. It has been ingeniously argued by Mr. Raymond, that the statute of 11 & 12 Vict. c. 43, s. 5, does not create a new offence, but merely a new mode of proceeding. But I am clearly of opinion that there was abundant ground [353] to warrant the magistrates in inferring that the respondent was jointly guilty of the trespass in pursuit of game with the man who fired the shot.

WILLIAMS, J. I am of the same opinion. The magistrates seem to have come to the conclusion that there was no evidence to justify them in inferring that the respondent was a party to the trespass committed by his brother. But I think there was abundant evidence that he was there aiding and abetting him in the commission of the offence, so as to bring him within the definition in 1 Russell on Crimes, 3rd edit. 26 (a). In trespass, all who act in concert are prin-[354]-cipals. There was abundant evidence on the face of the depositions here that the respondent was aiding in the capture of the hare. And it was not the less evidence of aiding and abetting, because it might have justified his conviction as a principal offender.

(a) The rule there laid down is as follows:—"Where two or more are to be brought to justice for one and the same felony, they are considered in the light either,—1, of principals in the first degree,—2, principals in the second degree,—3, accessaries before the fact,—or 4, accessaries after the fact. And in either of these characters they will be *felons* in consideration of law: for, he who takes any part in a felony, whether it be a felony at common law or by statute, is in construction of law a felon, according to the share which he takes in the crime.

"I. Principals in the first degree are those who have *actually and with their own hands committed the fact*: and it does not appear necessary to say anything in this case by way of explanation of the nature of their guilt, which will be detailed in treating of the different offences in the course of the work.

"II. Principals in the second degree are those who were *present, aiding and abetting* at the commission of the fact. They are generally termed *aiders and abettors*, and sometimes accomplices; but the latter appellation will not serve as a term of definition, as it includes all the participes criminis, whether they are considered in strict legal propriety as principals in the first or second degree, or merely as accessaries before or after the fact. The distinction between principals in the first and principals in the second degree, or, to speak more properly, the course and order of proceeding against offenders founded upon that distinction, appears to have been unknown to the most antient writers on our law, who considered the persons present aiding and abetting in no other light than as *accessaries at the fact*. But, as such accessaries, they were not liable to be brought to trial till the principal offenders should be convicted or outlawed; a rule productive of much mischief, as the course of justice was frequently arrested by the death or escape of the principal, or from his remaining unknown or concealed. And, with a view to obviate this mischief, the judges by degrees adopted a different rule; and at length it became settled law that all those who are present aiding and abetting when a felony is committed, are principals in the second degree.

"In order to render a person a principal in the second degree, or an aider and abetter, he must be *present aiding and abetting* at the fact, or ready to afford assistance if necessary; but the *presence* need not be a strict actual immediate presence, such a presence as would make him an eye or ear-witness of what passes, but may be a constructive presence. So that, if several persons set out together, or in small parties, upon one common design, be it murder or other felony, or for any other purpose unlawful in itself, and each takes the part assigned to him; some to commit the fact, others to watch at proper distances and stations to prevent a surprise, or to favour, if need be, the escape of those who are more immediately engaged; they are all, provided the fact be committed, in the eye of the law, present at it; for, it was made a common cause with them, each man operated in his station at one and the same instant, towards the same common end, and the part each man took tended to give countenance, encouragement, and protection to the whole gang, and to insure the success of their common enterprise."

WILLES, J. I am of the same opinion. As to the statute 11 & 12 Vict. c. 43, s. 5, I agree with my Lord [355] that it is unnecessary to refer to it. Mr. Raymond points out that the statute was not intended to create a new offence, but merely to facilitate the remedy against persons aiding and abetting an offender. It can only be necessary to have recourse to it where the law draws a distinction between principals in the first degree, principals in the second degree, and accessaries,—the latter being persons who aid or abet the principal offender in the commission of the offence, before or after. In cases of treason (*a*), and in offences which are less than felony, every one who in cases of felony would be a principal in the second degree, or an accessary, is a principal. That brings me to the second point,—that the information is wrong because it treats Thomas Teece Whitehurst as an accessary. I agree that it would have been better to have treated him as a principal; and doubtless the information could not be sustained without proving him to have been a principal offender. If the statement therein does not amount to that, the information would be bad. But I am of opinion that it does require the justices to draw such a conclusion from the facts as to shew that, if this had been a case of felony, the now respondent would have been an accessary, and therefore that he was a principal in the milder offence, in which the distinction is not known. It is in all cases sufficient to describe the matter of complaint or the offence in language which if proved as alleged leads to the inevitable conclusion that the cause of action existed or that the offence has been committed. That was the substance of the decision of the Exchequer Chamber in the fishery case of *Halford v. Bailey*, 13 Q. B. 426. It simply comes to the question whether there was evi-[356]-dence here of a joint trespass by the two Whitehursts,—not merely that they were plotting together, but that the trespass was committed for their joint benefit, or by means of their joint action. This doctrine is well illustrated by Lord Coke in the 4th Institute, c. 73, p. 317, treating of the Courts of the Forests, where he says: “And because it would be hard and difficult that any man should hunt and kill the King’s deer in his forest, and pass away without discovery, unless there were procurers, plotters, assisters, and receivers, by the law of the forest, whosoever receiveth within the forest any such malefactor either in hunting or killing, knowing him to be such a malefactor, or any flesh of the King’s venison, knowing it to be the King’s—in this case he is a principal trespasser, wherein the law of the forest differeth from the common law; for, by the common law, he that receiveth a trespasser (*sic*) and agreeth to a trespass after it be done, is no trespasser, unless the trespass was done to his use or for his benefit, and then his agreement subsequent amounteth to a commandment; for, in that case, *Omnis rati habitio retrahitur et mandato æquiparatur*: but, by the law of the forest, such a receiver is a principal trespasser, though the trespass was not done to his use, as well as the procurers and plotters: but, by the common law, in case of felony, such a receiver is but an accessary.” For these reasons, I agree with the rest of the court that the evidence in this case would have fully warranted the justices in finding that the respondent was guilty of the trespass, and might, if so minded, have convicted him upon this information.

KEATING, J. I am of the same opinion. The difficulty which the magistrates seem to have felt was, whether, the respondent not having left the vehicle, [357] and the offence having already been completed when John Whitehurst returned with the hare, there was a sufficient participation by the former to constitute him an aider and abetter within the statute. The facts, it seems to me, abundantly shew that the respondent did participate in the trespass: and I agree that the information would have been more artificially framed if it had been laid under the 1 & 2 W. 4, c. 32, s. 30, without referring to the 11 & 12 Vict. c. 43, s. 5, at all. There was abundant evidence to warrant the magistrates in drawing the inference that both were engaged in a common act of trespass in pursuit of game. It may be that they will not choose to infer that the respondent was guilty of the offence. All that we decide is that, upon the evidence they have laid before us, they might properly have done so.

Judgment for the appellant.

(a) “It seem to have been always an uncontroverted maxim, that there can be no accessaries in high treason or trespass.” Hawk. P. C., vol. 2, ch. xxix., p. 437.

KILLBY v. ROCHUSSEN. Jan. 16th, 1865.

1. A count by indorsee against drawer of a bill of exchange, alleging presentment and dishonour, and *due notice thereof* to the defendant, is sustained by proof of a subsequent promise by the defendant to pay, notwithstanding it is proved (or admitted) that due notice of dishonour was *not* given.—2. And the court will, if necessary, amend the declaration, by alleging a waiver of notice.

This was an action by an indorsee against the drawer of a bill of exchange. The declaration alleged presentment and non-payment of the bill by the acceptor, and due notice thereof to the defendant.

The defendant pleaded, amongst other pleas, that he had not received due notice of the dishonour of the bill; upon which issue was joined.

The cause was tried before Erle, C. J., at the sittings in London after last Term. The facts were these:—[358] Some three years ago, Wright, the acceptor of the bill, being desirous of borrowing money, the plaintiff agreed to make him an advance upon his acceptance at twelve months' date, drawn by the defendant. The bill was renewed from time to time. The bill in question falling due on the 28th of March, 1864, a conversation took place between Wright, who was unable to pay it, and the son of the plaintiff, the result of which was that it was to be renewed by a fresh bill, as on the former occasions. No formal notice of the dishonour of the bill was sent to the defendant, but the plaintiff's son swore that, shortly after the bill became due and had been dishonoured, he saw the defendant, and told him that Wright was unable to pay the bill, to which the defendant replied,—“I think he is: I suppose I must.”

It was objected, on the part of the defendant that, it being conceded that notice of dishonour had *not* been given, the above conversation (which was denied altogether by the defendant) did not sustain the allegation of notice in the declaration.

His Lordship reserved the point; but he also reserved leave to the plaintiff to amend the declaration by substituting for the averment of due notice of dishonour an averment of waiver of notice: and he left it to the jury to say whether or not the defendant had had notice of dishonour, telling them that a promise to pay amounted to notice.

The jury having returned a verdict for the plaintiff,

The Hon. G. Denman, Q. C., on a former day, moved to enter a verdict for the defendant, or for a new trial on the grounds of misdirection and that the verdict was against the weight of evidence. [Willes, J. The result of the authorities upon the subject seems to be that a promise to pay the bill is an absolute [359] waiver of notice of dishonour, and gives the go-by to the question whether notice has or has not been given. Bramwell, B., in a considered judgment in *Raby v. Gilbert*, 6 Hurlst. & N. 536, says: “If a person who has not had due notice of dishonour, nevertheless think fit to acknowledge his liability, though he does so to a party other than the person who afterwards sues upon the bill, that will enable the latter to maintain his action. For that position it is only necessary to refer to the case of *Potter v. Rayworth*, 13 East, 417, where the ordinary notice of dishonour had not been given, but the defendant nevertheless promised to pay a person to whom the plaintiff had indorsed the note. Afterwards, the plaintiff brought his action, and relied on that promise, and Lord Ellenborough in his judgment said, ‘that, whether the promise to pay was made to the plaintiff or to any other party who held the note at the time, it was equally evidence that the defendant was conscious of his liability to pay the note, which must be because he had due notice of dishonour.’ That means due notice so far as he was concerned. And Bayley, J., ‘considered the promise by the defendant either as an acknowledgment that he had had due notice of the dishonour, or that without such notice he was the proper person to pay the note, as the party for whose use it was drawn.’”] In no case has a promise to pay been considered evidence of notice, where it was proved or admitted that no notice was in fact given. In *Hicks v. The Duke of Beaufort*, 5 Scott, 598, 4 N. C. 229, in an action against the drawer of a bill of exchange, the defendant pleaded that he had had no notice of the dishonour of the bill. At the trial it was proved on the part of the plaintiff, that the defendant, upon being called upon for payment of the bill after it had been dishonoured, observed “that it was hard upon him to [360] be compelled to pay it, as he had only put his name to it as drawer for the accommodation of the acceptor:” and added that, “if the

acceptor did not pay it, he (the defendant) must : " but he requested the witness to exhaust all his influence to obtain the money from the acceptor before he resorted to him. And it was held that this was evidence, but not conclusive evidence, either that the defendant had had notice of dishonour, or that he waived it. "The cases," said Tindal, C. J., "seem to go to this extent,—where the drawer of a bill, after it has been dishonoured, makes a distinct promise to pay, such promise is evidence that he has received notice of dishonour : and the reason is this, that men are not prone to make admissions adverse to their own interest : and therefore, when the drawer promises payment, it is to be presumed that he does so because he is conscious that he is liable." But where there is direct proof that no notice has been given, there is no room for presumption. It was put to the jury as a proposition of law that a subsequent promise was equivalent to actual notice. It was never submitted to them whether or not there had been a waiver or dispensation of notice. In *Burgh v. Legge*, 5 M. & W. 418, upon the traverse of an allegation of notice of dishonour, the plaintiff, in order to support that issue, proved that on the day when the bill became due the defendant called upon him and told him that he knew it would not be paid ; that it was no use sending him a two-penny post letter the next day to give him notice, as it was not worth the money ; and that he would send the plaintiff money in part-payment of the bill on a future day : and it was held that this was not evidence of notice of dishonour, but of a dispensation with it, and that it ought to have been so alleged in the declaration. [Williams, J. That is a very different case.] The authorities are [361] thus summed up in Byles on Bills, 8 edit. 395,—"It was formerly considered doubtful whether such facts as dispense with presentment, protest, or notice of dishonour, could or could not be given in evidence in support of the common allegation of presentment, protest, or notice, in the declaration. It is now, however, clear that facts dispensing with presentment or notice, such as, absence of effects in the drawee's hands, or a countermand of payment by the drawer, must be specially alleged in the declaration ; and that proof of those facts is inadequate to the support of a positive averment of presentment, protest, or notice. A promise to pay, however, is still admissible under the common averments as *prima facie* evidence that the preliminaries essential to the maintenance of the action, such as presentment and notice, have been satisfied. But, if it should distinctly appear in evidence that there has been a neglect to present, and that the defendant, being aware of the omission, afterwards promised to pay, so that the promise is used as a waiver, it is conceived that the declaration must still be special. It may be otherwise, where there has been a neglect to give due notice of dishonour, and a promise to pay, with notice of the omission, has been afterwards made before action brought : for then the defendant has, in the words of the declaration, had notice of the dishonour, which notice, under the circumstances, may be deemed as against him due notice. But the law on this subject does not appear to be very clearly settled." In an earlier chapter, the learned author says,—p. 281 : "A prior dispensation with notice, as absence of effects, must be specially alleged in the declaration. So must the impossibility of giving notice, or any other excuse for not giving it. And it is conceived that a subsequent promise, when used as a waiver of notice, must also be specially pleaded. [362] But a subsequent promise to pay, when used as evidence of the fact of notice, need not." In *Cordery v. Colvin*, 14 C. B. (N. S.) 374, Byles, J., says : "The subsequent promise was either evidence of the fact of notice having been received, or that it had been waived." The jury should have had their attention called to the point, in order that it might be seen what it was that they did find.

Cur adv. vult.

WILLIAMS, J. I am of opinion that there should be no rule in this case. The first question raised is, whether upon the evidence and the finding of the jury there is sufficient to support the declaration as originally framed. I am of opinion that there was, because in effect the evidence was that the defendant being informed of the dishonour of the bill, unqualifiedly promised to pay it. It must be assumed that no due notice of dishonour was given. It was contended by Mr. Denman that, as it appeared that the defendant had *not* had notice, the promise to pay was not enough to support the allegation in the declaration that due notice of dishonour had been given to him. I am, however, of opinion that there was sufficient evidence, because the defendant was informed that the bill had been dishonoured, and afterwards promised to pay the amount. That operates as an acceptance by him of the notice given as a due notice. The jury, therefore, were not only justified in finding, but were bound to find,

that the defendant had received due notice of dishonour. Even if that were not so, we are still of opinion that there was sufficient to sustain the verdict, because the plaintiff had leave to amend his declaration by substituting an averment of waiver of notice for the averment of actual notice. It has, however, been contended by Mr. Denman that there was only [363] evidence for the jury, and, their opinion not having been taken upon it, there ought to be a new trial. But I am of opinion that, if the jury had declined to find that the promise to pay amounted to evidence of waiver, their verdict would have been unsatisfactory, and could not have been allowed to stand. When, therefore, leave was given to amend the declaration by inserting an averment of waiver instead of the averment of notice, it would be idle to send the cause to trial again, for the purpose of putting a question to the jury which they could only find one way. This course is inconsistent with the recent case of *Conbery v. Colvin*, 14 C. B. (N. S.) 374. Upon both grounds, therefore, I am of opinion that there is no foundation for a rule.

WILLES, J. I am entirely of the same opinion. The judgment just pronounced by my Brother Williams is in strict accordance with the law as laid down in *Potter v. Leppworth*, 13 East, 417, and *Robins v. Gilbert*, 6 Hurlst. & N. 536. The point of pleading is disposed of by the case of *Firth v. Turush*, 8 B. & C. 387, 2 M. & R. 359. There, the indorsee of a bill of exchange, dishonoured by the acceptor, being ignorant of the place of residence of one of the indorsers, employed an attorney to give notice to him and the other prior indorsers: the attorney, after inquiry, having received information of this indorser's place of residence on the following day, consulted his client, and on the third day sent notice of dishonour to him: and it was held that the notice was sufficient. The declaration averred that the defendant had notice of the dishonour: and the court held that that allegation was satisfied by proof that he had notice as soon as it could reasonably be given, and that it was unnecessary therefore to state in the declaration the special circumstances which rendered valid the notice given at a [364] later period than in ordinary cases would be sufficient. Whether or not I approve of the rule there laid down as to the validity of the notice, it is unnecessary to say.

The rest of the court concurring,
Rule refused.

GEORGE EATWELL, *Appellant*: ANDREW RICHMOND, *Respondent*. Jan. 25th, 1865.

[S. C. 12 L. T. 52; 13 W. R. 429.]

By a local turnpike-act (10 G. 4, c. ex.), the following tolls were imposed, amongst others,—"1. For every horse drawing any coach, caravan, or other such light carriage (*except stage-coaches*), 4d. 2. For every horse drawing any *stage-coach licensed to carry* not more than 16 passengers, 5d: and licensed to carry more than 16 passengers, 6½d. 3. For every horse drawing any van or other such carriage for the conveyance of goods for hire or pay, 6½d. 4. For every horse drawing any caravan or other such carriage (*licensed to carry passengers for hire*), at the same rate as stage-coaches carrying the same number of passengers." And a subsequent clause (s. 7) provided that only one full toll should be taken for passing and re-passing on the same day.—A., a carrier, was the owner of a four-wheeled van, in which he journeyed on certain days, and at stated times, between Bath and Chippenham, "carrying goods occasionally, and passengers occasionally, and sometimes both," for payment. He paid the annual duty of 2l. 6s. 8d. imposed by the 16 & 17 Vict. c. 90, sched. D. "for every carriage used by any common carrier principally and bona fide for and in the carrying of goods, wares, or merchandizes, whereby he shall seek a livelihood, where such carriage shall be occasionally only used in conveying passengers for hire, and in such manner that the stage-carriage duty, or any composition for the same, shall not be payable under any licence by the commissioners of inland revenue:"—Held, that A. was not chargeable with return toll, as the proprietor of a "stage carriage," under the 9th section of the local act, which provided that "for or in respect of the horses drawing any stage-coach, stage-waggon, van, caravan, cart, or other stage-carriage for the conveyance of *passengers* for payment, hire, or reward, for which toll should have been paid, and which should return on the same day through the same turnpike-gate or bar, the tolls thereby made payable should be

paid for every time of passing and re-passing through every such gate or bar, in like manner as if no toll had been before paid thereat."

At a petty sessions holden at Weston, in the county of Somerset, on the 18th of June, 1864, before, &c., six of Her Majesty's justices of the peace in and for the said county, an information preferred by George Eatwell, the owner and driver of a spring-van on four wheels which travels into bath from Chippenham and back [365] three times a week (hereinafter called the appellant), against Andrew Richmond, the collector or keeper of the London turnpike-gate (hereinafter called the respondent), charging for that "he the said Andrew Richmond, on the 6th of June, 1864, at the parish of Swainswick, in the said county of Somerset, did demand and take greater toll for a horse and caravan passing through the said turnpike-gate than he was authorized to do," was heard and determined; and, upon such hearing, the information was dismissed by a majority of the justices then present.

The appellant, being dissatisfied with the determination, as being erroneous in point of law, demanded a case for the opinion of this court, pursuant to the 20 & 21 Vict. c. 43, which was stated as follows:—

Mr. Edward Francis Slack, solicitor, attended on the part of the complainant, and Mr. Joseph Kilvert Bartrum, solicitor, attended on the part of the defendant.

Mr. Slack, in opening the complainant's case, cited the following authorities in support of his argument that whenever any doubt, existed in a local act of parliament in reference to the imposition of tolls, the public, and not the trustees, whose act it is, and who ought to have been particular as to its wording, were entitled to the benefit of such doubt, viz. *Gildart v. Gladstone*, 11 East, 675, *The Stockton and Darlington Railway Company v. Barrett*, 3 Scott, N. R. 803, 2 M. & G. 134, in error, 8 Scott, N. R. 641, 3 M. & G. 956, *Higginbottom v. Perkins*, 8 Taunt. 795, and *The Stourbridge Canal Company v. Wheeley*, 2 B. & Ad. 792.

Mr. Slack then stated that the appellant, who was a common carrier travelling with his van at a pace not exceeding four miles an hour from Chippenham to Bath, and back, for the conveyance of both goods and passengers, and who was not licensed, but paid a duty of 2l. 6s. 8d. under a clause in the schedule D. annexed [366] to the act of parliament 16 & 17 Vict. c. 90, and which is as follows,—“For every carriage used by any common carrier principally and bona fide for and in the carrying of goods, wares, or merchandize, whereby he shall seek a livelihood, where such carriage shall be occasionally only used in conveying passengers for hire, and in such manner that the stage-carriage duty, or any composition for the same, shall not be payable under any licence by the commissioners of inland revenue, where such last-mentioned carriage shall have four wheels, 2l. 6s. 8d., and where the same shall have less than four wheels, 1l. 6s. 8d.,” complained that, on the 6th of June instant, he was charged by the respondent with a toll of 6½d. for his one-horse van on passing through the respondent's gate in the morning, and another toll of 6½d. when returning with the same horse and van in the afternoon.

The following are the toll-imposing clauses in the local turnpike-act of 10 G. 4, c. ex., under which the respondent acted, which Mr. Slack considered applicable to the present case:—

Section 6. “And be it further enacted that a sum or sums not exceeding the respective tolls following shall be demanded and taken at each and every turnpike, toll-gate, bar, or chain, now set up or continued, or which shall hereafter be set up, upon or across or by the side of the roads by this act authorised or declared to be made, amended, widened, diverted, improved, and kept in repair, and the several branches thereof, or the said new line of road, by each and every such person or persons as the said trustees shall from time to time by virtue of this act continue or appoint to receive the same, before any horse, beast, or cattle, or any carriage, shall be permitted to pass through the same, that is to say,” amongst others,—

“For every horse or other beast drawing any coach, [367] barouche, sociable, berlin, chariot, landau, chaise, phaeton, curriole, gig, caravan, cart upon springs, hearse, litter, or other such light carriage (except stage coaches), any sum not exceeding *four pence*:

“For every horse or beast drawing any stage-coach licensed to carry in the whole inside and outside not more than sixteen passengers, any sum not exceeding *five pence*: and licensed to carry more than sixteen passengers, any sum not exceeding *six pence half-penny*:

"For every horse or other beast drawing any van or other such carriage for the conveyance of goods for hire or pay, any sum not exceeding *six pence half-penny* :

"For every horse or other beast drawing any caravan, tilted waggon, tilted cart, or other such carriage (licensed to carry passengers for hire), at the same rate as stage-coaches carrying the same number of passengers."

After the toll-imposing clauses are some provisoes, and amongst them are the following:—

Section 7. "Provided always, and be it further enacted that it shall not be lawful for the said trustees, or their collector or collectors, lessee or lessees, to demand or take more than the respective numbers of tolls in the whole hereinafter mentioned for and in respect of the same horses, cattle, and carriages, for passing and re-passing in any one day, to be computed from twelve of the clock in one night to twelve of the clock in the next succeeding night, along the whole line or lines of the said several roads as hereinafter mentioned (except as hereinafter mentioned), that is to say, on the said road which is called the London Road (forming part of the aforesaid first district), not more than one full toll," &c., &c.

Section 9. "Provided always, and be it further [368] enacted that, for or in respect of the horses or other cattle or beasts drawing any stage-coach, stage-waggon, van, caravan, cart, or other stage-carriage for the conveyance of passengers for payment, hire, or reward, for which toll shall have been paid, and which shall return on the same day through the same turnpike-gate or bar, the tolls hereby made payable shall be paid for every time of passing and re-passing through every such gate or bar, in like manner as if no toll had been before paid thereat."

Mr Slack contended, first, that, as a second toll could only be charged under the proviso in which the word "stage" apparently governed all the other expressions, and as it was not clear that this was a stage-van or a stage-caravan, a second toll could not, upon the principle he had contended for, be levied upon it,—secondly, that, as the van was not licensed, it did not come within the 4th clause of s. 6, which rendered licensed vehicles liable to the same rate as stage-coaches,—and, thirdly, that, although the respondent might have elected to have charged the appellant 4d. under the first clause, or 6½d., as conveying goods for hire, under the 3rd clause, yet, having elected to treat it as a goods-conveying van, and charged the higher toll, he had no power to demand such toll again, under the proviso, which extends only to conveyances carrying *passengers*, and not goods.

The following witness was called and examined by Mr. Slack:—George Eatwell. "I am a common carrier, living at Chippenham, and travelling to Bath with a light caravan on four wheels, drawn by one horse. I do not travel over four miles an hour. I carry goods occasionally, and passengers occasionally,—sometimes one, and sometimes the other, and sometimes both: always for payment. I deposit passengers occasionally at their own doors, when they request it: and universally I deliver goods at their destination, as [369] directed. I pay the 2l. 6s. 8d. duty as a carrier's van: and I produce my notice. That 2l. 6s. 8d. is under the Assessed Duty Act, 16 & 17 Vict. c. 90, schedule D. On the 6th of June, at the London gate, I was charged 6½d. each way, which I paid; and I at the same time protested against the payment, and claimed exemption."

Cross-examined by Mr. Bartrum "The caravan has moveable seats, which can be put up or down. On the 6th of June, I had one passenger coming into Bath, and no goods, except a bundle belonging to the passenger. On returning, I had the same passenger, and a packet of bacon going to Chippenham. I generally go to Bath on Mondays, Wednesdays, and Saturdays, and return the same day, leaving Chippenham at eight in the morning, and Bath at five in the afternoon. My name is in the carrier's list in the Bath directory."

Mr. Bartrum, citing the case of *The Queen v. Ruscoe*, 8 Ad. & E. 386, 3 N. & P. 428, contended that, as this was a regular conveyance for goods and passengers between certain places, at certain times, on fixed days, it was distinctly a stage-vehicle, coming within the meaning of the proviso which imposed a toll each way; and that, as the appellant carried goods for hire in his van, it was the respondent's duty to charge him the higher toll of 6½d., which toll he had also a right to redemand on the appellant's return.

The justices, by a majority, concurred in the view contended for by Mr. Bartrum.

The question for the opinion of the court was, what toll was chargeable under the

local act on such conveyance as that described in the evidence of George Eatwell, and whether such toll was chargeable again upon the return on the same day of the same horse and vehicle through the same gate.

Should the court be of opinion that a toll of 6½d. [370] could be demanded both on going and returning, the determination of the justices was to be affirmed; or, if not, to be reversed, and in the latter case such order made in relation to the matter as to the court might seem fit.

The tolls which were so demanded and paid as aforesaid were each of them demanded and paid as one full toll at the gate on the road referred to in the said local act as the London Road, and not as any part of the additional three-fourths of a full toll which by the said act the trustees were entitled to charge at certain parts of the road therein referred to as the new line of road.

Kingdon, for the appellant (*a*). The question is, under which of the first four clauses of the 6th section [371] of the local act of 10 G. 4, c. ex., the appellant was chargeable. Clause 1 is, "For every horse or other beast drawing any coach, barouche, sociable, berlin, chariot, landau, chaise, phaeton, curricie, gig, *caravan*, cart upon springs, hearse, litter, or *other such light carriage* (except stage-coaches), any sum not exceeding 4d." Clause 2 is, "For every horse or beast drawing any *stage-coach licensed to carry* in the whole, inside or outside, not more than sixteen passengers, any sum not exceeding 5d., and licensed to carry more than sixteen passengers, any sum not exceeding 6½d." Clause 3 is, "For every horse or other beast drawing any *van* or other such carriage *for the conveyance of goods for hire or pay*, any sum not exceeding 6½d." And clause 4 is, "For every horse or other beast drawing any caravan, tilted waggon, tilted cart, or other such carriage (*licensed to carry passengers for hire*), at the same rate as stage-coaches carrying the same number of passengers." It is submitted that the appellant's vehicle is chargeable under either the first or the third clause, and not under the second or fourth,—he not being licensed to carry passengers for hire, but only under the clause in the 16 & 17 Vict. c. 90, sched. D., which imposes an annual duty of 2l. 6s. 8d. "for every carriage used by any common carrier principally and bona fide for and in the carrying of goods, wares, or merchandize, whereby he shall seek a livelihood, where such carriage shall be occasionally only used in conveying passengers for hire, and in such manner that the stage-carriage duty, or any composition for the same, shall not be payable under any licence by the commissioners of inland revenue." He is, therefore, [372] within the 7th section of the local act, which limits the charge to one full toll for going and returning on the same day, and is not chargeable with return toll under s. 9, which provides that, "for or in respect of the horses or other cattle or beasts drawing any stage-coach, stage-waggon, van, caravan, cart, or *other stage-carriage for the conveyance of passengers for payment*, hire, or reward, for which toll shall have been paid, and which shall return on the same day through

(*a*) The points marked for argument on the part of the appellant were as follows:—

"1. That the appellant's caravan is not a stage-carriage within the meaning of the 6th and 9th sections of the local act, 10 G. 4, c. ex., and was therefore not liable to a second toll on its return journey:

"2. That the 6th section of the local act only makes stage-carriages liable to toll when they are licensed to carry passengers, and that the appellant's caravan is not so licensed, but only pays a duty as a carriage used by a common carrier under the 16 & 17 Vict. c. 90, Schedule D., and is therefore not liable to pay toll on its return journey, under the 9th section of the local act:

"3. That the toll imposed by the 6th section of the local act on stage-carriages varies in proportion to the number of passengers the carriages are licensed to carry, and that the appellant's caravan, not being licensed, cannot be liable to any such toll:

"4. That the appellant's caravan is only liable to a single toll on each journey, either of 4d. under the 1st clause of the 6th section of the local act, or of 6½d. under the 3rd clause of the same section:

"5. That the respondent, by claiming a toll of 6½d. on the first journey, which could only be claimed under the 3rd clause of the 6th section of the local act, has estopped himself from claiming a toll on the appellant's caravan on the return journey, as a stage-carriage, under the 2nd clause of the same section, and under the 9th section of the same act."

the same turnpike-gate or bar, the tolls hereby made payable shall be paid for every time of passing and repassing through every such gate or bar, in like manner as if no toll had been before paid thereat." This last provision is confined to "stage-carriages" only, the definition of which is to be found in the second and fourth clauses of s. 6, which vary the toll according to the number of passengers which the vehicle is licensed to carry. At all events, there was no pretence for the charge of 6½d., as if the appellant's van was licensed to carry more than sixteen passengers.

Karslake, Q. C., for the respondent (a). Upon the evidence given by the appellant himself before the [373] justices, it is plain that he was regularly plying for passengers between Bath and Chippenham. He is the proprietor of a stage-van or carriage for the conveyance of passengers for hire, and not a mere carrier, though licensed under the 16 & 17 Vict. c. 90, sched. D. [Keating, J. Is every toll-gate keeper to canvas the propriety of the duty charged for licences?] The appellant is clearly within the 4th clause of the 6th section of the local act, and liable to the return toll imposed by s. 9, as the proprietor of a stage-carriage for the conveyance of passengers for payment. The meaning of "stage-carriage" is well defined in *The Queen v. Ruscoe*, 8 Ad. & E. 386, 3 N. & P. 428. There, a turnpike-act contained a clause giving certain exemptions from toll, but excepted from it by a proviso all horses drawing *any stage-coach, diligence, van, caravan, or stage-waggon, or other stage-carriage conveying passengers or goods for pay*. R. was a wharfinger and agent to a company who were carriers of goods by canal. R. kept waggons and horses, which he employed in carrying out goods brought by the company to his wharf situate at Stoke-upon-Trent, for persons in the neighbourhood, and bringing goods from the neighbourhood to his wharf, for transit by the canal. For such his conveyance of goods he made charges on each parcel. His waggons were so employed in carrying goods to [374] and from persons residing at or near a place called Lane End, or places intermediate between that and Stoke-upon-Trent, almost every day except Sundays. The waggons went out and returned at different hours, according to circumstances: on some days they made more journeys than on others, and they seldom omitted going altogether. R. had no office or receiving-house at Lane End. And it was held that R.'s waggons were not *stage-waggons* or carriages within the terms of the proviso, and therefore were not excluded from the exempting clause. Lord Denman, C. J., there says: "I should apprehend that the legislature did not intend to exempt carriages of this description: but, if that was so, the proviso should not have been qualified by the word 'stage,' used as it is here: and we must find some meaning for that expression. Now, the lowest description of a 'stage' would be, a vehicle that starts from some one point at certain stated intervals, as an errand cart may do: anything below this cannot, in my opinion, answer to the term. But the carriages described in this case do not go at stated intervals, and may never go at all." There is nothing in the clause of the local act imposing the return toll, about the vehicle being licensed. If *used* for the conveyance of passengers for payment, the return toll

(a) The points marked for argument on the part of the respondent were as follows:—

"1. That the van in question was a van or carriage for the conveyance of goods for hire or pay, within the meaning of the local act, and was therefore liable to pay as and by way of toll a sum not exceeding 6½d.:

"2. That the van in question was 'a stage-van, caravan, cart, or other stage-carriage for the conveyance of passengers for payment, hire, and reward,' within the meaning of the local act, and therefore liable to pay a second or return toll:

"3. That it does not appear to have been proved before the justices, or that the fact was that the appellant took or received any ticket denoting payment of any toll, which enabled the said horse and van to re-pass through the gate during the day without paying a second or return toll, or toll-free:

"4. That it does not appear to have been proved before the justices, or that the fact was that the appellant produced any such ticket as aforesaid, so as to entitle the said horse and van to re-pass through the gate during the day without paying a return toll, or toll-free:

"5. That the fact of its not having been licensed did not prevent its being a van or carriage for the conveyance of goods for hire or pay, or stage-van, caravan, cart, or other stage-carriage for the conveyance of passengers for payment, hire, and reward."

is chargeable. It may be that the toll-collector was wrong in demanding 6½d., and that the appellant was only liable to the 5d. toll under the second clause in s. 6 of the local act; but that does not prevent his being liable to the return toll under s. 9, as upon a vehicle used for the conveyance of passengers. [Williams, J. Having elected on the first occasion to take the toll under the third clause of s. 6, he had no right afterwards to shift his ground.]

ERLE, C. J. The first question for our decision in [375] this case is, whether the respondent had a right under the circumstances stated to demand the return-toll. It appears that the appellant is in the habit of travelling at stated times from Bath to Chippenham and from Chippenham to Bath with a four-wheeled van for which he pays an annual duty of 2l. 6s. 8d., which is the duty payable under the 16 & 17 Vict. c. 90, Sched. D, "for every carriage used by any common carrier principally and bona fide for and in the carrying of goods, wares, and merchandizes, whereby he shall seek a livelihood, where such carriage shall be occasionally only used in carrying passengers for hire, and in such manner that the stage-carriage duty, or any composition for the same, shall not be payable under any licence by the commissioners of inland revenue." The appellant's caravan, therefore, is not a carriage licensed for the conveyance of passengers at all, but goods: though it appear that he occasionally does, and did upon the occasion in question, carry a passenger for hire. The question is, whether that occasional use of his vehicle makes it a stage-carriage upon which a return toll is imposed by the 9th section of the local act. The 6th section imposes tolls in respect of a variety of carriages. By clause 2, "for every horse or beast drawing any stage-coach licensed to carry in the whole, inside and outside, not more than sixteen passengers, any sum not exceeding 5d.; and licensed to carry more than sixteen passengers, any sum not exceeding 6½d." Then comes clause 2,—"*for every horse or other beast drawing any van or other such carriage for the conveyance of goods for hire or pay, any sum not exceeding 6½d.*" The appellant's vehicle clearly is not a "stage-coach" licensed to carry passengers. But, if he is liable in respect of his carrying passengers, it could only be under clause 4, which is as follows,—"*for every horse or other beast drawing [376] any caravan, tilted waggon, tilted cart, or other such carriage (licensed to carry passengers for hire), at the same rate as stage-coaches carrying the same number of passengers.*" Is this appellant the proprietor of a carriage "licensed to carry passengers for hire?" He pays duty as a carrier of goods for hire; and he occasionally carries passengers: for the out toll he clearly does not fall within the description given either in the second or the fourth clause. The 7th section limits the tolls to be taken on this particular road to one full toll each day. The 9th section provides that toll shall be paid for every time of passing and re-passing, if the vehicle comes within the class described in that section. The carriages there described are, "any stage-coach, stage-waggon, van, caravan, cart, or other stage-carriage for the conveyance of passengers for payment, hire, or reward." I think that section is to be read with the 6th; and by the 6th section the rate of toll is settled and ascertained by the license which the owner of the vehicle has, and consequently that the return-toll is imposed only upon stage-coaches or carriages which are licensed to carry passengers for hire. The construction sought to be put by the respondent upon this 9th section is that, because the word "licensed" is there omitted, the toll-gate keeper has a right to look into every carriage, and to inquire quo intuitu the particular journey is made, and to claim the return-toll when it is used for the carriage of a passenger. I am very clear that he has no such right, and that the toll imposed by s. 9 is imposed in respect of that which is the accustomed use of the vehicle, and that the toll-gate keeper should be satisfied with the licence which the party has. It would lead to the most pernicious consequences if he were to be allowed to stop and cross-examine the driver every time of passing, as to the [377] object of his journey, and so change the liability at his discretion or caprice. Vexatious delay and possible breaches of the peace would naturally be the result. The legislature never could have intended to allow that. The character of the vehicle is to be determined by the licence which the owner has obtained for it; and the toll-gate keeper must be content with that.

WILLIAMS, J. I am of the same opinion. The vehicle in question is clearly not a "stage-carriage" within s. 9 of the local act merely because it is used occasionally for the conveyance of passengers.

WILLES, J. I am of the same opinion. The case will go back to the justices

with an intimation of our opinion that the appellant was not under the circumstances liable for the back toll, but that 6½d. was the proper sum to be demanded for the forward toll.

KEATING, J. I entirely agree with the rest of the court. The toll-gate keeper was right when he demanded a toll of 6½d. under the third clause of s. 6 of the local act: and I think that precluded him from afterwards claiming the return-toll under s. 9.

Case remitted, without costs (*a*).

[378] JAMES COMLEY, *Appellant*; WILLIAM CARPENTER, *Respondent*.
May 16th, 1865.

[S. C. 12 L. T. 453; 11 Jur. N. S. 712; 13 W. R. 812.]

By a local turnpike-act (6 G. 4, c. exliii.), the following tolls (amongst others) were imposed,—"For every horse or other beast drawing any coach, *stage-coach*, diligence, van, caravan, sociable, berlin, landau, chariot, vis-a-vis, barouche, phaeton, chaise-marine, calash, curricule, chair, gig, whiskey, hearse, litter, chaise, or other such like carriage, 9d.: For every horse or other beast drawing any waggon, wain, cart, or other such like carriage, having the felloes of the wheels thereof of the breadth of six inches or upwards at the bottom or soles thereof, 6d." And a subsequent clause provided that one toll only should be paid for passing and re-passing on the same day.—A., a carrier, was the owner of a covered caravan (the single toll on which was admitted to be 6d.) with which he travelled between Cirencester and Cheltenham every Tuesday and Thursday, at a pace not exceeding four miles an hour. He used his caravan principally for carrying *goods, for hire*, but he frequently (as he did upon the occasion in question) conveyed therein also *passengers*, for hire. He was not licensed under the Stage-Carriage Act, 2 & 3 W. 4, c. 120, but paid the duty imposed by the 16 & 17 Vict. c. 90, sched. D., "for every carriage used by any common carrier principally and bona fide for and in the carrying of goods, wares, or merchandizes, whereby he shall seek a livelihood, where such carriage shall be occasionally only used in conveying passengers for hire, and in such manner that the stage-carriage duty, or any composition for the same, shall not be payable under any licence by the commissioners of inland revenue:"—Held, that A. was the proprietor of a "stage-carriage *conveying goods* for pay or reward," within the 11th section of the local act, which provided that "the tolls thereby made payable for or in respect of horses or beasts drawing any stage-coach, diligence, van, caravan, or stage-waggon, or other stage-carriage conveying passengers or *goods* for pay or reward, shall be payable and paid every time of passing or re-passing along the said road;" and therefore liable to the return-toll.

At a petty sessions held on the 27th of February, 1865, at Cirencester, in the county of Gloucester, an information was preferred by James Comley (hereinafter called the appellant) against William Carpenter (hereinafter called the respondent), for that the respondent, on the 16th of February, 1865, at Stratton, in the said county, then being the collector of the tolls at a certain turnpike-gate there, called the Stratton Gate, on a certain turnpike-road there situate, unlawfully did demand and take from the appellant the sum of 6d. as and for the toll of a horse and cart of which the appellant was the driver, on the said turnpike-road, the said appellant being exempt from the payment of such toll by reason of toll having been paid for the passing of the same horse and cart through the same gate on the same day, and the said horse and cart being then returning and re-passing through the same gate before twelve o'clock at night of the same day: and, after hearing the parties and the evidence adduced by them, the information was dismissed.

[379] Against this decision the appellant appealed; and the following case was stated for the opinion of the court, pursuant to the statute 20 & 21 Vict. c. 43:—

It was proved, on the part of the appellant, that he is a common carrier, living at Cirencester, and travelling between that town and the town of Cheltenham every Tuesday and Thursday; and he so travels, sometimes with a covered caravan or

waggon on four wheels, and sometimes with a covered caravan or cart on two wheels drawn respectively by one or two horses, as the weight of the load or the state of the roads may require, and travelling at a pace not exceeding four miles an hour; that the said appellant uses such caravans principally for carrying goods, for hire, but that he frequently conveys therein also passengers, for hire: that he is not licensed under the stage-carriage act for either of such caravans, but pays the duties of 2l. 6s. 8d. and 1l. 6s. 8d. for the same respectively, as for carriages used by a common carrier, under the 16 & 17 Vict. c. 90, schedule D.; that, on the day on which the alleged offence is charged to have been committed, being Thursday, the 16th of February, 1865, the appellant travelled as usual from Cirencester to Cheltenham, and back, with the said covered caravan or cart on two wheels, and which on that occasion was drawn by one horse; that, on the morning of the day in question, the appellant conveyed goods in such caravan from Cirencester to Cheltenham, and in the afternoon conveyed goods therein from Cheltenham to Cirencester, and in each case delivered such goods according to the directions thereon, and received payments for the carriage and delivery thereof according to a usual scale adopted by him; that he also on the day in question conveyed one passenger on each time of passing the same gate, and received payment of such passenger; that the appellant travels from Cirencester [380] to Cheltenham along the turnpike-road between those towns, and which is one of the district roads which are repaired and maintained under the provisions of the Cirencester Roads Act, 1862, 6 G. 4, c. cxliii.; that there is a turnpike or toll-gate upon such road, in the parish of Stratton, called the "Stratton Gate," and that the respondent is the collector of tolls at such gate; that, on the morning of the day in question, the appellant passed through the said gate on his way to Cheltenham, and was charged by the respondent a toll of 6d. for the horse drawing the said caravan, and paid the same; and that, on the afternoon of the said day (and before twelve o'clock at night), the appellant re-passed through the said gate on his return to Cirencester, and was then again charged by the respondent a toll of 6d. for the same horse drawing the same caravan, which second toll the appellant thereupon paid under protest.

The Cirencester Roads Act, 1862, was put in evidence.

The preamble of such act recites an act passed in the 6 G. 4, c. cxliii., intituled "An Act for maintaining and improving certain roads leading to and from the town of Cirencester in the county of Gloucester," which last-mentioned act was also put in evidence, and contains the following sections:—

Section 8. "And be it further enacted that it shall and may be lawful for the said trustees or any person or persons to be appointed collector or collectors of the tolls to be taken by virtue of this act, to demand and take the tolls hereinafter mentioned, at the several and respective toll-gates or turnpikes or toll houses, or side-gates or side-bars or chains, which shall be erected or placed by virtue of this act in, upon, across, or on the side or sides of the said roads, and on every day (such day to be computed from twelve of the clock at [381] night to twelve of the clock in the next succeeding night), that is to say,

"For every horse or other beast drawing any coach, stage-coach, diligence, van, caravan, sociable, berlin, landau, chariot, vis-à-vis, barouche, phaeton, chaise-marine, calash, currie, chair, gig, whiskey, hearse, litter, chaise, or other such like carriage, the sum of 9d.:

"For every horse or other beast drawing any waggon, wain, cart, or other such like carriage, having the felloes of the wheels thereof of less breadth than four and a half inches at the bottom or soles thereof, the sum of 9d.: and having the felloes of the wheels thereof of the breadth of four and a half inches or upwards, and less than six inches at the bottom or soles thereof, the sum of 7½d.: and having the felloes of the wheels thereof of the breadth of six inches or upwards at the bottom or soles thereof, the sum of 6d.

"For every horse, mule, or ass, laden or unladen, and not drawing, the sum of 1d.:

"For every ox or head of neat cattle, the sum of 1d.: and for every calf, sheep, swine, or lamb, the sum of ½d.

"Which said respective sums of money or tolls shall be demanded and taken before any horse, mule, ass, beast, or other cattle whatsoever shall be permitted to pass though any toll-gate or turnpike, or side-gate, or side-bar or chain, which shall be erected or placed by virtue of this act in, upon, or across the said roads, or on the sides thereof, or any part thereof: and which said respective tolls shall be and are

hereby vested in the said trustees, and shall be applied for the purposes of this act in manner hereinafter directed : ”

Section 9. “ Provided always, and be it further enacted that, in case the toll hereby authorized to be taken shall have been paid for the passing of any [382] horse, beast, or cattle, through any one of such toll-gates, turnpikes, or side-gates, such horse, beast, or cattle shall, upon a ticket denoting such payment on that day being produced, be permitted to pass toll-free through the same toll-gate, turnpike, or side-gate, and also through any such other gate or gates (if any) as the ticket for such payment shall free, at any time or times during the same day (to be computed as aforesaid), anything in this act contained to the contrary thereof in anywise notwithstanding.”

Section 11. “ Provided always, and be it further enacted that the tolls hereby made payable for or in respect of horses or beasts drawing any *stage-coach, diligence, van, caravan, or stage-wagon, or other stage-carriage, conveying passengers or goods for pay or reward*, shall be payable and paid every time of passing or re-passing along the said road.”

The act of 1862 enacts as follows :—

Section 1. “ From and after the commencement of this act, the said recited act of the 6 G. 4, c. cxlii., shall be repealed, and this act shall thenceforth be put into execution during the term and for the purposes hereinafter mentioned.”

Section 13. “ Notwithstanding the repeal of the recited act, the several tolls thereby granted and made payable shall continue to be paid at the toll-gates to be continued or erected on or on the sides of the said roads, until other tolls shall be appointed to be taken under the powers of this act.”

Section 16. “ From and after the commencement of this act, it shall be lawful for the said trustees to demand and take on each and every day, such day to be computed from twelve of the clock at night to twelve of the clock on the next succeeding night, at each and every toll gate which shall be continued or set up by virtue of this act in, upon, across, or on the sides of [383] the said roads, or any of them, such tolls as the said trustees at any of their meetings shall direct, not exceeding the sums following, that is to say,—

“ For every horse or other beast drawing any coach, stage-coach, diligence, van, caravan, sociable, berlin, landau, chariot, vis-a-vis, barouche, phaeton, chaise-marine, calash, curricule, chair, gig, whiskey, hearse, litter, chaise, break, or other such like carriage, the sum of 9d.

“ For every horse or other beast drawing any waggon, wain, cart, van, caravan, dray, timber-carriage, steam-engine or machinery, or other carriage of a like description, by whatsoever name called or known, having the felloes of the wheels thereof of the breadth of six inches or upwards at the bottom or soles thereof, the sum of 6d. ; and having the felloes of the wheels thereof of the breadth of four and a half inches or upwards, and less than six inches, at the bottom or soles thereof, the sum of 7½d. ; and having the felloes of the wheels thereof of less breadth than four and a half inches at the bottom or soles thereof, the sum of 9d. :

“ For every horse, mule, or ass, laden or unladen, and not drawing, the sum of 2d. :

“ For every drove of oxen or neat cattle the sum of 1s. 8d. per score, and so in proportion for any less number :

“ And for every drove of calves, swine, sheep, lambs, or goats, the sum of 10d. per score, and so in proportion for any less number :

“ Which said tolls shall be demanded and taken before any horse, mule, ass, beast, or other cattle whatsoever shall be permitted to pass through any toll-gate which shall be maintained, erected, or placed by virtue of this act, in, upon, or across any of the said roads, or on the sides thereof, or any part thereof : and which said respective tolls shall be and are hereby vested [384] in the said trustees, and shall be applied for the purposes of this act in manner hereinafter directed.”

Section 18. “ In case the tolls hereby authorised to be taken shall have been paid for the passing of any horse, mule, ass, beast, or other cattle or animal, or any carriage, through any or either of such toll-gates, no toll shall be demanded or taken for or in respect of such horse, mule, ass, beast, or other cattle or animal, or carriage, returning, passing, or re-passing through the same toll-gate before twelve of the clock at night of the same day ; but, on a note or ticket being produced, denoting the payment of such toll, such horse, mule, ass, beast, or other cattle or animal, or carriage, shall (except

in the cases hereinafter mentioned) be permitted to pass toll-free through the same toll-gate, and also through every such other toll-gate or gates, if any, as the ticket for such payment shall free, at any time during the same day before the said hour; which note or ticket, naming and specifying the gate or respective gates freed by such payment, the several collectors of the said tolls are hereby respectively required to give gratis on receipt of the toll."

Section 20. "The tolls hereby made payable for or in respect of horses or beasts drawing *any stage-coach, diligence, omnibus, van, caravan, chaise, cart, chair, break, or stage-waggon, or other stage carriage conveying passengers or goods for hire or reward*, shall be payable and paid every time of passing or re-passing along the said roads, or any of them."

On the hearing of the said information, it was treated as an admitted fact on both sides that, under the said acts, the sum of 6d. demanded and paid in respect of the appellant's caravan on the first time of the same passing the said gate, as before stated, was the toll legally and properly payable in respect thereof: but it was not proved or admitted before the justices [385] whether such toll was payable under the act of 6 G. 4, as continued by s. 13 of the act of 1862, or whether the same was payable by virtue of section 16 of the said act of 1862.

The appellant contended,—first, that his caravan was not a carriage conveying passengers or goods for hire or reward, within the meaning of s. 20 of the said act of 1862, and that therefore the horse drawing the same was not liable to pay toll on each time of passing through the said gate, secondly, that, according to the construction of such section, the stage carriage thereby made liable to pay toll every time of passing along the turnpike-road, means a stage-carriage *licensed as such* under the Stage-Carriage Act, 2 & 3 W. 4, c. 120.

The respondent contended, first, that the caravan driven by the appellant was a stage-carriage conveying *goods* for hire or reward, within the meaning of the said section, and that therefore the horse drawing the same was liable to pay toll on each time of passing through the said gate,—secondly, that, according to the true construction of such section, a carriage which is used as a regular conveyance for *goods and passengers* between certain places, at stated times, on fixed days, and in respect of which duty is paid under the 16 & 17 Vict. c. 90, schedule D., as a carriage used by a common carrier, is a stage-carriage, and liable to toll on each time of passing notwithstanding that, by reason of such carriage travelling at a pace not exceeding four miles an hour, the same may not be licensed or require to be licensed under the Stage-Carriage Act, thirdly, that, by giving the said section the construction contended for by the appellant, no meaning is attached to the words "or goods," contained therein, inasmuch as a stage-carriage, as defined by the Stage-Carriage Act, means a carriage used or employed for purpose of carrying passengers for hire.

[386] The justices were thereupon of opinion that the appellant's caravan was a stage-carriage conveying *goods* for hire, within the meaning of the said acts, and that the same was liable to toll on each time of passing and re-passing along the said turnpike-road, and they therefore dismissed the information.

The question for the opinion of the court was,—whether, upon the above facts, the appellant was legally chargeable with the toll of 6d. in respect of the said caravan, on the occasion of his re-passing along the said turnpike-road on the day mentioned in the said information.

Should the court be of opinion that the appellant was so chargeable, then the decision of the justices was to be affirmed. If otherwise, then such decision was to be reversed, and such order made in relation to the matter of the said information as to the court should seem fit.

Kington, for the appellant. The present case very much resembles that of *Eatwell, App., Richmond, Resp.*, ante, p. 364: but the words of the section of the act then under consideration (10 G. 4, c. ex.), which imposed the return-toll (s. 9), are somewhat different from those of the corresponding clause in the statute now before the court. In both cases, however, the duty paid by the owner of the vehicle was that charged upon carriages used by a common carrier under the 16 & 17 Vict. c. 90, Schedule D.; and in neither case was the vehicle licensed under the Stage-Carriage Act, 2 & 3 W. 4, c. 120. In *Eatwell, App., Richmond Resp.*, the court in substance held that the vehicle of the appellant, not being *licensed to carry passengers for hire*, was not liable for the second toll, under the proviso in s. 9 of the 10 G. 4, c. ex., that "for or in

respect of the horses or other cattle or beasts drawing any stage coach [387] stage-waggon, van, caravan, cart, or other stage-carriage *for the conveyance of passengers* for payment, hire, or reward, for which toll shall have been paid, and which shall return on the same day through the same turnpike-gate or bar, the tolls hereby made payable shall be paid for every time of passing and re-passing through every such gate or bar, in like manner as if no toll had been before paid thereat." Under the act now in question,—which for the purpose of the argument may be assumed to be the 6 G. 4, c. exliii.,—the proviso is (s. 20) "the tolls hereby made payable for or in respect of horses or beasts drawing any stage-coach, diligence, omnibus, van, caravan, chaise, cart, chair, break, or stage-waggon, or other stage-carriage conveying passengers or goods for hire or reward, shall be payable and paid every time of passing or re-passing along the said roads, or any of them." The definition of a "stage carriage" given in the 2 & 3 W. 4, c. 120, s. 5, is as follows:—"Every carriage used or employed for the purpose of conveying passengers for hire to or from any place in Great Britain, and which, when passing along any highway or other road, shall travel at the rate of three miles or more in the hour (a), shall, without regard to the form or construction thereof, be deemed and taken to be a stage-carriage within the meaning of this act; provided the passengers, or any one or more of them, thereby conveyed, shall be charged or shall pay separate and distinct fares or a separate and distinct fare, or shall be charged or pay at the rate of separate and distinct fares, for their respective places or seats or his place or seat therein or conveyance thereby." And the 6th section enacts that "it shall not be lawful for any person to keep, use, or employ any stage-carriage, unless such person shall have a licence in force so to do, granted [388] to him under the authority of this act." Some light may be thrown upon the question by the 19th section of the 25 Vict. c. xliii., which enacts that "the tolls hereby made payable for and in respect of horses or beasts drawing any waggon, cart, or other such carriage shall be payable and paid for or in respect of horses or beasts drawing any waggon, cart, or other such carriage laden with stone, every time of passing and re-passing along the said roads, or any of them." [Montague Smith, J. What effect can you give to the words "stage coach, caravan, or other stage-carriage conveying passengers or goods for hire or reward," in s. 20?] The words "or goods" are not found in the corresponding clause in the 10 G. 4, c. ex.: but the difficulty suggested by Erle, C. J., as to the inexpediency of an examination by the toll-gate keeper into the use of the carriage on the particular journey, is quite as apparent in the one case as in the other. *Prima facie*, the appellant is liable only for one toll under the 9th section of the 6 G. 4, c. exliii. (or the 18th section of the 25 Vict. c. xliii.): and it is for the respondent to satisfy the court that the return-toll ought to be imposed. To render him so chargeable, it is submitted, the appellant must be shewn to be the owner of a licensed stage-carriage, as well as of a carriage conveying passengers or goods for hire and reward. [Byles, J. This vehicle was conveying, and was constructed for the conveyance of, goods.] No doubt it was.

No one appeared on behalf of the respondent.

WILLES, J. In this case the court has sustained much inconvenience from the fact of no counsel having been instructed to appear on the part of the respondent. Probably in consequence of having heard only the argument for the appellant, my mind has fluctu-[389]-ated considerably. At last, however, upon the best consideration I am able to bring to bear upon the case, I have arrived at the conclusion that the decision appealed from is right. I do not mean to throw any doubt upon the recent decision of this court in *Eatwell, App., Richmond, Resp.* On the contrary, it has my entire assent. But, comparing the language of the act of parliament upon which that decision proceeded with that of the act we have now to interpret, it seems to me that the expression in the 11th section of the 6 G. 4, c. exliii.,—"any stage-coach, &c., or other stage-carriage conveying passengers or goods for pay or reward,"—bears a substantially different meaning from the words of the 9th section of the 10 G. 4, c. ex., upon which *Eatwell, App., Richmond, Resp.*, proceeded, viz. "any stage-coach, &c., or other stage-carriage for the conveyance of passengers for payment, hire, or reward." The result of the consideration I have been able to give to the case is similar to the result in the case referred to; because, as there the court held, upon the true construction of the statute then before them, that the carriage to be exempted from the return-

(a) Altered by a later act to four miles.

toll was a carriage to be licensed as such under the acts relating to the inland revenue, and not a carriage to be used as a carrier's wain, without reference to the particular employment at the time of its passing the toll-gate, so in this case my impression is that all carriages falling within the description of stage-carriages must pay the toll for each time of passing, without reference to whether or not they are actually conveying passengers or goods at the time of passing through the gate, provided they are intended for the purpose of carrying passengers or goods at the time the toll is demanded. The expression in the act, "conveying passengers or goods," may mean either to denote the employment of the vehicle at the moment of passing through the gate, or [390] it may denote the employment for which the carriage is destined, though not at the moment earning a fare from the conveyance of passengers or goods. I incline to think that the latter is the true construction, and that the exemption ought to be read as if it ran, "stage-carriage for the conveyance of goods for hire," which is the conclusion at which the magistrates arrived. I feel the full force of the suggestion thrown out in *Eatwell, App., Richmond, Resp.*, as to the inconvenience which would result from a search on every occasion to see whether or not the carriage contained passengers or goods. For these reasons, I think the return-toll is charged in respect of any horse, &c. drawing any carriage which falls within the definition of a stage-carriage, and that it is not necessary to go into the inquiry as to whether or not it is actually doing the work of a stage-carriage at the time of passing through the gate. I think more effect will be given to the language of the act by adopting the conclusion the magistrates came to, than by yielding to the argument urged by Mr. Kingdon.

BYLES, J. I am of the same opinion. It seems to me that this vehicle might well fall within either of the single toll clauses of the 6 G. 4, c. cxliii. The first clause comprehends vehicles of a kind used by the superior classes of society: the second deals with vehicles of an inferior description. If this vehicle falls within the first clause, it is undercharged. If such a vehicle goes through a toll-gate once, it pays: if it returns, it is not charged again, unless it falls within the description of carriages in s. 11, that is, "any stage-coach, diligence, van, caravan, or stage-waggon, or other stage-carriage, conveying passengers or goods for pay or reward." It seems to me that, in which ever single toll clause this vehicle falls, it falls within [391] the return-toll clause. A stage-carriage means a carriage plying regularly from place to place. The case finds that this caravan was used for the regular conveyance for hire of goods, and occasionally of passengers, from Cirencester to Cheltenham and back. That being so, it is a "stage-carriage, caravan, or waggon," within s. 11. If it is adapted for the conveyance of passengers or goods, or so used, or both adapted and used for that purpose, the requisites of the statute are fulfilled. Upon the words of *this act*, I am of opinion that the return-toll was plainly payable. I desire to throw no doubt upon the decision of this court in *Eatwell, App., Richmond, Resp.*, and I certainly feel none. As far as I can see my way, I am of opinion that the two decisions will in no degree conflict.

KEATING, J. I am of the same opinion, though at one time I inclined to yield to the argument of Mr. Kingdon. I am now, however, satisfied that the magistrates have come to a right conclusion: nor do I think that this decision will at all conflict with *Eatwell, App., Richmond, Resp.*, to which I was a party. The language of the statute which we had to consider in that case was quite different from that of the act of parliament now before us. The difficulty I conceive here is to strike out the words "or goods" in the return-toll clause. That being so, we cannot take the license from the commissioners of inland revenue as a test of the double liability. The return-toll clause in *Eatwell, App., Richmond, Resp.*, imposed the second toll in respect of the horses drawing any stage-coach, &c., "for the conveyance of *passengers* for payment, hire, or reward." The test, therefore, which was applicable in that case is not applicable here. It is impossible to give any effect to the words of the return-toll clause in this act of parliament, without holding that the appellant was properly charged.

[392] MONTAGUE SMITH, J. I also think the conclusion which the magistrates came to in this case was right. The primary object of the appellant's journeys was the carriage of goods for hire, though he occasionally carried passengers also. The case, therefore, falls distinctly within the 20th section of the 25 Vict. c. xiii. (which is in terms the same as the 11th section of the 6 G. 4, c. cxliii.), and which imposes the return-toll "for or in respect of horses or beasts drawing any stage-coach, diligence,

omnibus, van, caravan, chaise, cart, chair, break, or stage-waggon, or other stage-carriage, conveying passengers or goods for hire or reward." It is said that that cannot be so, because the appellant's vehicle is not a vehicle requiring a licence under the 2 & 3 W. 4, c. 120. Nor does any carriage used for the conveyance of goods for hire require such a licence. The construction the court is putting upon s. 20 is very much fortified by the language of the 21st and 22nd sections, which are to be taken in *pari materia* with the 20th. The 21st section enacts that "the tolls thereby made payable for or in respect of horses or beasts let out to hire, and drawing any post-chaise or other carriage, shall be payable and paid every time of passing along the said roads, or any of them, whenever any new hiring thereof shall take place, in the same manner as if no previous payment of tolls in respect of such horses or beasts had been made on the same day." And the 22nd section enacts that "the tolls hereby authorised shall be payable at each and every toll-gate belonging to the trustees, in respect of horses or other beasts of draught drawing any waggon, wain, dray, cart, or such like carriage, for every time during the same day that any such horse or other beast of draught shall pass through any of the toll-gates of the trustees, drawing any other waggon, wain, dray, cart, or such like carriage, than that which such horse or other [393] beast of draught was employed in drawing at any former time during the same day at which such tolls shall have been paid." This vehicle was in effect hired by different persons on the two journeys. Upon this act, therefore, I feel no doubt that the justices have come to a right conclusion. I also think the case of *Eatwell, App., Richmond, Resp.*, is distinguishable, on the grounds stated by my two learned Brothers who were members of the court when that decision was pronounced.

Decision affirmed.

PENNY, Executor of Penny, Deceased v. BRICE. Jan. 18th, 1865.

[S. C. 11 L. T. 632; 13 W. R. 342.]

1. It is not competent to an executor to maintain an action for a debt which accrued to this testator, and for which he might have sued, more than six years before the issuing of the writ.—2. A. had a right of action against B. for a debt in respect of which the Statute of Limitations began to run in September, 1856. A. died on the 31st of May, 1862. His executor proved the will on the 12th of July, and commenced an action against B. on the 5th of November:—Held,—that the Statute of Limitations was a bar to the claim, notwithstanding a jury (or an arbitrator) might think that the executor had commenced the proceeding *within a reasonable time*.

This was an action brought by the plaintiff, as the executor of the last will and testament of Charles Penny, deceased, to recover the balance of an account for money lent and money paid by the testator in his life-time to the use of the defendant.

The cause having proceeded as far as declaration was, by an order of a judge, under the Common Law Procedure Act, 1854, referred to a barrister, with power to state a case for the opinion of the court.

It was contended by the defendant's counsel before the arbitrator, that the whole demand was barred by the Statute of Limitations; and the arbitrator found that it was, except as to the sum of 187l. 13s. 5d. As to that sum, he stated the following case:—

[394] The cause of action for the sum in question arose in England, while the defendant was beyond the seas, in India, whence he returned to England some time in September, 1856, and remained. The other material facts arose in the year 1862, as follows:—

The plaintiff's testator died on the 31st of May, never having brought any action. The plaintiff, his surviving executor, proved the will on the 12th of July. On the 1st of October six years had elapsed since the defendant's return to England. On the 5th of November, this action was brought.

The plaintiff's counsel contended that the action had been brought within a reasonable time after the death of the testator, and therefore was not barred. The defendant's counsel contended that the action was barred on the expiration of the six years; and he denied that the action had been brought within a reasonable time.

In so far as that question might be treated as one of fact to be found by the

arbitrator for the court, he found that the action was brought within a reasonable time after the death of the testator.

The question for the opinion of the court was,—whether, as to the sum in question, the action was barred by the Statute of Limitations.

If it was not, judgment was to be entered for the plaintiff for that sum. If it was, judgment was to be entered for the defendant, barring the action.

Mellish, Q. C., for the plaintiff. The question for the consideration of the court in this case is, whether, if one having a cause of action dies shortly before the time when his demand would be barred by the Statute of Limitations, his executor may bring an action after the expiration of the six years from the accrual of the cause of action, provided he commences it within a reasonable time after the death of his testator. [395] The affirmative of that proposition receives some countenance from a passage in Williams on Executors, 5th edit. p. 1706, where it is said that, “If an executor takes out proper process in assumpsit within a year after the death of his testator, the six years not being elapsed before, though they expire within that period, yet it is said that will be sufficient to take the case out of the statute (Tidd, 28, 9th edit., citing *Cawer v. James*, Bull. N. P. 150). But, where a plaintiff dies, a writ by journeys accounts cannot be brought by his executor: *Kinsey v. Heyward*, 1 Ld. Raym. 432. It was indeed ruled in *Elstob v. Thorogood*, 1 Ld. Raym. 283, that a general executor might bring a writ by journeys accounts upon a writ brought by the executor *durante minore etate*, although it was otherwise in the case of a writ brought by an administrator *durante minore etate*. But, in *Kinsey v. Heyward*, Treby, C. J., said that, although he concurred in that opinion on the former occasion, he was never ashamed to retract his opinion, when convinced upon better reason; and he therefore now declared that he thought that the executor could in neither case have the writ; because in no case can a writ of journeys accounts be, but by the same person, not only in representation, but strictly and truly the same person: see *Spencer's case*, 6 Co. Rep. 10 b. However, where a party brings an action before the expiration of six years, and dies before judgment, the six years being then expired, it has been held that his executor or administrator may, within the equity of the 4th section of the Statute of Limitations (21 Jac. 1, c. 16), bring a new action,—*Matthews v. Phillips*, 2 Salk. 425; *Kinsey v. Heyward*, 1 Lutw. 260,—provided he does it recently, or within a reasonable time. No precise time is fixed as to what shall be deemed a reasonable time: but it should seem that the statute [396] is the best guide upon the subject; and, as that provides that a new action, in the cases enumerated in it, must be commenced *within a year*, so an executor ought also to bring a new action within that period: 2 Saund. 64 a., note to *Hodsdon v. Harridge*. In *Kinsey v. Heyward*, a year is said to be a reasonable time: and the court of King's Bench appears to be of this opinion in *Wilcox v. Huggins*, 2 Stra. 907, Fitzg. 178, 289.” [Willes, J. This matter was much discussed in the court of Queen's Bench in *Carlewis v. The Earl of Mornington*, 7 Ellis & B. 283, and afterwards in the same case in the Exchequer Chamber, 27 Law J., Q. B. 439; and also in the Exchequer in *Rhodes v. Smethurst*, 4 M. & W. 42 (in error, 6 M. & W. 351), where it was held, that it is no answer to a plea of the Statute of Limitations that, after the cause of action accrued, and after the statute had begun to run, the debtor within the six years died, and that by (reason of litigation as to the right to probate) an executor of his will was not appointed until after the expiration of the six years, and that the plaintiff sued such executor within a reasonable time after probate granted.] In the case last cited, it was the defendant who died. In the absence, however, of any express authority, it is difficult to ask the court to disregard the plain words of the statute.

Coleridge, Q. C., *contra*, was not called upon.

ERLE, C. J. I am of opinion that there must be judgment for the defendant. There is, as Mr. Mellish admits, no express authority. And the words of the statute are too plain.

WILLIAMS, J. The passage referred to in Williams on Executors was guardedly cited, out of deference to [397] the authority of Tidd. The facts found here clearly afford no answer to a plea of the statute. As to the action being brought within a reasonable time, that is not applicable to a case where no action had been brought by the testator. The present case falls within the general rule that, where there is a cause of action, and a person who can be sued, the Statute of Limitations begins to run, and, having begun, it continues to run.

WILLES, J. The decision of *Curlewis v. The Earl of Mornington*, in the Exchequer Chamber, is put upon the ground that an action had been brought, and abated by the death of the defendant; and a fresh action commenced by the plaintiff after the six years, but within four months from the date of the administration, was held to have been brought within due time, either according to the equitable construction of the 4th section of the Statute of Limitations, or according to the principle of the old writ by journeys accounts. Here, no action had been brought within six years, and therefore *Rhodes v. Smithurst* is in point. No action has been lost, and therefore we cannot apply the old doctrine of journeys accounts, or the modern law under the 4th section of the statute of James.

KEATING, J., concurred.

Judgment for the defendant.

[398] PERCIVAL v. OLDACRE. Jan. 17th, 1865.

The defendant, who had a horse for sale at a commission stable, meeting the plaintiff at Tattersall's, and being informed by him that he had been looking at the horse, said,—"He is a good harness horse. He belonged to Baron R., who sold him because he could not match him." The plaintiff went again to the stable, and, after having had the horse put into a break, agreed to purchase him for 65l. There was no suggestion that the defendant had intentionally misrepresented the horse: but he turned out to be a kicker. The jury having found that the representation made at Tattersall's was part of the contract, and amounted to a warranty that the horse was quiet in harness,—the court refused to disturb the verdict.

This was an action for an alleged breach of warranty on the sale of a horse.

The cause was tried before Byles, J., at the sittings at Westminster after the last term. The evidence was in substance as follows:—In January, 1863, the plaintiff went to Banks's commission-stables, in the Gray's Inn Road, and there saw some horses which belonged to the defendant, and among them a grey horse. He shortly afterwards met the defendant at Tattersall's, and said to him, "I have been to Banks's, and have seen a grey horse there," upon which the defendant replied, "He is a good harness-horse. He belonged to Baron Rothschild, who sold him because he could not match him." The plaintiff again went to Banks's, and had the horse put into a break and tried, and ultimately he bought him for 65l.,—which was 15l. less than the defendant had given for him. It was true that the horse had belonged to Baron Rothschild; and no fraud was imputed to the defendant: but the animal turned out to be a kicker.

The conversation at Tattersall's was relied on by the plaintiff as a warranty that the horse was quiet in harness.

On the part of the defendant, it was submitted that there was no evidence of either misrepresentation or warranty; and *Hopkins v. Tanqueray*, 15 C. B. 130, was relied on. There, A. sent his horse to Tattersall's for sale by public auction, where he was to be sold without a warranty. On the day prior to the intended sale, meeting B. at the stable, and seeing him in the act of examining the horse's legs, A. said,—“You have nothing to look for; I assure you he is perfectly [399] sound in every respect;” whereupon B. replied, “If you say so, I am perfectly satisfied,” and, upon the faith of the representation so made to him by A.,—which was admitted to have been made in perfect good faith,—became the purchaser: and it was held that there was no evidence of *warranty* to go to a jury, —the representation made by A. on the day preceding the auction forming no part of the contract of sale.

The learned judge left the case to the jury, but reserved leave to the defendant to move (if the jury should be against him) to enter the verdict for him if the court should be of opinion that there was no evidence of warranty.

The jury having returned a verdict for the plaintiff, with 25l. damages,

Hawkins, Q. C., moved to enter a verdict for the defendant, pursuant to the leave reserved. He submitted that the conversation which passed between the plaintiff and the defendant at Tattersall's before there was any negotiation for a sale of the horse, did not amount to anything like a warranty, nor even to a representation,—for which he relied upon *Hopkins v. Tanqueray*.

ERLE, C. J., after consulting Byles, J., now said that the court, having read the

learned judge's notes, were of opinion that there was evidence to go to the jury, and that they were justified in finding, as they did, that the representation made by the defendant at Tattersall's was part of the contract; and consequently that there should be no rule.

Rule refused.

[400] PHILLIPS AND ANOTHER v. J. C. IM THURN. June 19th, 1865.

To an action upon a bill of exchange purporting to be drawn by A. payable to the order of B., and to have been indorsed by B. to C., and by C. to the plaintiff,—the defendant (who had accepted the bill for the honor of A.), besides traversing the indorsements by B. and C., pleaded that, when the bill was made, there was no such person as B., the supposed payee, but that his name was merely fictitious, whereof he (the defendant) at the time of his acceptance of the bill had no notice or knowledge.—The court declined to allow the plaintiff to reply that the names of B. and C. were already on the bill when the defendant accepted it, and consequently that he was estopped from denying that they were real indorsers,—holding that the matter was admissible under the traverse of the indorsement.

This was an action against the acceptor for honor of a bill of exchange.

The first count of the declaration stated that theretofore, to wit, on the 12th of May, 1864, certain persons by and under the name and style of Canevaro & Co., in parts beyond the seas, to wit, at Lima, made their bill of exchange in writing, and directed the same to one H. H. Stultzberger, and thereby required the said H. H. Stultzberger, at sixty days' sight, to pay by that their first of exchange (second and third not being paid), to the order of Mr. Carlos Raffo the sum of 400l. sterling, and the said Carlos Raffo then indorsed the said bill to one Enrique Plana, who then indorsed the same to the plaintiffs; and the said bill was duly presented to the said H. H. Stultzberger for acceptance, and he then saw but did not nor would then or at any other time before or afterwards accept the same or the said second or third of exchange in the said bill mentioned; whereupon the said bill was then duly protested for non-acceptance thereof, of all which the defendant then had due notice; and thereupon the defendant, in order to prevent the said bill from being sent back and returned to the said Canevaro & Co., did, under the said protest, according to the custom of merchants, accept the said bill for the honor of the said Canevaro & Co.; and the said H. H. Stultzberger did not pay and has never paid the said bill, or the said second or third of exchange in the said bill mentioned, or any part thereof, although more than sixty days had before suit elapsed from the time when the said bill was so seen and ac[401]-cepted by the defendant as aforesaid, and although the said bill was duly presented to the said H. H. Stultzberger and the defendant for payment on the day when it became due; whereupon the said bill was duly protested for non-payment thereof,—of all which premises the defendant then had due notice; and, although all conditions had been fulfilled, and all times had elapsed, necessary to entitle the plaintiffs to maintain this action against the defendant in respect of the breach thereafter alleged, and nothing happened to prevent the plaintiffs from maintaining the action for the same, yet the defendant had not paid the said bill, or any part thereof, and had always wholly neglected and refused so to do; and by reason of the premises the plaintiffs incurred and were put to divers costs and expenses in and about the presenting and noting of the said bill, and otherwise incidental to the dishonour thereof.

There was also a count for money had and received, money paid, and money found due upon accounts stated.

The defendant pleaded, to the first count, —1. That the defendant did not accept the said bill as alleged, —2. That the said Carlos Raffo did not indorse the said bill to the said Enrique Plana, as alleged,—3. That the said Enrique Plana did not indorse the said bill to the plaintiffs, as alleged,—4. That the said bill was not duly presented to H. H. Stultzberger for payment as alleged,—5. That the said bill was not duly presented to the defendant for payment, as alleged,—6. That, when the bill of exchange in the said first count mentioned was made, there was no such person as Carlos Raffo, the supposed payee named in the said bill, but the name of Carlos Raffo was and is merely fictitious, whereof the defendant at the time of his

acceptance of the said bill had no notice or knowledge,—7. That the [402] said bill was not duly protested for non-payment thereof, as alleged,—8. (To the second count) never indebted.

Hannen moved for leave to reply by way of estoppel, that the names of Raffo and Plana were already on the bill at the time the defendant accepted for honor. The application had been made to Crompton, J., at Chambers, but was negatived, on the ground that the matter might be given in evidence under the traverse of the indorsement. He referred to *Aspitel v. Brown*, 32 Law J., Q. B. 91, where Wightman, J., and Crompton, J., seem to have held that such matter need not be replied, but might be given in evidence under the traverse of the indorsement. That case, however, can hardly be called a decision upon the point, inasmuch as all the pleadings but the traverse of the indorsement, &c., were struck out by consent, the defendant having leave to appeal, and the court of error to have power to make all amendments to determine the question as to the quasi estoppel in pais. [Willes, J. *Sanderson v. Collman*, 4 M. & G. 209, 4 Scott, N. R. 638, is an authority to shew that matter of estoppel in pais *may* be pleaded. But it is very clear that matter of estoppel in pais *need not* be pleaded.]

ERLE, C. J. I am of opinion that the matter sought to be replied may be given in evidence under the traverse of the indorsement: and I am strongly of opinion that that is the more expedient course.

The rest of the court concurring,

Hannen took nothing.

[403] FALK v. FLETCHER AND ANOTHER. Jan. 16th, 1865.

[S. C. 34 L. J. C. P. 146: 11 Jur. N. S. 176: 13 W. R. 346. Referred to, *Gabarron v. Krofft*, 1875, L. R. 10 Ex. 280. Distinguished, *Jones v. Hough*, 1879, 5 Ex. D. 122. Referred to, *Cassaboglou v. Gibbs*, 1883, L. R. 11 Q. B. 807.]

The plaintiff, a salt-merchant at Liverpool, was in the habit of shipping cargoes of salt there for De M., a merchant in London, on board vessels chartered by De M., charging him a commission in addition to the price, and getting bills of lading making the salt deliverable to his order, which bills of lading he sent with the invoice and a draft at four months to De M.—In November, 1863, De M. chartered the ship “S. F.,” belonging to the defendants, to carry a cargo of salt from Liverpool to Calcutta,—freight to be paid one-third by freighter’s acceptance at four months from the sailing of the vessel, the remainder on delivery of the cargo at Calcutta. Pursuant to instructions from De M., the plaintiff proceeded to load the “S. F.,” and had shipped 1007 tons (for which he took the mate’s receipts *in his own name*), when he learned that De M. had stopped payment. He thereupon refused to load any more, and the defendants filled up the loading themselves. The plaintiff then produced to the defendants the mate’s receipts for the 1007 tons, and demanded a bill of lading for that quantity, *making it deliverable to his order*. This the defendants refused, and the vessel sailed with the salt on board:—Held, that it was properly left to the jury to say whether or not the plaintiff put the salt on board the “S. F.” with the intention of passing the property therein to De M.: and that (the jury having found that the plaintiff did not intend to pass the property to De M.) the sailing from Liverpool without giving the plaintiff a bill of lading in exchange for the mate’s receipts, as demanded, was a conversion: and that the proper measure of damages was, the value of the salt at Liverpool at the time of sailing.

This was an action brought by the plaintiff, a salt-merchant at Liverpool, against the defendants, ship-owners in London, for the alleged wrongful conversion of 1007 tons of salt, with the usual common counts.

The defendants pleaded, to the first count, not guilty, and that the goods were not the goods of the plaintiff, and, to the rest of the declaration, never indebted.

The cause was tried before Blackburn, J., at the last Assizes at Liverpool, when the following facts appeared in evidence:—In November, 1863, one W. N. De Mattos, a merchant in London, entered into the following charterparty for a voyage to Calcutta:—

"London, November 12th, 1863.

"It is this day mutually agreed between G. H. Fletcher & Co, owners of the good ship or vessel called the 'Savoir Faire,' A 1 at Lloyd's, new iron ship, of 1400 tons or thereabouts, now in the port of Liverpool, whereof ——— Meikle is master, and W. N. De Mattos, of London, merchant, that the said ship, being tight, staunch, and strong, and every way fitted for the voyage, shall with all possible dispatch load, in the usual and customary manner, a full and complete cargo of salt, which the said freighter binds himself to [404] ship, not exceeding what she can reasonably stow and carry over and above her tackle, apparel, provisions, and furniture; the freighter finding mats, and the ship damage, both as customary; and, being so loaded, shall therewith proceed to Calcutta, or so near thereto as she may safely get, and deliver the same alongside any craft, floating depôt, or pier where she can lie afloat, as ordered by the consignee: Notice to be given to the agents of the vessel being ready to discharge (the act of God, the Queen's enemies, pirates, fire, and all and every other dangers and accidents of the seas, rivers, and navigation during the said voyage being mutually excepted): The freighter to be paid on unloading the right delivery of the cargo, at and after the rate of 21s. per ton on the quantity delivered, in full of all port charges, pilotages, and Dover and Ramsgate dues as customary: and such freight is to be paid, say, one-third by freighter's acceptance at four month's from the final sailing of the vessel from her last port in the United Kingdom, less cost of insurance, and the remainder on the right delivery of the cargo agreeably to bills of lading, in cash, at current rate of exchange for bills on London at six months: The vessel to deliver as customary, and the cargo to be discharged at the average rate of not less than sixty tons a working day, weather permitting, or to pay demurrage at the rate of 4d. per ton register (O. M.) per diem: All claims for average to be settled in London in conformity with the rule of Lloyd's: The ship and her freight are bound for this venture: The penalty for non-performance of this agreement is to be 1800l.

"In the event of the ship putting into Table or Timon's Bay, the captain is to address himself to Messrs. Dean, Brothers, & Co., subject to reply by Friday the 31st instant, at noon, by telegraph.

"G. H. FLETCHER & Co.

"W. N. DE MATTOS.

[405] "The captain to apply to Mr. H. E. Falk for cargo and Custom-House business."

The plaintiff was in the habit of shipping cargoes of salt for De Mattos. The course of business between them was this:—When De Mattos took up a ship on charterparty, a copy of the charterparty was sent to the plaintiff, and he thereupon shipped the salt, "free on board," charging a commission which he included in the invoice-price,—De Mattos having no agent at Liverpool. The salt was thereupon shipped by the plaintiff from his own lighters, and weighed on board, the mate's receipt being given for the quantity received, which was afterwards exchanged for a bill of lading, making the salt deliverable to the plaintiff or his assigns. The plaintiff then sent the bill of lading to De Mattos in London, together with an invoice and a draft at four months for the price.

On the present occasion, after the plaintiff had in the usual way shipped about 1007 tons of salt on board the "Savoir Faire," he received intelligence that De Mattos has stopped payment. He communicated the fact to the defendants, who thereupon wrote to De Mattos, as follows:—

"Liverpool, December 9th, 1863.

"Sir,—We write to inform you that Mr. Falk has stopped the loading of the 'Savoir Faire,' on the ground, as he alleges, that you have stopped payment. We much regret that this should be so: but, having made all arrangements for the vessel's proceeding to sea at the end of this week, we must send her; and we are compelled to hold you liable for all loss and injury which we must sustain by reason of the vessel's loading not being completed.

"G. H. FLETCHER & Co."

No reply to this letter was sent. The plaintiff then proposed to the defendants to allow him to complete [406] the loading of the ship on his own account; or that they should purchase the 1007 tons already on board, and complete the loading on their account; or to give him a bill of lading for the quantity he had shipped, he

paying freight according to the charterparty. Feeling themselves fettered by the charterparty with De Mattos, the defendants declined to assent to either of these proposals: and, no more salt being sent on board by the plaintiff, the defendants completed the loading, and the vessel sailed with the salt on board on the 15th of December.

On the 16th, the plaintiff sent his clerk with the mate's receipts for the 1007 tons, and demanded a bill of lading in his own name. The defendants refused to give it. No offer of a draft for one third of the freight, pursuant to the charterparty, was made. On the same day, a protest was made against the defendants for their refusal to sign bills of lading.

Upon the arrival of the "Savoir Faire" at Calcutta, Messrs. Gosche & Co., the plaintiff's agents, wrote to Messrs. Borradaile & Co., the defendants' agents, a letter, as follows:—

"Calcutta, April 9th, 1864.

"To Captain Meikle, master of the ship 'Savoir Faire,' and to Messrs. John Borradaile & Co., agents for the said ship.

"Gentlemen,—As agents for and on behalf of Mr. Hermann Eugene Falk, of Liverpool, the shipper per the said ship of 745 tons of stoved salt, and 262 tons of butter salt, we hereby present to you the mate's receipts (eleven in number) for the said salt, and demand the delivery thereof, we being ready and willing and hereby offering to pay freight for the same at the rate of 21s. per ton of 20 cwt. delivered.

"R. G. GOSCHE & Co."

To this letter Messrs. Borradaile & Co. replied, as follows:—

"Messrs. R. G. Gosche & Co.

[407] "Calcutta, April 9th, 1864.

"Dear Sirs,—We are in receipt of your favour of this date, addressed to Captain Meikle, of the 'Savoir Faire,' and to ourselves as agents for the said ship, tendering us mate's receipts on behalf of Mr. Hermann Eugene Falk, of Liverpool, for 745 tons of stoved salt and 262 tons of butter salt shipped by the 'Savoir Faire,' and offering to pay freight for the same at the rate of 21s. sterling per ton of 20 cwt. delivered.

"As we intimated to the bearer of your letter, to whom we returned the mate's receipt's tendered by you, we decline to deliver the salt in question to your good selves as agents for Mr. H. E. Falk, of Liverpool, Messrs. G. H. Fletcher & Co., of Liverpool, the owners of the 'Savoir Faire,' informing us that the late firm of Messrs. De Mattos & Co. were the shippers of the same, and that the proceeds will have to be accounted for to the estate of the firm.

"JOHN BORRADAILE & Co."

The salt was afterwards sold by Messrs. Borradaile & Co. at Calcutta, and realized 1154l., which, after deducting 1950l. for the freight and expenses, left 104l. as the value of the 1007 tons. The value of the salt at Liverpool on the day of sailing, without the freight and expenses, was proved to be 582l. 19s. 6d.

On the part of the defendants it was contended that, by the delivery of the salt on board the "Savoir Faire," the property passed to De Mattos, the delivery on board being as much a delivery to the vendee as if the salt had actually been delivered into the vendee's warehouse; and that the taking of the mate's receipts was nothing more than a means of ascertaining the quantities.

For the plaintiff, it was insisted that he had done nothing to divest himself of the property in the salt, [408] and that the sailing of the vessel with the salt on board amounted to a conversion.

The learned judge left it to the jury to say whether or not the plaintiff by putting the salt on board the defendants' vessel had so parted with the possession as to vest the property therein in De Mattos, and whether the defendants had been guilty of a conversion,—telling them that, if they thought that by delivering the salt on board, the plaintiff intended to pass the property in it to De Mattos, and that the taking the mate's receipts in his own name was a mere accident, they might find for the defendants; but that, if they thought that by taking the receipts in his own name the plaintiff intended to retain a control over the property, they must find for the plaintiff; and that the sailing away from Liverpool with the salt without giving the plaintiff a

bill of lading, was evidence of a conversion. As to the damages, the learned judge told the jury that the plaintiff would be entitled to recover the value of the salt on the day of the conversion in Liverpool.

The jury returned a verdict for the plaintiff, damages 582l. 19s. 6d.

E. James, Q. C., now moved for a new trial, on the grounds of supposed misdirection and that the verdict was against the evidence, and also on the ground of surprise as to the amount of damages. He submitted that there was no conversion of the salt by the defendants prior to the sailing of the ship from Liverpool, there having been no demand except the qualified proposals which the defendants declined to accept; and that the delivery of the salt on board a ship chartered by the buyer, irrespective of the form of the mate's receipts, passed the property to the buyer, and that the seller could not afterwards change its destination. [409] [Willes, J. Can he be said to have given it a destination before he got a bill of lading? Having got the mate's receipts in his own name, he was the only person who would be entitled to demand a bill of lading.] The plaintiff was acting as agent for De Mattos. He had notice of the charterparty, which fixed the destination of the ship; and he could not alter it. The fact of his having taken the mate's receipts in his own name was only a circumstance. The learned judge, therefore, was wrong in telling the jury that what occurred at Liverpool amounted to a conversion. He was also wrong in telling the jury that they might give as damages the value of the goods at the time of the sailing from Liverpool; whereas, the only conversion was the sale at Calcutta. Assuming that the conversion was at Liverpool, the damages were calculated upon a wrong basis (a).

ERLE, C. J. I am of opinion that there should be no rule in this case. The plaintiff was in reality in the position of an unpaid vendor. As agent for De Mattos, he put the salt on board a ship chartered by De Mattos, taking the mate's receipts for it in his own name. Under these circumstances, the proper question for the jury, and the question which was submitted to them, was, whether when he put the salt on board he intended to pass the property in it to De Mattos, or whether he intended to keep it under his own control. [410] The jury have found that he did not intend absolutely to part with the control over the property and to pass it to De Mattos. Then, the next question is, was there a conversion? and when? The vessel sailed from Liverpool with the plaintiff's property on board, and it was lost to him. That was a wrongful conversion; and the plaintiff was entitled to recover the value of the salt at that time, which the jury have given him. I cannot think there is any ground for saying that the defendants were taken by surprise with respect to the damages. They might have qualified themselves to prove the real value of the salt at the date of the sailing of the ship from Liverpool.

WILLIAMS, J. I am of the same opinion. It was a pure matter of fact what was the intention of the plaintiff in putting the salt on board; and the jury might well have found it either way. They having found that the plaintiff did not intend to part with the control over it, I see no ground for our interference. One of the elements to be taken into consideration in disposing of that question is, the circumstance that the plaintiff filled the joint character of vendor and agent to the vendee. No doubt that was powerfully pressed upon the attention of the jury. I see no misdirection. As to the conversion, as soon as the defendants sailed away from Liverpool with the salt, and thereby deprived the plaintiff of the control over it, they were clearly guilty of a conversion. As to the affidavits, they shew no ground for a rule: the defendants must have been aware that the amount of damages would be a question, and they ought to have come properly prepared to meet it.

WILLES, J. I am of the same opinion. It appears to me that the proper question was left to the jury in [411] this case, viz. whether or not it was the intention of the plaintiff to appropriate the 1007 tons of salt to De Mattos, and to pass the property therein to him, when he put it on board the "Savoir Faire." And, looking at what

(a) He produced affidavits shewing that the amount claimed and allowed by the jury as the price of the salt at Liverpool was extravagant; that the price which the defendants paid for the quantity required to fill up the ship was 6s. per ton for stoved salt, and 5s. per ton for butter salt, at which prices the value of 745 tons of the former and 262 tons of the latter, including river freight and dock and town dues, would have been 450l. 12s. 6d., and the cost of mats for dunnage 15l.

appears to have been the course of business between the plaintiff and De Mattos, I think the jury came to a right conclusion. Many hard cases have arisen from the course of business frequently adopted, of remitting the bill of lading, invoice, and draft for acceptance, direct to the principal,—as in *Key v. Cotesworth*, 7 Exch. 595,—instead of adopting the course there suggested, of transmitting the bill of lading indorsed in blank to an agent, to be delivered over only upon the draft being accepted. The course adopted by this plaintiff on the previous transactions with De Mattos was similar to that adopted in *Turner v. The Trustees of the Liverpool Docks*, 6 Exch. 543. There, B. & Co., merchants at Liverpool, sent orders to M. & Co., merchants at Charleston, to ship on account of B. & Co. a quantity of cotton for the homeward voyage of their ship, the “Charlotte.” M. & Co. accordingly made considerable purchases of cotton, and shipped it on board the vessel of B. & Co. The master signed a bill of lading of the cotton, to be delivered at Liverpool “to order or to our assigns, paying for freight for the cotton nothing, being owners’ property; and M. & Co. indorsed the bill of lading,—“Deliver the within to the Bank of Liverpool, or order.” M. & Co. informed B. & Co. that they had drawn bills upon them for the cargo on their account by the “Charlotte,” and desired them to insure the cotton. M. & Co. also sent to B. & Co. an abstract invoice, which stated that the cotton was shipped by M. & Co. on board the “Charlotte” for Liverpool “by order and for account and risk of B. & Co. there, and addressed to order.” M. & Co. afterwards sent a full invoice, stating that the cotton was [412] shipped for Liverpool “by order and for account of B. & Co. there, and to them consigned.” M. & Co. not having sufficient funds of B. & Co. to pay for the cotton, sold the bills to a bank at Charleston, and delivered to the bank the bill of lading so indorsed, as a security for payment of the bills, which were dishonoured, and taken up by M. & Co. B. & Co. became bankrupt before the arrival of the vessel; and on its arrival M. & Co., by their agent, claimed to stop the cargo in transitu, and it was afterwards stored in the warehouse of the defendants. The assigns of B. & Co. having brought detainee, the defendants traversed the possession of the assignees, and also set up the right of M. & Co. as against them. It was held,—first, that the property in the cotton did not vest absolutely in B. & Co., notwithstanding the delivery on board their ship; for, by the terms of the bill of lading, M. & Co. reserved to themselves a *ius disponendi* of the goods, which the master acknowledged by signing the bill of lading making the cotton deliverable to their order or assigns, although by so doing the master might have exceeded his authority,—secondly, that M. & Co. did not by their indorsement and delivery of the bill of lading to the bank divest themselves of their property in or possession of the goods. Here, the mate’s receipts were given in the plaintiff’s name. It is clear, therefore, that he meant to adopt the later practice, and to have the bill of lading made deliverable to himself or order, that he might make use of it for his further security. The fact of the plaintiff being agent for De Mattos is no doubt a circumstance that is not to be lost sight of. But, in the sense of being the person who put the goods on board, he is in the same condition as if he had been an ordinary unpaid vendor. For this the case of *Feist v. Wray*, 3 East, 93, is an authority, though that was a case of stoppage in transitu. [413] There, a trader in London gave an order to his correspondent abroad to ship him certain goods, which the latter procured upon his own credit, without naming the trader here, and shipped to him at the original price, charging only his commission; and it was held that the correspondent abroad was so far a *vendor*, as between him and the trader here, that, on the bankruptcy of the latter, he might stop the goods in transitu by procuring the bill of lading from the bankrupt’s brother,—and this though the trader here had before his bankruptcy accepted bills drawn on him by his correspondent for the value of the goods. The fact of the plaintiff’s being agent was one which under the circumstances the jury rightly disregarded. As to the conversion, I think that was complete when the vessel sailed away with the plaintiff’s goods on board. And, as to the damages, the value of the salt at Liverpool at the time of the conversion was indisputably the proper measure of damages; and there is nothing in the affidavits to warrant us in disturbing the verdict on that ground.

KEATING, J., concurred.

Rule refused.

[414] CLUBE v. HUTSON. Jan. 19th, 1865.

[Referred to, *Whitmore v. Farley*, 1880, 43 L. T. 196; *Jones v. Merionethshire Permanent Benefit Building Society*, [1891] 1 Ch. 183.]

A promissory note given in consideration of the payee's forbearing to prosecute a charge against the maker, of obtaining money by false pretences, is illegal, and cannot be enforced.

This was an action by the payee against the maker of a promissory note.

The defendant pleaded, amongst other pleas that, before the making of the note, the plaintiff had preferred a charge against the defendant of obtaining money by false pretences, and that, in consideration of the plaintiff's consenting to withdraw the charge and abstain from prosecuting the same, the defendant agreed to give him 10l. and the promissory note declared on (for 20l.), and that the charge was thereupon abandoned.

At the trial before Willes, J., at the first sitting at Westminster in this term, the plea being proved, the learned judge directed a verdict to be entered for the defendant, reserving to the plaintiff leave to move.

Reynolds, accordingly, obtained a rule nisi to enter a verdict for the plaintiff, on the ground that the consideration for the note, as stated in the fifth plea, was not illegal. He relied on *Drage v. Ibberson*, 2 Esp. N. P. C. 643.

H. Matthews now shewed cause. This case is decided by *Kear v. Leeman*, 6 Q. B. 308. It was there held, that the law will permit a compromise of any offence, though made the subject of a criminal prosecution, for which offence the injured party might recover damages in an action; but that, if the offence is of a public nature, no agreement can be valid that is founded upon the consideration of stifling a prosecution for it. Therefore, although the party injured may lawfully compromise an indictment for a common [415] assault, an agreement to pay the costs of a prosecution for assault on the plaintiff and riot, and of an action for unlawful levy under a fi. fa., which agreement was founded partly on compromise of the prosecution and partly on an undertaking to withdraw the execution under the fi. fa., was held to be altogether invalid, as grounded on an illegal consideration,—although the compromise of the prosecution was entered into with the leave of the judge before whom the indictment came on for trial. The judgment of the court of Queen's Bench in that case was affirmed on error: upon which occasion all the authorities were carefully reviewed: and Tindal, C. J., in delivering the judgment of the court, says: "It seems clear, from the various authorities brought before us on the argument, that some misdemeanors are of such a nature that a contract to withdraw a prosecution in respect of them, and to consent to give no evidence against the parties accused, is founded on an illegal consideration. Such was the case of *Collins v. Blantern*, 2 Wils. 341, 347, which was the case of a prosecution for perjury. It is strange that such a doubt should ever have been raised. A contrary decision would have placed it in the power of a private individual to make a profit to himself by doing great public injury. It is difficult to comprehend the case of *Johnson v. Oquilly*, 3 P. Wms. 277, 279. There, a prosecution for a fraud was suppressed, and that suppression made the consideration for an agreement to pay money. The distinction between felony and misdemeanor seems to have been the foundation of the decision, if it was made, by Lord Talbot,—a distinction overruled in *Collins v. Blantern*, which was decided at a later period. It is not, indeed, at all clear that the indictment for the fraud was compromised, as a part of the agreement, or that the fraud was an indictable one: and perhaps the case may be [416] so explained. If not, it cannot, we conceive, be sustained as law." After observing upon *Drage v. Ibberson*, 2 Esp. N. P. C. 643, his Lordship adds,—“But there is a class of cases, such as *Bechey v. Wingfield*, 11 East, 46, and *Baker v. Tearnshand*, 7 Taunt. 422, J. B. Moore, 120, which do not at all break in upon sound principles. These are cases where the private rights of the injured party are made the subject of agreement, and where, by the previous conviction of the defendant, the rights of the public are also preserved inviolate. As Gibbs, C. J., in the latter case, well observes, ‘the parties have referred nothing but what they have a right to refer. They have referred the several assaults’ (by which we understand him to mean, their several rights to damages for those assaults): ‘these may be referred.

They have referred the right of possession: that may be referred. The reference of all matters in dispute *refers all other their civil rights*:¹ which words shew our previous interpretation to be correct." And, in conclusion, his Lordship says: "We have no doubt that, in all offences which involve damages to an injured party for which he may maintain an action, it is competent for him, notwithstanding they are also of a public nature, to compromise or settle his private damage in any way he may think fit." That, it is submitted, is a decisive authority in favour of the validity of this plea.

Reynolds, in support of his rule. Obtaining money by false pretences is a private misdemeanour. [Erle, C. J. It is on the borders of larceny.] *Drayge v. Ibberson* was a case of obtaining goods by false pretences: and Lord Kenyon said "he should adhere to the class of cases which held that the consideration being the settling a misdemeanour, might be good in law." The rule is thus laid down in Byles on Bills, 8th edit. [417] p. 125: "Considerations impeding the course of public justice, as, dropping a criminal prosecution for a felony or a public misdemeanour, or suppressing evidence, are illegal considerations,"—citing *Nicot v. Wallace*, 3 T. R. 17, *Fallows v. Tindor*, 7 T. R. 475, *Edgeworth v. Ridd*, 5 East, 294. "But it has been held that compounding a private misdemeanour is a good consideration for a note,"—citing *Drayge v. Ibberson*, 2 Esp. N. P. C. 643, and *Coppock v. Barber*, 4 M. & W. 361. No man is bound to prosecute for a misdemeanour. The remedy is substantially for the benefit of the person who is injured by it.

ERLE, C. J. It is to the interest of the public that the suppression of a prosecution should not be made matter of private bargain. I think the obtaining money by false pretences is not one of the misdemeanours in which the personal interest of the aggrieved party alone is concerned. The case of *Kear v. Leaman*, 6 Q. B. 308, 9 Q. B. 371, appears to me to be a decisive authority in favour of this defence.

The rest of the court concurring,
Rule discharged (a).

[418] SKILTON v. SYMONDS. Jan. 27th, 1865.

Where a deed of composition under s. 192 of the Bankruptcy Act, 1861, has been duly registered, but has become unavailing by reason of the failure of the debtor to carry out the arrangement, the application for leave to issue execution against his property or person under s. 198 must be made to the court of bankruptcy.

The defendant had entered into a deed of composition with his creditors under the 192nd section of the Bankruptcy Act, 1861 (24 & 25 Vict. c. 134), by which they released him from their several debts in consideration of his engagement to pay a composition of 2s. 6d. in the pound by instalments at three and six months. The deed was registered and a certificate of registration duly obtained under the 198th section of the act. The defendant having failed to pay the instalments, pursuant to his covenant,

Griffiths, on a former day in this term, obtained a rule calling upon him to shew cause why the plaintiff should not have the leave of this court, under the above-mentioned section, "to make the judgment obtained by him in this action available by execution by fi. fa. or ca. sa., notwithstanding the registration of the deed of composition by the defendant, he the defendant not having paid or tendered to the plaintiff and others the first instalment payable under the said deed, when due." He referred to the 198th section, which enacts that, "after notice of the filing and registration of such deed [a deed under s. 192] has been given as aforesaid [under s. 193], no execution, sequestration, or other process against the debtor's property in respect of any debt, and no process against his person in respect of any debt other than such process by writ or warrant as may be had against a debtor about to depart out of England, shall be available to any creditor or claimant, *without leave of the court*: and a certificate of the filing and registration of such deed under the hand of the chief registrar and the seal of the court shall be available to the debtor for all purposes as a [419] protection in bankruptcy." The question was whether that meant the leave of the court out of which the process issued, or the leave of *the court of bankruptcy*. Referring to the

(a) See *Ward v. Lloyd*, 7 Scott, N. R. 449.

interpretation clause of the Bankruptcy Act, 1861, s. 229, which declares that "the court" shall mean "the court in London, or any country district court, or any county-court acting under this act, according as such several constructions shall be consistent with the context," it would seem that the leave of the court of bankruptcy was intended: but, on the other hand, it might be urged that the court of bankruptcy would have no power to interfere with the process of the superior courts at Westminster. [Keating, J. The Lord Chancellor has held that the debtor must apply for his discharge to the court out of which the process issues. Erle, C. J. And that was the inclination of this court in *Leigh v. Puddlebury*, 15 C. B. (N. S.) 819, 820.] Acting upon that principle, the court of bankruptcy has refused to discharge a party.

Kenealey now shewed cause. This, which is the first application of the kind which has been made in full court, is in effect an attempt to revoke or annul an order of protection in bankruptcy. The deed, which has been executed and duly registered, is good upon the face of it: and no fraud is suggested,—the only objection which can be urged being, that the debtor has failed to pay or tender the composition instalments. [Erle, C. J. The release is conditional only upon the instalments being paid or tendered. The contention on the part of the creditor is, that the deed, though valid at first, has become inoperative by reason of the non-performance of a condition subsequent. If the deed were altogether void, no doubt we might interfere. Williams, J. Such an order as is sought by this [420] motion was made by Pollock, C. B., at Chambers, in a case of *Daricks v. Gladstone*.] It is submitted that this is not the proper court in which to try whether or not the bankrupt has acted properly. "The court," in s. 198, must mean the court of bankruptcy: no other court is mentioned or referred to in that section: and wherever the legislature has intended to preserve the jurisdiction of the superior courts of common law, it has done so in express terms. This is manifest from the 197th section, which enacts that, "from and after the registration of every such deed or instrument in manner aforesaid, the debtor and creditors and trustees, parties to such deed, or who have assented thereto or are bound thereby, shall in all matters relating to the estate and effects of such debtor be subject to the jurisdiction of *the court of bankruptcy*, and shall respectively have the benefit of and be liable to all the provisions of this act, in the same or like manner as if the debtor had been adjudged a bankrupt, and the creditors had proved, and the trustees had been appointed creditors' assignees under such bankruptcy; and the existing or future trustees of any such deed or instrument, and the creditors under the same, shall, as between themselves respectively, and as between themselves and the debtor, and against third persons, have the same powers, rights, and remedies with respect to the debtor and his estate and effects, and the collection and recovery of the same, as are possessed or may be used or exercised by assignees or creditors with respect to the bankrupt, or his acts, estate, and effects, in bankruptcy; and, except where the deed shall expressly provide otherwise, *the court* shall determine all questions arising under the deed, according to the law and practice in bankruptcy, so far as they may be applicable, and shall have power to make and enforce all such orders as it would be authorized to do if the [421] debtor in such deed had been adjudged bankrupt, and his estate were administered in bankruptcy." Throughout that section, "the court" evidently means the court of bankruptcy. Is not this "a question arising under the deed?" If the debtor has in any way misconducted himself, the court of bankruptcy may revoke his protection: and this court will leave the creditor to that remedy, and will not lend itself to a motion the manifest object of which is to enable the sheriff to escape the peril of an action. In *Ex parte Godden*, *In re Shettle*, 32 Law J., Bankruptcy, 37, 1 De Gex, Jones, & S. 260, Mr. Commissioner Holroyd having ordered the release of the debtor, on a deed of composition being registered, on appeal to the Lords Justices, Lord Justice Knight Bruce said: "In this case, which is one of an appeal from a most able and experienced commissioner, several points have been argued. One is, as to jurisdiction, with regard to which it was contended that the learned commissioner had not the power to make the order or to entertain the application in which it was made, there not having been an actual bankruptcy. That is a point which is certainly open to a difference of opinion. My opinion, on looking at sections 192 and 198, and other parts of the act of 1861, is, that the commissioner has jurisdiction, that it is not necessary to apply to a judge of one of the courts at Westminster, and that the appellant's objection as to this point is not well founded, though I do not feel confident upon it. I will

assume, however, that the respondent is so far right." In *Ex parte Morrison, In re Clun*, 33 Law J., Bankruptcy, 47, where a debtor having *no assets* executed a statutory composition-deed for the mere purpose of defeating a creditor who had recovered judgment against him, the Lord-Chancellor, acting under the 198th section, on appeal against an order of Mr. Commissioner Fane, gave leave to [422] the creditor to issue execution on his judgment, notwithstanding the deed; saying,—"The assignment was a mockery, for there was actually nothing to assign, and it was impossible it could be for the benefit of the creditors." *Walter v. Adcock*, 31 L. J., Exch. 380, 7 Hurlst. & N. 541, was also referred to.

Griffiths, in support of his rule. This is a question of great importance. There is a case now pending in the Queen's Bench, in which the court has taken time to consider whether or not the sheriff is liable to an action for refusing to arrest a party under a *ca. sa.*, where the deed had subsequently been held to be void. [Erle, C. J. You may assume that the court will do all it can to protect the sheriff, and that *prima facie* the sheriff would have a right to rely on the debtor's protection.] The court of bankruptcy, it is submitted, can have no right to interfere in any way with the process of this court. Under the Bankruptcy Act, 1861, whatever the form of the deed, if the affidavit of its execution be duly made under the provisions of s. 192, and a certificate of registration granted, it protects the debtor from all process. [Willes, J. I cannot think that the registrar would file a deed which is obviously bad upon the face of it.] The registrar has no power to reject a deed which comes accompanied by the requisite affidavit. It is admitted that this deed is now operative, so that it could not be set up in answer to an action for the debt. There is no provision in the Bankruptcy Act enabling that court to set aside the certificate of registration: it can only investigate the debtor's rights to property, if any. The order made by Pollock, C. B., in *Daniels v. Gladstone* was not appealed against. In a case of *Re Harwood*, 7 Law Times (N. S.) 171, the debtor having been arrested upon process issuing out of one of the courts at [423] Westminster, Mr. Commissioner Fonblanque held that the application for his release must be made to the court out of which the process issued. [Willes, J. That is a totally different matter. Either court may discharge the party from custody. It is the common course, where a party claims to be privileged from arrest, to apply for his discharge either to the court whose privilege is violated, or to the court whose process is used in violation of the privilege.] In *Baerselmann v. Langlands*, 34 Law J., Exch. 3, the court of Exchequer held that a debtor arrested on a *ca. sa.* after executing a good deed of arrangement under s. 192, is, according to s. 198, entitled to his discharge from custody on the deed being duly registered. [Erle, C. J. We are all agreed as to the power to *discharge* the debtor. Here, the sheriff is asking this court for advice. If we have no jurisdiction, our order would be merely delusive.] The court of bankruptcy cannot exercise any control over the process of this court. And, when the 198th section says that no process against the property or the person of the debtor shall be available to any creditor *without leave of the court*, it must necessarily mean the leave of the court out of which the process issues, which court alone can exercise jurisdiction over such process.

ERLE, C. J. I am of opinion that this rule should be discharged. The Bankruptcy Act, 1861, has enacted that, where a deed framed in compliance with the provisions and conditions of the 192nd section has been registered, and all the requirements of the statute have been duly complied with, the debtor and his property shall be protected from all process. The words are, that, after notice of the filing and registration of such deed, no execution, sequestration, or other process against the debtor's property, in respect of any debt, [424] and no process against his person in respect of any debt, other than such process by writ or warrant as may be had against a debtor about to depart out of England, shall be available to any creditor or claimant, *without leave of the court*. The question is, what court do these words refer to. The clauses to which our attention has been called, and especially the interpretation clause, to my mind clearly shew that they refer to the court of bankruptcy. That court would have power to suspend the debtor's protection, without at all interfering with the process of this court. It would be merely removing an impediment. I am the more confirmed in this view, inasmuch as our order would afford the sheriff no protection: and I see no sign of any such jurisdiction being given to this court under this statute. As Mr. Kenealey observed, the court of bankruptcy has a much wider

jurisdiction in matters of this sort, and has the means of doing that which is for the substantial interest of the creditors as well as of the bankrupt. Here is a deed which was valid at the time of its execution, but which has subsequently become void by reason of the non-payment of the instalments. The court of Chancery, administering its jurisdiction in bankruptcy, may make provision to enforce payment, and may deal with the bankrupt in a way in which we cannot. For these reasons, it seems to me that the application for leave to proceed under the 198th section must be made to the court of bankruptcy.

WILLIAMS, J., concurred.

WILLES, J. As to the power to discharge the debtor, I consider that we are bound by authority. The cases I referred to as to privilege are collected in 1 Archbold's Practice, 11th edit. 770, 771, where numerous [425] instances are given, of persons arrested under process of one court, and discharged by another. As this protection of the debtor is in the nature of a privilege, looking at the very general terms in which all the powers and authorities of the superior courts of law and equity are by the 1st section of the statute conferred upon the court of bankruptcy, I take leave to doubt whether, if that court thought fit to exercise the discretion of ordering the release of a debtor in custody under process of one of the superior courts, the sheriff would not be protected by it. But, at all events, it seems to me to be quite clear that the court of bankruptcy alone has power to grant leave to issue execution under the 198th section.

KEATING, J. I am entirely of the same opinion. The court of bankruptcy is clearly the court intended in s. 198 and in the several sections in immediate connection therewith. That court alone can give leave to make the process available either against the property or the goods of the debtor.

ERLE, C. J. As the rule asks for costs, it must be discharged with costs. Rule accordingly.

[426] HOGG v. SKEEN AND VINCENT. Jan. 19th, 1865.

[S. C. 34 L. J. C. P. 153; 11 L. T. 709; 11 Jur. N. S. 244; 13 W. R. 383.]

1. To an action by an indorsee against A. and B. as the acceptors of a bill of exchange, B. having suffered judgment by default, A. pleaded that he did not accept the bill. At the trial it was proved that A. and B. were partners, and that the bill had been accepted by B. in fraud of the partnership articles, without the knowledge of A., and for his own private purposes:—Held, that this cast upon the plaintiff the burthen of shewing that he gave value for the bill.—2. *Musgrave v. Drake*, 5 Q. B. 185, Dav. & Mer. 347, distinguished.

This was an action by the indorsee of a bill of exchange against the acceptors.

Vincent, one of the defendants, suffered judgment by default. The other defendant, Skeen, pleaded that he did not accept the bill.

At the trial before Willes, J., at the sittings in London after last Trinity Term, it appeared that the bill was accepted by Vincent in the name of the firm, but without authority from his partner, and in violation of the terms of the articles of partnership, which were produced. There was no evidence that the plaintiff had notice of the partnership deed or that the bill was not accepted for the purposes of the firm: and the only evidence that he gave value for the bill was the statement of his attorney that he gave Vincent a cheque for the amount of the bill (which was 38l. 17s. 6d.), less 15s. for discount. The cheque, however, was not produced; and the plaintiff was not present to explain the transaction. It did not appear that the plaintiff had ever had any other dealing with the firm.

On the part of the plaintiff it was submitted that, to negative his right to recover upon the bill, it was incumbent on the defendant to shew affirmatively that the plaintiff knew, or had reason to suspect, that it was drawn in fraud of the partnership, and that he took it without value.

The learned judge left it to the jury to say whether or not the plaintiff had given value for the bill. They found for the defendant.

C. Pollock, in pursuance of leave reserved to him at the trial, subject to the condition that the matter [427] should not go beyond this court, in Michaelmas Term

last, obtained a rule to shew cause why the verdict should not be entered for the plaintiff, on the ground that, there being no evidence as to notice to the plaintiff or want of consideration, the plaintiff was entitled to the verdict; or for a new trial, on the ground that the verdict was against the evidence. He referred to *Musgrave v. Drake*, 5 Q. B. 185, Dav. & Mer. 347.

Griffiths now shewed cause. It is clear that Vincent had no right to accept bills in violation of the partnership deed: and the question whether the plaintiff had given value was a question for the jury, and that is disposed of by their finding. On the subject of notice, it is laid down in Byles on Bills, 8th edit. 113, that "a wilful and fraudulent abstinence from inquiry into the circumstances (and it has even been said by the court of Queen's Bench that gross negligence may be evidence of fraud,—*Goodman v. Harry*, 4 Ad. & E. 870, 6 N. & M. 372), where they are known to be such as to invite inquiry, will (if a jury think that the abstinence from inquiry arose from a belief or suspicion that inquiry would disclose a vice in the bill,) amount to general or implicit notice,"—citing *Oakeley v. Ooddeen*, Guild. C. P. Nov. 1861, *Jones v. Smith*, 1 Hare, 55, *Ware v. Lord Egmout*, 4 De Gex, M'N. & G. 473, and *The Attorney-General v. Stephens*, 6 De Gex, M'N. & G. 111. [Keating, J. That question does not arise here. The jury have negatived value. Erle, C. J. The bill is shewn to be tainted with illegality: and the jury have found that the plaintiff gave no value. We must hear what can be said in support of the rule.

C. Pollock The acceptance was proved: and the plaintiff's attorney proved that a cheque was given for the amount of the bill less the discount. On the [428] part of the defendant, it was proved that the acceptance of the bill by Vincent was in fraud of the partnership articles: but there was no evidence upon the defendant's case of the circumstances under which the plaintiff received the bill. *Musgrave v. Drake* is precisely in point. That was an action by an indorsee against the acceptors of a bill of exchange. One of the defendants suffered judgment by default. The others pleaded that they did not accept. It was proved that all the defendants were partners, and that the defendant who had suffered judgment by default had accepted the bill in the name of the firm, in fraud of the partnership, and not for partnership purposes: and it was held that such proof, without evidence of knowledge on the part of the plaintiff, did not, under this issue, oblige the plaintiff to prove the circumstances under which the bill was indorsed to him. In giving the judgment of the court, Lord Denman said: "We have taken pains to ascertain what, as understood in the other courts, would be the course at nisi prius on the trial of such an issue as this. We find that the other courts agree in our view: which is this. Where issue is joined on a plea of non acceptit, and the proof offered of the acceptance is the signature of the partner competent to bind the firm, then, though the defendants shew that this signature was a fraudulent act on the part of such partner, yet, if the proof does not affect the plaintiff with knowledge of the fraud, that does not put the plaintiff to an answer, nor make it necessary for him to give any explanation or account of the transaction." A distinction is there made between a transaction which is altogether fraudulent, and an acceptance which is a violation of the contract of partnership. [Willes, J. The case turned upon a point of pleading: no question was reserved. Keating, J. In Byles on Bills, 44, note (u), it is said that [429] "the case of *Grant v. Hawkes*, Chitty on Bills (10th edit.) 42, does not appear to have been brought to the notice of the court."] *Grant v. Hawkes* is only to be found in Chitty on Bills, and, as Byles, J., observes, it is distinguishable. The question as to the amount of evidence required to put the plaintiff to proof that he has given value for the bill, was much discussed in *Smith v. Braine*, 16 Q. B. 244. But here the acceptance was in the ordinary name of the firm: and there was nothing upon the face of it to excite suspicion. Then, as to the evidence. All that the defendant proved was, that the bill was accepted in violation of the partnership articles entered into between him and Vincent, and without his consent. There was nothing to shew that the plaintiff took it out of the ordinary course of business. [Willes, J. It did not appear that the plaintiff had had any previous dealings with the firm. Unless he shewed that he had given value for the bill, therefore, he could have no title.] The only defect in the plaintiff's case was, that he had not the cheque in court which his attorney swore was given for the bill. That clearly was not enough to justify the jury in coming to a conclusion which almost amounts to a perverse verdict.

ERLE, C. J. I am of opinion that this rule should be discharged. The action is

brought by the holder of a bill of exchange against the acceptors ; and there is a plea of non accepit by one of the defendants : the other having suffered judgment by default. The evidence was, that Skeen and Vincent were partners, and that the bill in question was, in fraud of the partnership articles, accepted by Vincent in the name of the firm, and not for partnership purposes. The question is whether that cast upon the plaintiff the burthen of proving that he had given value for the bill. [430] I consider it to have been established by a long course of precedents that, on proof being given that the bill is tainted with fraud in its inception, the burthen is thrown upon the party who seeks to enforce payment, to shew that he gave value for the bill. And this I consider to be a most salutary rule, for the prevention of fraud and wrong against an innocent party. Mr. Pollock has relied on the case of *Musgrave v. Drake*, 5 Q. B. 185, Dav. & Mer. 347, where the bill was tainted with this particular description of fraud. There the action was, as here, by the indorsee against the acceptors, and, under a plea of non accepit, it was proved that the defendants were partners, and that one of them (who had suffered judgment by default) had accepted the bill in the name of the firm, in fraud of the partnership deed, and not for partnership purposes : and the court of Queen's Bench held that such proof, without evidence of knowledge on the part of the plaintiff, did not, under the issue on non accepit, oblige the plaintiff to prove the circumstances under which the bill was indorsed to him. The judgment, however, proceeds entirely on the effect of that plea : the court do not affect to raise a doubt as to that which I have stated to be the rule of law upon the subject. At that period, there had been great variation of opinion amongst the judges as to what was put in issue by that particular form of plea : and the judgment was not properly the judgment of the court of Queen's Bench. It begins with a recital of a talk with the other judges : and we know from experience that on such casual conversations with reference to some particular matter, there is always great danger of the real point in issue being lost sight of. Speaking for myself, I must say I should have placed more reliance on that case if it had been the unassisted judgment of the court of Queen's Bench. Lord Denman gives the result of the conference thus :—[431] “Where issue is joined on a plea of non accepit, and the proof offered of the acceptance is *the signature of the partner competent to bind the firm*,”—which is not the case here,—“then, though the defendants shew that this signature was a fraudulent act on the part of such partner, yet, if the proof does not affect the plaintiff with knowledge of the fraud, that does not put the plaintiff to an answer, nor make it necessary for him to give any explanation or account of the transaction.” The effect of that judgment, as my Brother Willes suggested, is merely to settle the point of pleading, and not in any way to interfere with the ordinary rule of law that, wherever it is shewn that the instrument is tainted with fraud, the party who seeks to enforce his remedy upon it must shew that he received it for value. As to that part of the rule which seeks to set aside the verdict on the ground that it is against the evidence, having consulted my Brother Willes, I find that he is not dissatisfied. That part of the rule, therefore, also fails.

WILLIAMS, J. The principles which affect this case, as to the necessity for the plaintiff's shewing that he gave value for the bill, where the defendant has made out a *prima facie* case of fraud in its inception, are so familiar that it was impossible for Mr. Pollock to have made any shew of argument, but for the case of *Musgrave v. Drake*, 5 Q. B. 185, Dav. & Mer. 347. I entirely agree with my Lord that the question there involved was a question of pleading only. The court assume that, if the plaintiff had no knowledge of the signature being in fraud of the other partners, the fact of his having given value for the bill was not material, not being involved in the issue on non accepit ; but they seem to say it would have been otherwise if the plaintiff had been affected with the knowledge of the [432] fraud, because, under those circumstances, one partner has not *prima facie* authority to accept bills in the name of the firm, as against one who has notice or knowledge of the fraud. No question, however, arises here as to the form of the pleadings.

KEATING, J. I am of the same opinion, and for the same reasons.

WILLES, J. I am of the same opinion. As to the case of *Musgrave v. Drake*, 5 Q. B. 185, Dav. & Mer. 347, I think it right to say that I think it distinguishable from the present case. That appears to have been the simple case of a partner who *prima facie* had authority to accept bills in the name of the firm of which he was a member, accepting a bill in the partnership name in fraud of his partners and for his

own private purposes: and I cannot help thinking that the court of Queen's Bench, in its desire to narrow the issue, for the sake of convenience, omitted to consider what would be the effect of their decision upon the general law upon the subject. I am satisfied that that court would not have come to the conclusion they there did in a case like this, where the partner who accepted the bill in the name of the firm never could have had authority so to accept. But, I disclaim proceeding upon that distinction, because, treating *Musgrave v. Drake* as a decision upon a question of pleading, I cannot assent to the principle there laid down. The reason why, in the case of a partnership, a party is bound by an acceptance which is not his own, but that of his co-partner, is a reason founded on the law of estoppel in pais. Having consented to the exercise by another of an apparent authority to accept bills so as to bind him (even though such authority has been fraudulently exercised), as against a person who has taken the bill bona [433] fide and without notice of the fraud, the acceptor is estopped from denying the acceptance. Therefore, on a plea denying the acceptance, it seems to me to be a contradiction to say that you may go into the question whether he is estopped or not by reason of the holder of the bill being a holder without notice, but that you cannot go into the question of estoppel by reason of the party having given no value for the bill. The defendant must, I think, be at liberty to go into the one question, if he may into the other. *Musgrave v. Drake* shews that he may go into the one inquiry. If that be so, the question resolves itself into a question upon whom is cast the burthen of proof. I would only add a reference to Byles on Bills, where the learned author lays it down with his usual distinctness that, where the bill is infected with fraud or illegality in its inception, the holder must shew that he gave value. As to the burthen of proof, the rule is laid down clearly at p. 111:—"As soon as it appears to the jury by the defendant's evidence that the bill was originally infected with fraud or illegality, then it is plain that the original holder's title being destroyed, the title of every subsequent holder which reposes on that foundation and no other, falls with it. Hence, it appears that the plaintiff, the transferee, can then have no title till he shews that he or some other holder under whom he claims gave value for the bill,"—citing *Smith v. Martin*, 9 M. & W. 304, *Bailey v. Budwell*, 13 M. & W. 73, and *Harvey v. Towers*, 6 Exch. 656. "Therefore, where the question is thus raised whether the transferee be a holder for value, it is not for the defendant to prove the absence of value, but for the plaintiff, the transferee, to prove value given either by himself or by some under whom he claims." I would also refer to the way in which the learned author deals with the case of *Musgrave v. Drake*. At p. 44 he says: "The proper [434] mode of raising the defence of unauthorized and fraudulent acceptance by one partner, and notice to the plaintiff, is by a traverse of the acceptance,—*Jones v. Corbett*, 2 Q. B. 828; *Grant v. Enthoven*, 1 Exch. 382. If the defendants shew that the bill was circulated in violation of partnership articles, it has been held that they will thereby put the plaintiff to prove that he gave value for it,—*Grant v. Hawkes*, Chitty, 42. But it seems from a recent decision in the court of Queen's Bench, after conference with the judges of the other courts, that, in order to maintain the action, where it appears that one partner has accepted in fraud of his co-partners, *where issue is taken on the acceptance*, it is not necessary for the plaintiff to prove that he gave value, but the defendants must affect the plaintiff with notice of the fraud, or otherwise impeach his title,"—*Musgrave v. Drake*. And in the note he adds: "The case of *Grant v. Hawkes*, however, does not appear to have been brought to the notice of the court, though, perhaps, distinguishable." The learned author puts the words "where issue is taken on the acceptance" in italics, from which it appears that he treats it as a question of pleading, or as an exception to the general rule, by reason of its being narrowed by the form of the issue. As to the other part of the rule, it was entirely a matter for the consideration of the jury: and I cannot say that I am dissatisfied with the verdict.

Rule discharged.

[435] NEILL AND ANOTHER v. WHITWORTH AND OTHERS. Jan. 26th, 1865.

[S. C. in Exchequer Chamber, L. R. 1 C. P. 684.]

A. contracted to sell to B. 500 bales of cotton at a given price, to arrive at L. per ship or ships from C. The contract contained provisions as to quality, and for a

reference in case of dispute; and then followed these words,—“*The cotton to be taken from the quay: customary allowances of tare and draft; and the invoice to be dated from date of delivery of last bale:*”—Held that the stipulation as to the place of delivery was not a condition precedent, but a mere stipulation in favour of the seller, and that the contract amounted in effect to a contract to deliver the cotton at a reasonable time and under reasonable circumstances, the article to be at the buyer's charge from the time of its landing on the quay.

This was an action for an alleged breach of a contract for the delivery of certain cotton.

The declaration stated that the defendants bargained and sold to the plaintiffs, and the plaintiffs bought of the defendants, certain cotton, that is to say, 500 bales of cotton, guaranteed to be October shipment, at 15½d. per lb., to arrive from Calcutta in Liverpool per ship or ships, and to be fair Bengal cotton: *the said cotton to be taken from the quay: customary allowances of tare and draft; and the invoice to be dated from the date of the delivery of the last bale.* The said cotton to be in merchantable condition: the damaged, if any, to be rejected, provided it could not be made merchantable. Should the said cotton be transhipped into other vessels arriving, the contract to hold good: but if any of the vessels should be lost, the contract to be void so far as regarded such ships only. Payment for the said cotton to be made in cash within ten days, made equal to ten days and three months; and cash on account to be paid before delivery, if required. Averment, that all conditions were fulfilled and all things happened and all times elapsed necessary to entitle the plaintiffs to the delivery of the said cotton as agreed: Breach, that the defendants made default in delivering the said cotton, as agreed; whereby the plaintiffs had lost and been deprived of the profits which would have accrued to them from the delivery of the said cotton, and were prevented from fulfilling a contract entered into by them for the re-sale of the said cotton, and thereby lost great gains and profits, &c., and by reason of the premises the plaintiffs incurred expenses in and about endeavouring [436] to procure the delivery of the said cotton by the defendants, as agreed.

The defendants pleaded,—first, that the defendants did not bargain and sell to the plaintiffs, and the plaintiffs did not buy from the defendants, the cotton in the declaration mentioned. upon the terms therein alleged,—secondly, that the defendants did not make default in delivering the cotton in the declaration mentioned, as therein alleged,—thirdly, that the plaintiffs were not ready to accept the cotton. Issue thereon.

The cause was tried before Piggot, B., at the last Summer Assizes at Liverpool, when the following facts were taken by consent on the learned judge's note:—The plaintiffs were merchants in London: the defendants were merchants at Manchester; and both dealt largely in cotton. On the 2nd of October, 1863, the defendants, through their brokers, Trueman & Rouse, sold to the plaintiffs 500 bales of cotton, at 15½d. per lb. The bought-note was as follows:—

“Bought for account of Messrs. Neill, Brothers, of B. Whitworth & Brothers, Manchester, 500 bales of cotton, at 15½d. per lb., guaranteed October shipment, to arrive in Liverpool per ship or ships from Calcutta.

“The cotton guaranteed fair Bengal. Any slight variation in mark not to vitiate this contract. In case of dispute arising out of this contract, the matter to be referred to two respectable brokers, who shall decide as to quality, and the allowance, if any, to be made.

“*The cotton to be taken from the quay: customary allowance of tare and draft; and the invoice to be dated from date of delivery of last bale.*

“To be in merchantable condition; the damaged, if any, to be rejected, provided it cannot be made merchantable. Should the cotton be transhipped into other vessels arriving, the contract to hold good: but, [437] if any of the vessels be lost, the contract to be void, so far as regards such ships only.

“Payment, cash within ten days, made equal to ten days and three months. Cash on account, before delivery, if required.

“TRUEMAN & ROUSE.”

On the 28th of October, 1863, the plaintiffs re-sold the cotton to one Clarke, through the same brokers, at 18½d. per lb.

On the 8th of January, 1864, the defendants declared the "Talavera" and the "Fort George" as the ships by which the cotton was to arrive,—250 bales by each. The "Talavera" arrived at Liverpool on the 3rd of February, with a cargo of cotton which was landed on the quay there, and subsequently warehoused. Application was made on the part of the plaintiffs for delivery orders, but none were given or tendered until after the cotton had been carried to the warehouse. By the dock regulations at Liverpool, the authorities have power to warehouse all goods after they had been twenty-four hours on the quay.

The "Fort George" was stranded in Carnarvon Bay, and her cargo was landed there, and forwarded by railway to Liverpool. Arrived there, it was put into the "wreck transit sheds" on the quay, which is considered as part of the quay. The 250 bales ex "Fort George" were afterwards removed from the wreck transit sheds to the warehouse.

On a subsequent day, the vendors (the defendants) offered to deliver the whole 500 bales from the warehouse, but at quay weights, and without any charge for warehousing, or to cart them back to the quay and deliver them there. The plaintiffs, however, refused to take them, insisting that the defendants had broken their contract by allowing the cotton to be warehoused, instead of delivering it on arrival "from the quay."

[438] A verdict was taken for the plaintiffs, with 2109l. 7s. 6d. damages (*a*), leave being reserved to the defendants to move to enter a verdict for them, or to reduce the damages,—the court to be at liberty to draw such inferences of fact as a jury might have drawn, and to make all such amendments as the judge at nisi prius might have done.

Brett, Q. C., accordingly, in Michaelmas Term last, obtained a rule nisi to enter a verdict for the defendants, or to reduce the damages, on the grounds, as to the first point, that the stipulation in the contract that *the cotton should be taken from the quay*, was in favour of the vendors, or, if not, that it was a stipulation only, and not a condition in the contract; and, as to the second point, that the damages should be either nominal or at most the difference between the contract-price and the market-price on the day of the breach. He submitted that, inasmuch as the plaintiffs might without any expense have had the very cotton contracted for at the price agreed on, viz. 15½d., they could only be entitled to nominal damages for the defendants' breach of contract: but that, in any event, they could not have more than the difference between the contract-price and the price at which they might have bought similar cotton in the market on the day of the breach, which was proved to be 17d.

Edward James, Q. C., Mellish, Q. C., and Baylis, now shewed cause. By the terms of the contract, the plaintiffs were entitled to have the cotton in question delivered to them from the quay, which would limit it [439] to twenty-four hours after the landing, that being the time which by the regulations of the docks goods are permitted to lie upon the quay, after which they were warehoused at the expense and risk of the owner: and the plaintiffs by their contract bound themselves in the same terms to deliver to their sub-purchaser. The defendants had notice of the sub-contract, and consequently were aware of the importance of such a delivery as would enable the plaintiffs to perform it. The stipulation for delivery from the quay was an essential part of the contract, binding the sellers to deliver and the buyers to take the cotton from the quay; and was not, as is contended on the part of the defendants, a mere stipulation introduced in favour of the sellers: for, if so, there would be no time or place provided for the delivery at all. This form of expression occurs in the contract in *Moor v. Campbell*, 10 Exch. 323. The more difficult question is, what is the proper measure of damages,—the difference between the contract-price (15½d. per lb.) and the price at which the plaintiffs had re-sold the cotton,—the difference between the contract-price and the market-price of the day on which the default in delivery of the cotton was made,—or nominal damages, because the cotton contracted for was actually tendered within three days of the landing, free of expense, and so the vendees sustained no damage? If the plaintiffs could have gone into the market and obtained cotton which would have enabled them to perform their contract with

(a) The difference between the contract-price (15½d.), and the price at which the plaintiffs had re-sold the cotton to Clarke (18½d.),—the average weight of a bale of cotton being 3 cwt.

their sub vendees, it may be conceded that they would only have been entitled to the difference between the contract-price and the market-price of the day. But here, relying upon the defendants' performance of their contract, they have made a contract which they could not possibly fulfil. They are therefore entitled to damages computed by the difference between the contract-price and the price at [440] which they re-sold,—these being the damages which must be considered as fairly and reasonably resulting according to the usual course of things from the breach of the contract: *Waters v. Towers*, 8 Exch. 401; *Hadley v. Baxendale*, 9 Exch. 341; *Dalton v. The South Eastern Railway Company*, 4 C. B. (N. S.) 296; *Horn v. Felton*, 11 C. B. (N. S.) 142. At all events, the plaintiffs would, on all the authorities, and more especially according to the rule laid down by Willes, J., in *Borries v. Hutchinson*, post, p. 445, be entitled to the difference between the contract-price and the market-price on the day of breach.

Brett, Q. C., and Holker, in support of the rule. Two questions arise in this case,—first, whether the defendants were guilty of any breach of contract,—secondly, what damages the plaintiffs are entitled to recover. The action is for the non-delivery of cotton, to arrive; and it is an admitted fact that the defendants did give the plaintiffs a delivery order before the commencement of the action. The contention on the part of the plaintiffs is that the defendants did not deliver the cotton at the time and place when and where they bound themselves by their contract to deliver it. By the terms of the contract, the buyers were to take the cotton “from the quay.” That, it is submitted, does not amount to a condition binding the sellers to deliver on the quay, but merely to a stipulation for their advantage that, if they choose so to deliver, the vendees shall be there ready to receive it; the object being that the vendors shall not be at the charge of warehouse-rent, risk of fire, and the like. The distinction between stipulations which are conditions precedent and those which may be compensated for by damages in a cross-action is very elaborately discussed by Williams, J., in a judgment delivered by him in the Exchequer Chamber in a case of *Behn v. Burness*, 32 Law J., Q. B. 204, the result of which shews that this was a mere stipulation introduced for the benefit of the sellers. Whether particular terms of delivery amount to a condition precedent or not, depends, according to the judgment of Lord Ellenborough in *Ritchie v. Atkinson*, 10 East, 295, 306, “not on any formal arrangement of the words, but on the reason and sense of the thing, as it is to be collected from the whole contract.” The like rule is laid down in *Abbott on Shipping*, Part 4, ch. 1, § 5: and see *Tarrabochia v. Huckle*, 1 Hurlst. & N. 183, and *Jonassohn v. Young*, 32 Law J., Q. B. 385. At all events, the utmost the plaintiffs could be entitled to recover would be nominal damages.

ERLE, C. J. I am of opinion that this rule should be made absolute to enter a verdict for the defendants. The action is brought for the non-delivery of 500 bales of cotton pursuant to contract. The defendants plead that they did not make default, and that the plaintiffs were not ready to accept the cotton. The objection urged on the part of the plaintiffs, was that, the contract contained a condition precedent which was not performed by the vendors, and therefore that they, the plaintiffs, are entitled to maintain this action: and the question is, whether the contract between the parties does contain a condition precedent to be performed by the vendors before they could call upon the vendees to accept the cotton. The words relied on as constituting a condition precedent are, “The cotton to be taken from the quay.” It was in fact landed and warehoused: and the plaintiffs, finding that it had been taken to the warehouse, refused to receive it, although the defendants offered to deliver it to them at quay weights, and even to cart it back to [442] the quay free of expense. The law upon the subject of what does and what does not amount to a condition precedent, or only to an independent stipulation, is laid down with much clearness by my Brother Williams in a very elaborate judgment delivered by him in the Exchequer Chamber in the recent case of *Behn v. Burness*, 4 Best & Smith, 296. The distinctions there pointed out are well worthy of attention. Looking at the contract now before us with the light afforded by that case, I am of opinion that the clause in question constitutes an independent stipulation introduced solely for the benefit of the vendors, and therefore is matter on which the vendees cannot rely as amounting to a condition precedent. See the nature of the contract. It is a contract by bought and sold-notes for 500 bales of cotton to arrive, at a certain price and of a certain quality. Then comes a stipulation that, “in case of dispute arising out of this contract, the matter shall be referred to two respectable brokers, who shall decide as to quality, and the allowance, if any, to be

made." Then come the words in question,—“The cotton to be taken from the quay.” This comes after the more operative words, and among some provisions which are inserted in favour of the vendors. Looking at the nature of the stipulation itself, I cannot see how it can be of any importance to the vendees whether they receive the cotton from the quay or from the warehouse, provided the warehousing does not impose on them any additional expense or undue delay. It seems to me to be perfectly clear that it was a stipulation inserted for the benefit of the vendors, to enable them to call upon the vendees to take the cotton from the quay, in order to save them expense. I am also clearly of opinion that it was not intended to operate as a stipulation for time. There is nothing to shew that the whole number of bales [443] stipulated for were to be delivered out of the ship the moment she arrived: they might be the first 250 unloaded, or the last. I see nothing, therefore, in the stipulation which points to the time of delivery, or shews that it was for the benefit of the vendees: and I do see very good reason why the vendors should make it. I am therefore of opinion that it was not a condition precedent, that there has been no breach of the contract on the part of the vendors, and consequently that this action will not lie.

WILLIAMS, J. I am of the same opinion, and for the same reasons.

WILLES, J. I am of the same opinion. It struck me at first that the expression “the cotton to be taken from the quay” must be construed as a stipulation on the one hand, accompanied by a corresponding promise on the other, that the delivery should take place upon the quay, and that, unless the vendors were ready to deliver the cotton there, they failed in the performance of their contract, and would be liable for all the consequences of such failure. But, upon consideration, I am satisfied that that literal construction of the words would be an incorrect one. There are several reasons for holding that it could not have been so intended. The stipulation does not affect the identity of the cotton, or its quantity, or its quality,—as, for instance, that it should be cotton from Mobile or from New Orleans, or the like. Then, does it amount to a stipulation as to time. Without it, the contract would stand as a contract for the delivery of the cotton within a reasonable time. The words were evidently introduced with reference amongst other things to who was to be at the charge of the warehouse-rent, insurance, &c. These would otherwise have been at [444] large. There was, therefore, a manifest use for the words “the cotton to be taken from the quay.” The meaning of them is that the quay is to be taken as the place at which the delivery is to be made. This construction is fortified by the provision made for the usual allowances, and the stipulation that the invoice is to date from the delivery of the last bale. That must mean from the time the last bale is landed on the quay. The contract, therefore, stands as a contract for the delivery of the cotton in a reasonable time and under reasonable circumstances, the cotton to be at the buyers’ charge from the time it is landed on the quay. That seems to me to be the proper construction: and it is the construction which the sellers have put upon it. They offered to deliver the cotton to the buyers on the same terms as if it had been delivered on the quay: nay, more, the vendors offered to take it back to the quay, so as literally to comply with the words of the contract. For these reasons, I am of opinion that the rule should be made absolute to enter the verdict for the defendants.

KEATING, J. I am of the same opinion. I think, after hearing the argument, it is quite clear that the words in question were introduced as a stipulation in favour of the vendors. The place where they are found seems to me to make this quite obvious. The meaning is that the vendees shall be bound to take the cotton from the quay, provided the vendors were ready to deliver it there. The words were in all probability introduced in order to get rid of any question as to which party was to bear the expenses to be subsequently incurred. That seems to me to be the only sensible construction of the contract.

Rule absolute accordingly.

[445] BORRIES AND OTHERS v. HUTCHINSON. Jan. 19th, 1865.

[S. C. 34 L. J. C. P. 169; 11 L. T. 771; 11 Jur. N. S. 267; 13 W. R. 386. See *Ellinger Actien-Gesellschaft v. Armstrong*, 1874, L. R. 9 Q. B. 476. Followed, *Hinde v. Liddell*, 1875, L. R. 10 Q. B. 265. Distinguished, *Thol v. Henderson*, 1881, 8 Q. B. D. 457. Doubted, *Grébert-Borgnis v. Nugent*, 1885, 15 Q. B. D. 94.]

The defendant contracted to sell to the plaintiffs 75 tons of caustic-soda,—a commodity not ordinarily procurable in the market, —at a given price, to be delivered on the rails at Liverpool for Hull, 25 tons in June, 25 tons in July, and 25 tons in August; but he failed to deliver any until the 16th of September, between which day and the 26th of October he delivered 26 tons in all. At the time of entering into the contract, the defendant was aware that the plaintiffs were buying the soda for a foreign correspondent, but did not know until the end of August that it was destined for St. Petersburg.—The plaintiffs had in fact contracted to sell the soda to A., a merchant at St. Petersburg, at an advanced price; and A. had contracted to sell it to B., a soap manufacturer at that place, for a still further advance.—In consequence of the late delivery of the 26 tons, the plaintiffs were compelled to pay a higher rate of freight and insurance. This amounted to 40l. 17s. For their failure to deliver the remainder to A., they were called upon to pay and actually paid 159l., which A. claimed as the compensation he had been obliged to pay to B. for the failure to perform his sub-contract with him.—In an action by the plaintiffs to recover from the defendant damages for the breach of his contract with them, it was conceded that they were entitled to recover the difference between the price (on the 49 tons undelivered) at which he had sold the caustic-soda to them, and the price at which they had contracted to sell it to A., —in other words, the loss of profit on the re-sale: and,—Held that, they were also entitled to recover the 40l. 17s., the excess of freight and insurance, which was the necessary result of the defendant's breach of contract; but that the defendant was not chargeable with the 159l. which the plaintiffs had paid to A. to compensate B. for the loss of his bargain,—this being too remote a damage.

This was an action for the breach of a contract for the sale of a quantity of caustic-soda.

The declaration stated that the plaintiffs bargained with the defendant and agreed to buy of him a large quantity, to wit, 75 tons, of his best caustic-soda, strength guaranteed not to be less than 70 per cent., in 5 cwt. iron casks or 3 cwt. wooden casks, at the plaintiffs' option, at the price of 16l. 5s. per ton free on rails at Widness Dock, less 2½ per cent. discount and 1 per cent. commission: payment, cash fourteen days after delivery: shipment to be, 25 tons in June, 25 tons in July, and 25 tons in August: Averment, that all conditions were fulfilled, and all things happened, and all times elapsed necessary to entitle the plaintiffs to the delivery of the said caustic-soda: Breach, that the defendant did not deliver the same to the plaintiffs; and the plaintiffs; by reason of the premises, had been hindered and prevented from performing a certain other contract made by them with one Heitmann, of St. Petersburg, for the sale to him of the said caustic-soda at greatly increased prices, which last-men-[446]-tioned contract was made on the faith of the agreement by the defendant; and by reason of the premises the plaintiffs had been obliged to pay a much larger sum for freight and insurance than they otherwise would have done if the defendant had performed his said contract, and had incurred other losses, and were liable for other damages, &c.

The defendant paid 52l. 5s. 4d. into court, averring that that sum was sufficient to satisfy the claim of the plaintiffs: which they by their replication traversed; and thereupon issue was joined.

The cause was tried before Willes, J., at the second sitting in London in Michaelmas Term last. The facts were as follows:—On the 11th of May, 1863, the defendant, who was an alkali-manufacturer at Liverpool, sold to the plaintiffs, who were merchants at Newcastle-upon-Tyne, 75 tons of caustic-soda, to be delivered free on the rails for Hull, 25 tons in June, 25 tons in July, and 25 tons in August, at 16l. 5s. per ton. The contract was made by letters, which letters and some subsequent correspondence between the plaintiffs and the defendant shewed that the plaintiffs were to the knowledge of the defendant buying the article for shipment to "friends on the

continent." The plaintiffs had in fact made a sub-contract with one Heitmann, a merchant of St. Petersburg, to supply him with the article in question, to be shipped at Hull, at 17l. 10s. per ton, and had made arrangements for its shipment for the Baltic at the times above mentioned."

No part of the caustic-soda was delivered by the defendant until September, between the 16th and the 26th of which month several deliveries took place, in the whole amounting to 26 tons, which were shipped by the plaintiffs for St. Petersburg in pursuance of their contract with Heitmann: but, in consequence of the advanced season, this was done at an increased [447] rate for freight and insurance to the extent of 40l. 17s. (being 35l. 15s. for freight, and 5l. 2s. for insurance) beyond what they would have had to pay if the shipments had been made before the end of August.

It was admitted that caustic-soda is not an article which is kept in stock, so as to be capable of being at any time bought in the market like most other articles of commerce, consequently there was no ascertainable market-price; hence, the defendant paid into court enough to cover the difference between the price the plaintiffs had contracted to pay him for the caustic-soda and the price at which they had contracted to sell the article to Heitmann.

The plaintiffs, however, further claimed to be entitled to recover as damages the increased freight and insurance which they had been obliged to pay by reason of the lateness of the shipment. They also claimed to be entitled to a further sum of 159l. for the loss of Heitmann's profit upon the 49 tons undelivered, and a compensation which Heitmann had been obliged to pay (and which they had re-paid him) for the non-performance of his contract with one Heinburger, a soap and candle-manufacturer at St. Petersburg, to whom he had contracted to sell the caustic-soda,—of which contract the defendant had notice by the correspondence, but not at the time he made his contract with the plaintiffs.

On the part of the defendant it was submitted that these two last-mentioned items of damage were too remote: and that the mention of "our friends on the continent," in the correspondence which took place concerning the contract, at the utmost amounted only to an intimation to the defendant that the plaintiffs were buying as agents for a foreign merchant.

The learned judge was inclined to think that the plaintiffs were entitled to recover in respect of the [448] extra cost for freight and insurance occasioned by the delay, but not for the loss by reason of the sub-contract entered into by Heitmann with Heinburger.

The jury returned a verdict for the full sum claimed,—199l. 17s.: and the learned judge reserved leave to the defendant to move to reduce the damages, the court to be at liberty to draw such inferences as the jury might have done.

Brett, Q. C., in the course of the term, obtained a rule nisi accordingly.

S. Temple, Q. C., and Udall, now shewed cause. The plaintiffs were entitled to be reimbursed by the defendant all the loss and expense they had sustained through his breach of contract. It was conceded that there was no market to which the plaintiffs could have resorted, on the defendant's failure to supply the article contracted for: therefore the ordinary rule cannot apply here. The defendant had notice from the correspondence that the damages now claimed would be the natural and necessary result of the breach of his contract. The extra freight and insurance became necessary from the lateness of the delivery at Hull of the 26 tons which were delivered: and, when a man contracts to sell goods to a merchant, he is necessarily cognizant of the fact that they are bought for the purpose of re-sale, or to supply orders already received. [Willes, J. The sale by Borries & Co. to Heitmann was not made with any reference to the particular terms of their contract with Hutchinson.] We are justified in assuming that Heitmann bought from the plaintiffs upon the same terms (except as to price) on which the plaintiffs bought of Hutchinson [Erle, C. J. It is not to be assumed, because the buyer is a merchant, he will contract to sell on and before [449] he has possession of the goods.] Such is the invariable practice in every market. The rule, as laid down by Alderson, B., in delivering the judgment of the court in *Hadley v. Baxendale*, 9 Exch. 341, 354,—and which has since received almost universal assent,—is that, "where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e. according to the usual course of things, from such breach of

contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it." In *Randall v. Raper*, Ellis, B. & Ellis, 84, the plaintiffs, corn-factors, bought of the defendant a quantity of barley which was warranted to be seed barley of a particular quality, and in the course of their trade re-sold it, with a like warranty, to third persons, who sowed it on their land, believing that it was of the description warranted. The crop which came up was of an inferior kind of barley, and claims were made upon the plaintiffs by their vendees for compensation in respect of the damage which they had suffered, and the plaintiffs agreed to satisfy them, but no sum was fixed. In an action by the plaintiffs against the defendant, it was held (Wightman, J. *hæsitante*), that they might recover the amount of damage which their vendees had sustained, they being liable to pay it, though they had not actually done so. In giving judgment, Lord Campbell says: "The true rule is that you must shew that the damage which is sought to be recovered naturally arose from the breach of contract of which you complain. Suppose the plaintiffs had paid according to the liability which they had incurred, it would have [450] been a natural, probable, and necessary consequence of the breach of the contract, for the defendant sells the barley as Chevalier seed barley, and the purchaser sells it again with the same description. If it be sown, and turns out not to be Chevalier seed barley, it will not produce that quality of grain which was warranted, not on account of climate, or soil, or weather, but because seed will produce the same product, and the difference in value will be a necessary loss, and one which naturally arises from the breach of contract by the defendant. Therefore, the defendant having warranted the barley as Chevalier seed barley, if the plaintiffs had been sued, and had been obliged to pay damages, there is no doubt that they could have recovered them again. But then it is said that here there has only been a claim, no action having been brought, or any sum paid. It would be a great hardship if we were to say that the liability to pay damages was not enough to enable the plaintiffs to recover; and no case can be found where it has been decided that there must be more than a liability." [Erle, C. J. It is agreed on all hands that the loss of profit upon the first re-sale (to Heitmann) is recoverable.] That which is said by Parke, B., in the course of the argument in *Hudley v. Barendale*, 9 Exch. 346, is abundantly sufficient to shew that the plaintiffs are entitled to recover the whole of the damages which they now claim. "The sensible rule," he says, "appears to be that which has been laid down in France, and which is declared in their code,—Code Civil, liv. iii., tit. iii., ss. 1149, 1150, 1151, and which is thus translated in Sedgwick, p. 67,—'The damages due to the creditor consist in general of the loss that he has sustained, and the profit which he has been prevented from acquiring, subject to the modifications hereinafter contained. The debtor is only liable for the damages [451] foreseen, or which might have been foreseen, at the time of the execution of the contract, when it is not owing to his fraud that the agreement has been violated. Even in the case of non-performance of the contract, resulting from the fraud of the debtor, the damages only comprise so much of the loss sustained by the creditor, and so much of the profit which he has been prevented from acquiring, as directly and immediately results from the non-performance of the contract.'" The rule is well laid down by an eminent American judge (Selden, J.), in a case of *Griffin v. Colver*, 2 Smith's New York Rep. 489, 494,—"It is an error to suppose that 'the law does not aim at complete compensation for the injury sustained,' but 'seeks rather to divide than satisfy the loss' (Sedgwick, ch. 3). The broad general rule in such cases, is that the party injured is entitled to recover all his damages, including gains prevented as well as losses sustained: and this rule is subject to but two conditions. The damages must be such as may fairly be supposed to have entered into the contemplation of the parties when they made the contract, that is, must be such as might naturally be expected to follow its violation: and they must be certain, both in their nature and in respect to the cause from which they proceed. The familiar rules on the subject are all subordinate to these: for instance, that the damages must flow directly and naturally from the breach of contract, is a mere mode of expressing the first; and that they must be not the remote but proximate consequence of such breach, and must not be speculative or contingent, are different modifications of the last. These two conditions are entirely separate and independent, and to blend them tends to confusion." [Erle, C. J. That is, such damages as may naturally be expected to follow and are certain to follow a breach of the contract.] The [452] general rule is

also stated by Tindal, C. J., in delivering the judgment of the Exchequer Chamber in *Barrow v. Armand*, 8 Q. B. 604, 609, as follows:—"Where a contract to deliver goods at a certain price is broken, the proper measure of damages in general is, the difference between the contract-price and the market-price of such goods at the time when the contract is broken, because the purchaser, having the money in his hands, may go into the market and buy. So, if a contract to accept and pay for goods is broken, the same rule may be properly applied: for, the seller may take his goods into the market and obtain the current price for them." But that rule is inapplicable to a case like this, where there is no market-price, and no possible means of obtaining other goods, so as to enable the purchaser to perform the sub-contract. In *Dunlop v. Higgins*, 1 House of Lord Cases, 381, the measure of damages in an action for breach of contract in the sale of goods, is held to be not merely the amount of the difference between the contract-price and the price at which such goods could be bought at the moment when the contract was broken, but likewise a compensation for such profit as might have been made by the purchaser had the contract been duly performed. [Willes, J. Mr. Mayne, observing upon that case (*Mayne on Damages*, 18), says: "It may be as well to state that, according to the Scotch law, loss of profits may be included in the estimate of damages. It was on this ground that *Dunlop v. Higgins* was decided in the House of Lords. It was an appeal from a Scotch court: and it was held that, in an action in that country for non-delivery of goods according to contract, the damages were not restricted to the difference between the contract and market-price, but that the plaintiff might recover in respect of the profits which he would have made by a contract of re-sale into [453] which he had entered. The decision is in itself no authority in England, as it turned upon the acknowledged difference between the law of the two countries in this respect. It is remarkable, however, for a vigorous onslaught upon the English law by so formidable an opponent as Lord Cottenham, C. He said,—'If pig-iron had only risen 1s. a ton in the market, but the purchasers had lost 1000l. upon a contract with a railway company, in my opinion they ought not only to recover the damage which would have arisen if they had gone into the market and bought the iron at the increased price, but also that profit which would have been received if the party had performed his contract. No other rule is reconcileable with justice, nor with the duty which the jury had to perform,—that of deciding the amount of damage which the party has suffered by the breach of his contract.' But, with the greatest possible respect, it may be suggested that the rule most reconcileable with justice would be, to inquire what was the contract, and what were the liabilities really entered into by the parties. The question is, not what profit the plaintiff might have made, but what profit he professed to be purchasing. Not what damage he actually suffered, but what the other contemplated, and undertook to pay for. It is quite clear that loss of profits by a re-sale can never be contemplated, unless the re-sale has actually taken place at the time, and is communicated to the other party. The reason is that such a profit is utterly incapable of valuation. It may depend upon a change of weather, a scientific discovery, an outbreak of war, a workman's strike. It will depend upon the energy and sagacity of the person who purchases the goods, and the solvency of the person to whom he sells them again. In short, if the Scotch rule were to be carried out to its fair extent, no one [454] could contract to sell goods which were not actually in his possession, without charging an additional premium, commensurate to the profits which the vendee might possibly make, and for which he himself would have to pay, if prevented from carrying out his agreement." The English rule, it is submitted, is that which should be followed here. [Erle, C. J. The real question is, whether the plaintiffs are entitled to recover the 159l. as damages arising out of the re-sale of the soda by Heitmann to Heinburger.] In *Josling v. Irvine*, 6 Hurlst. & N. 512, the defendant on the 26th of July sold by sample to the plaintiff 3000 gallons of naphtha, at 2s. 2d. per gallon. On the 27th the plaintiff re-sold the same to H. (also by sample), at 2s. 6d. It appeared that the sample contained 73 per cent. of benzol, an article used in the manufacture of Magenta dye, then newly discovered, and for that purpose was worth 5s. 9d. a gallon. The defendants failed to deliver the naphtha. It was proved that H. had claimed the difference between 5s. 9d. and 2s. 6d. from the plaintiff. In assessing the damages in an action for the non-delivery of the naphtha, the jury gave this amount to the plaintiff as damages. The court directed a new inquiry, because it did not appear at what price the plaintiff could have procured naphtha according to the sample, at the time of the breach,—

Martin, B., saying: "Upon these facts, I think that the case of *Randall v. Harper*, E. B. & E. 84, is decisive to shew that the damage which the plaintiff is liable to pay to the sub-purchaser may be taken into consideration. I agree that, if a person purchases stock, or any other article which has a certain known price and quality, the market price at the time of the breach affords a fair measure of damage. But, in this case, the value of the naphtha may have risen immediately after the sale, and there may have been no ascertainable mar-[455]-ket value." On a second inquiry, it appeared that naphtha known to contain 73 per cent. of benzol could not have been bought for less than 5s. 9d. at the time of the breach. The learned judge before whom the inquiry was executed told the jury that the plaintiff would have no answer to an action by H. for the difference, and advised the jury to give such a sum as would enable him to pay H. The jury having adopted this view, it was held that the damages were rightly assessed, and that there was no misdirection. In *Mayne on Damages*, p. 16, it is said: "One very common instance in which damages are held to be too remote, arises where the plaintiff claims compensation for the profits which he would have made if the defendant had carried out his contract. It is by no means true, however, that such profits can never form a ground of damage. There are many cases in which the profit to be made by the bargain is the only thing purchased, and in such cases the amount of that profit is strictly the measure of damages. When A. agrees to execute work for B., or to sell him goods, or hire him a ship at a future day, the benefit to A. is the profit flowing from the transaction, and to this he is entitled. But, when the thing purchased is a specific article, and not the right to make a profit, the measure of damages will be the value of that article, or the difference between the contract-price and that at which it could have been purchased elsewhere. The mere fact that some ulterior profit might have been made out of it cannot be considered, because such profit formed no part of the contract. This distinction has been very clearly pointed out in a case in the Supreme court of New York. The plaintiffs had contracted with the defendants to furnish marble from a specified quarry, at a fixed sum, for the erection of a City Hall. The plaintiffs entered into a contract with [456] the proprietors of the quarry for the required amount, at a smaller sum. After delivering a part of the marble, the defendants refused to receive any more. The plaintiffs sued for breach of contract, and claimed as damages the profit they would have made by furnishing the marble at a larger sum than they were to pay for it. Kent, J., ruled accordingly, 'that the jury should allow the plaintiffs as much as the performance of the contract would have benefited them:' and this ruling was affirmed in the court above. Nelson, C. J., said: 'It is not to be denied that there are profits or gains derivable from a contract which are uniformly rejected as too contingent and speculative in their nature, and too dependent upon the fluctuation of markets and the chances of business to enter into a safe or reasonable estimate of damage. Thus, any supposed successful operation the party might have made, if he had not been prevented from realizing the proceeds of the contract at the time stipulated, is a consideration not to be taken into the estimate. Besides the uncertain and contingent issue of such an operation, it has no legal or necessary connection with the stipulations between the parties, and cannot therefore be presumed to have entered into their consideration at the time of contracting. When the books and cases speak of the profits anticipated from a good bargain as matters too remote and uncertain to be taken into the account in ascertaining the true measure of damages, they usually have reference to dependent and collateral engagements entered into on the faith and in the expectation of the performance of the principal contract. But, profits or advantages which are the direct and immediate fruits of the contract entered into between the parties, stand upon a different footing. These are part and parcel of the contract itself,—entering into and constituting a portion of its very [457] elements; something stipulated for, the right to the enjoyment of which is just as clear and plain as to the fulfilment of any other stipulation. They are presumed to have been taken into consideration and deliberated upon before the contract was made, and formed perhaps the only inducement to the arrangement:' *Masterton v. The Mayor, &c., of Brooklyn*, 7 Hill's N. Y. Rep. 61. It is conceded that the plaintiffs are entitled to the loss of profit on their sale to Heitmann. Are they not also entitled to recover the sum which they were compelled to pay Heitmann to compensate him for the loss he sustained by the breach of his contract with his vendee? It is difficult to discover any principle upon which these two heads of damage are to be distinguished.

When a man sells goods to a merchant, he knows that they are bought for the purpose of re-sale. In *Smeed v. Ford*, 1 Ellis & Ellis, 602, the defendant contracted to deliver to the plaintiff, a farmer, a threshing-machine, within three weeks. It was the plaintiff's practice, known to the defendant, to thresh wheat in the field, and send it thence direct to market. At the end of the three weeks, the plaintiff's wheat was ready in the field for threshing; and, on the plaintiff's remonstrating at the delay in the delivery of the machine, the defendant several times assured him it should be sent forthwith. The plaintiff, having unsuccessfully tried to hire another machine, was obliged to carry home and stack the wheat, which, while so stacked, was damaged by rain. The machine was afterwards delivered to the plaintiff, who paid the defendant the contract-price. The wheat was then threshed; and it was found necessary, owing to its deterioration by the rain, to kiln-dry it. When dried and sent to market, it sold for a less price than it would have fetched had it been threshed at the time fixed by the contract for the de-[458]-livery of the machine, and then sold,—the market-price having in the meantime fallen. In an action for the non-delivery of the machine, it was held that the plaintiff was entitled to recover substantial damages in respect of the expense of stacking the wheat, of loss arising from its deterioration by the rain, and of the expense of drying it in the kiln (a).

Brett, Q. C., and Littler, in support of the rule. There being no market to which the plaintiffs could have resorted in order to supply themselves with the article in question upon the defendant's failure to deliver it pursuant to his contract, it may be that the plaintiffs were entitled to recover as damages the difference between the contract-price and the price which they would have received under their sub-contract with Heitmann; and that sum the defendant has paid into court. All beyond that was clearly too remote. The plaintiffs, however, claim to be entitled also to the increased freight and insurance to which the 26 tons delivered were subjected by reason of the lateness of the season for the Baltic, and also the loss sustained by Heitmann by reason of his inability to perform his contract with his sub-vendee. The true measure of damages, as laid down by all the authorities is, the loss which the defendant has contracted to make good. The amount of damages payable for a breach is as much part of the contract as the quantity of goods to be delivered or the price to be paid for them. The rule is neatly laid down in Mayne on [459] Damages, p. 15: "The first, and in fact the only inquiry in all these cases is, whether the damage complained of is the natural and reasonable result of the defendant's act: it will assume this character if it can be shewn to be such a consequence as in the ordinary course of things would flow from the act;" that is, the result which might reasonably be expected from the defendant's breach of contract: "or, in cases of contract, if it appears to have been contemplated by both parties. Where neither of these elements exists, the damage is said to be too remote." That means, contemplated at the time the contract is made, and with reference to the contract. This case, it is submitted, does not fall within either of those rules. The contract was made with the plaintiffs at Newcastle. It is true that the defendant was told at the time that the soda was wanted for shipment to a correspondent abroad: but no names were disclosed, nor was it stated to what part abroad it was to be sent. What, then, is the natural consequence of the breach of such a contract? Can it be more than the loss of the profit the plaintiffs would have made if they had been enabled to perform their contract with the merchant abroad? Then, upon what principle can the defendant be liable for the increased freight and insurance? There is no pretence for saying that there was anything in the contract from which the plaintiff could reasonably infer that the defendant knew the soda was to be shipped for the Baltic. Vessels are constantly running to Antwerp and Rotterdam from Hull, as well as to Hamburg and the Baltic. Or it might be that the soda was wanted for shipment to a Belgian or a French port. The claim in respect of the sub-contract is altogether out of the question. That is disposed of by the case of *Portman v. Middleton*, 4 C. B. (N. S.) 322. There, A. contracted with B. to repair a steam [460] threshing-machine, undertaking to get it ready by harvest-time. A new fire-box being needed, C. engaged to make one for

(a) But that he was not entitled to recover any damages in respect of the fall in the market-price of the wheat, inasmuch as that could not have been in the contemplation of the parties when the contract was made, and could not be said to have been in any way the natural result of the defendant's breach of contract.

A. "in about a fortnight," but failed in the performance of his contract, and A. (who had paid C. for the article) was obliged to get one made elsewhere, at an additional cost; but this he did not do in time to enable him to perform his contract with B. (although there was ample time for him to have done so after C. had broken *his* contract); whereupon B. sued A., who paid him 20l. to settle the action. It was held that A. was entitled to recover from C. the sum he had paid for the fire-box, and the extra cost incurred in getting another; but that the compensation paid by A. to B. was not such a damage "as might fairly and reasonably be considered either as arising naturally from C.'s breach of contract, or such as might reasonably be supposed to have been in the contemplation of the parties, at the time they made the contract, as the probable result of the breach of it,"—within the rule in *Hadley v. Baxendale*, 9 Exch. 341.

ERLE, C. J. This was an action for the breach of a contract to deliver a quantity of caustic-soda. As a general rule, a vendor who fails to deliver goods according to his contract, must pay as damages to the vendee the difference between the value of the goods at the time of the breach of contract as compared with the contract-price: or, in other words, if the vendee can go into the market and get the article contracted for, the vendor must reimburse him the difference between that which he has been compelled to pay for it and the price at which the vendor had contracted to deliver it. But, where the article is not one of constant demand and supply, so that there is no market which can be resorted to for the purpose of obtaining it, another [461] principle must be had recourse to in order to determine the measure of damages which the vendee is to recover: and that principle has been adopted here, in accordance with the rule in *Hadley v. Baxendale*, 9 Exch. 341, where it was held that, where two parties have made a contract, which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e. according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it. The vendor is to pay to the vendee such damages as he may fairly and reasonably be supposed to have considered that he would be liable to pay in the event of his failure to perform his contract. Here, the vendor had notice that the vendee was buying the caustic-soda,—an article not ordinarily procurable in the market,—for the purpose of re-sale to a sub-vendee on the continent. He made the contract, therefore, with knowledge that the buyers were buying for the purpose of fulfilling a contract which they had made with a merchant abroad. If the plaintiffs could have delivered the caustic-soda which the defendant failed to supply to their vendee Heitmann, their profit thereon would have been 52l. 5s. 4d. That sum the defendant has paid into court: and we may assume that the plaintiffs are entitled to recover as damages for the defendant's breach the loss of the profit which the plaintiffs would have derived from the transaction if the defendant had delivered the caustic-soda pursuant to his contract.

Then, the contract was for the sale of 75 tons, 25 tons of which was to be delivered in June, 25 tons in July, and 25 tons in August. None was delivered [462] until September; and then only 26 tons in all. The question is, to what damages the defendant is liable by reason of that late delivery. Now, the purchaser of the caustic-soda from the plaintiffs was a merchant residing in St. Petersburg: and, if the plaintiffs could have had the article at the times stipulated for, viz. in the months of June, July, and August, they could have forwarded it to St. Petersburg at a less charge for freight and insurance than they were compelled to pay. In consequence of the lateness of the season, it cost the plaintiffs 35l. 15s. additional for freight, and 5l. 2s. additional for insurance, beyond what they would have had to pay if the soda had been forwarded in time. It was insisted by Mr. Brett that notice to the defendant that the plaintiffs were buying the caustic-soda for the purpose of fulfilling a contract with a correspondent "on the continent," and that the place of shipment was Hull, was not a notice that the sub-purchaser was a merchant in Russia, and that the destination of the soda was a port in the Baltic; and therefore that this loss by the increase of freight and insurance was not one which the plaintiffs could claim as a matter in respect of which the defendants had had notice at the time of the contract. It seems to me that Mr. Brett has succeeded in making good that ground. I do not think a notice that the sub-purchaser was a person residing "on the continent," was notice that the goods were for shipment

to the Baltic. But, the defendant has broken his contract, and the plaintiffs are entitled to damages for that breach. What are those damages? I think they are such as might reasonably be expected to arise from the breach. The goods were to be sent to Hull, where, if duly delivered, they would have been available for the Baltic market. When they were sent, they were not so available for the Baltic market as they would have been if [463] they had been sent to Hull in accordance with the terms of the contract. I agree that it is not competent to a purchaser so to deal with goods delivered under such circumstances as to exaggerate the loss: but, if he does all that a man of reasonable skill and care can do to make the damage as small as possible, there is no reason why he should not be recouped to that extent. Receiving the soda in September and October, I think the plaintiffs turned it to the best account they could by forwarding it to Heitmann as they did. I do not see how they could have diminished the loss by sending it elsewhere. Having sent it to St. Petersburg at an increased cost of 40l. 17s., I think that sum fairly represents the amount of deterioration of the article by reason of the defendant's breach of contract, and that the plaintiffs were entitled to charge the defendant for that deterioration.

The plaintiffs further claimed damages by reason of their having been called upon to reimburse Heitmann, their vendee, to the extent of 159l. which Heitmann had paid to Heinburger, a manufacturer to whom he had contracted to sell the soda, to compensate him for the breach of his contract with him. It appears to me that that claim is too remote. The defendant had notice at the time of entering into the contract with the plaintiffs that they had contracted with one purchaser on the continent. For the damages resulting from that, it is agreed that he is responsible. But he had no notice of the subsequent re-sale: and it is not to be assumed that the parties contemplated that he was to be held responsible for the failure of any number of sub-sales. These could not in any sense be considered as the direct, natural, or necessary consequence of a breach of the contract he was entering into.

WILLES, J. I am of the same opinion. As to the [464] damages claimed in respect of the loss on the contract between Heitmann and Heinburger, it is consistent with all that was or could have been known to the defendant at the time he made his bargain with the plaintiffs, that such a contract might or might not have been entered into. Even supposing the defendant knew that Heitmann was the purchaser from the plaintiffs, and that it was Heitmann's intention to sell the soda again, I see no principle upon which he could be made liable in respect of that. This is a very different case from *Randall v. Raper*, E. B. & E. 84, where the defendant sold the plaintiffs' seed barley with a warranty that it was barley of a particular description. There, the seed was subject to an inherent or latent defect, by reason of which it produced an inferior and insufficient crop: and, whether the damages accrued to the first purchaser or to a sub-purchaser from him, was a matter of comparative indifference: they were equally damages naturally resulting from his breach of contract. But here the purchasers entered into a contract to sell to Heitmann, trusting to the performance of his contract by the defendant, to enable them to perform theirs. The defendant had notice of this contract; and I see no injustice in holding him to be liable to that extent. Heitmann chose to take upon himself a similar risk, and to contract for the sale of the soda to Heinburger. Even if the defendant had notice of this second contract at the time he sold to Heitmann, I think the damages arising from the non-delivery by Heitmann to Heinburger were too remote: he entered into no bargain to be answerable for such consequences. As to the additional cost for freight and insurance incurred in sending the 26 tons to Russia, by reason of the lateness of the period at which they were forwarded to Hull, it seems to me that that was properly recoverable [465] as damages which were the direct and natural consequence of the defendant's failure to perform his contract, and upon the simple ground stated by my Lord. It is not suggested that the plaintiffs could have done other than they did to make the soda more valuable. What they did seems to have been the only reasonable thing they could do: and it shewed in the result what the real worth of the soda was. In ordinary cases, where the article is one which can be bought in the market, the proper measure of damages for breach of a contract to deliver is, the difference between the contract-price and the market-price on the day of the breach: and I can quite understand a case arising where goods are bought for the purpose of fulfilling a contract for re-sale at a price higher than the market-price, and the original seller has notice of that fact: the damages in such a case might well be influenced by that fact. That, how-

ever, is not this case; there was no such notice; and there was no market-price to which resort could be had as a test of damage. We must, therefore, ascertain what was the value of the article contracted for at the time it ought to have been and at the time when it actually was delivered. Now, the value of such an article as this depends upon the existence of facilities for its transport to the place for which it is destined. If the caustic soda had been forwarded to Hull at the times contracted for, it was capable of being sent to St. Petersburg. When it was delivered, it was also capable of being sent to St. Petersburg, but only at a greater cost for freight and insurance than would have been incurred if it had been delivered in due course at Hull. It necessarily follows, therefore, that the soda was worth less when it was delivered, by the difference between the cost of forwarding it at that time to St. Petersburg and what the cost would have been if delivered at the times men-[466]-tioned in the contract. The plaintiffs are clearly entitled to recover that as the direct and natural consequence of the defendant's breach of contract. The rule will, therefore, be made absolute to reduce the verdict by the 159l. paid by the plaintiffs to Heitmann for the compensation paid by him to Heinburger for the breach of his contract with him.

KEATING, J. I also am of opinion that the plaintiffs were entitled to recover as damages for the defendant's breach of contract the increased amount incurred for freight and insurance by reason of the delay in the delivery of the caustic-soda contracted for, on the ground already stated by my Lord and my Brother Willes, viz. that the lateness of the delivery occasioned a diminution in the market-value of the article. That is entirely in accordance with the principle upon which this court acted in the case of *Wilson v. The Lancashire and Yorkshire Railway Company*, 9 C. B. (N. S.) 632. That arose out of a contract of carriage. The goods, which consisted of cloth, had been purchased by the plaintiff, a cap-manufacturer, for the purpose of being made up into caps; but, in order to use the cloth to the best advantage, it was necessary that he should have it in time to make it into caps by a certain season. The delay in its transmission by the defendants caused the loss of the season. This court held that the loss of the season might under the circumstances fairly be considered as a deterioration or diminution of the market-value of the cloth. That is identical in principle with this case. I also entirely agree with the rest of the court that the further damage claimed, viz. the sum paid by Heitmann to compensate Heinburger for the loss of his sub-contract with Heitmann, was too remote, and cannot be recovered by the plaintiffs in this action.

Rule absolute accordingly.

[467] SEMENZA AND OTHERS v. BRINSLEY AND ANOTHER. Feb. 27th, 1865.

[S. C. 34 L. J. C. P. 161; 12 L. T. 265; 13 W. R. 634. Dictum adopted, *Borries v. Imperial Ottoman Bank*, 1873, L. R. 9 C. P. 45. Explained, *In re Henley*, 1876, 4 Ch. D. 133. Referred to, *Maspons v. Mildred*, 1882-83, 9 Q. B. D. 544; 8 App. Cas. 874. Explained and adopted, *Sterens v. Biller*, 1883, 25 Ch. D. 35.]

1. One who buys goods of a person whom he knows to be selling them as an agent, cannot set off in an action by the principal for their price a debt due to him from the agent, even though he did not at the time of the purchase know and had not the means of knowing who was the real owner.—2. To an action for goods sold and delivered, the defendants pleaded that the goods were sold to them by one Moll, then being the agent of the plaintiffs and intrusted by them with the possession of the goods as apparent owner thereof; that Moll sold them in his own name and as his own goods with the consent of the plaintiffs; that the defendants at the time of the sale and delivery did not know and had not the means of knowing that the plaintiffs were the owners of the goods, or that Moll was their agent; and that, at the time of the said sale and delivery of the goods, and before the defendants knew that the plaintiffs were the owners of the goods, or that Moll was the plaintiffs' agent, Moll became and continued indebted to the defendants for goods sold, &c., to an equal amount, which they were willing and offered to set-off:—Held, a bad plea, for not averring that the defendants did not know and had not the means of knowing that Moll at the time he sold the goods to them was a mere agent.

The third count of the declaration was for money payable by the defendants to the plaintiffs for goods bargained and sold by the plaintiffs to the defendants, and for

goods sold and delivered by the plaintiffs to the defendants, and for money received by the defendants for the use of the plaintiffs, and for interest payable by the defendants to the plaintiffs upon money due from the defendants to the plaintiffs and forborne at interest by the plaintiffs to the defendants at their request, and for moneys found to be due from the defendants to the plaintiffs on accounts stated between them: and the plaintiffs claimed a return of the goods mentioned in the first count, or their value, and 500l. for their detention, and also 500l. in respect of the matters mentioned in the other counts of the declaration.

The defendants pleaded amongst other pleas, sixthly, to the third count, so far as it related to the said money payable for the said goods sold and delivered, that the said goods were sold and delivered to the defendants by one John Peter Moll, then being the agent of the plaintiffs in that behalf, and intrusted by the plaintiffs with the possession of the said goods as apparent owner thereof, and the said John Peter Moll, having possession of the said goods as aforesaid, sold and delivered the same to the defendants in his own name and as his own goods, with the consent of the [468] plaintiffs: that, at the time of the said sale and delivery of the said goods, the defendants did not know, and had not the means of knowing, that the plaintiffs were the owners of the said goods or were interested therein or in the said sale thereof, or that the said John Peter Moll was the agent of the plaintiffs in that behalf: and that, at the time of the said sale and delivery of the said goods, and before the defendants knew that the plaintiffs were the owners of the said goods or any of them, or interested therein, or that the said John Peter Moll was the agent of the plaintiffs in the sale thereof, the said John Peter Moll became, and was at the commencement of this suit, and still was, indebted to the defendants in an amount equal to the plaintiffs' claim, for money payable by the said John Peter Moll to the defendants, for goods sold and delivered by the defendants to the said John Peter Moll, and for money found to be due from the said John Peter Moll to the defendants on accounts stated between them, —which amount the defendants were willing to set off against the plaintiffs' claim.

The plaintiffs demurred to this plea, the ground of demurrer stated in the margin being, "that the plea does not allege that the defendants did not know or had not the means of knowing that Moll was *merely an agent*, but only that they did not know and had not the means of knowing that Moll was *agent for the plaintiffs*: and it is consistent with such plea, that they knew and [or?] had the means of knowing that Moll was a mere agent." Joinder.

Sir George Honyman, in support of the demurrer. The sixth plea is objectable upon two grounds,—first, for not alleging that the defendants did not at the time of the sale know that Moll was a mere agent,—secondly, for not alleging that at the time when the [469] debt as between Moll and the defendants was contracted, the defendants did not know that he was a mere agent. All that the plea states is, that the goods were sold to the defendants by one Moll, then being the agent of the plaintiffs and intrusted by them with the possession of the goods as apparent owner thereof; that Moll sold them in his own name and as his own goods with the consent of the plaintiffs: that the defendants at the time of the sale and delivery did not know and had not the means of knowing that the plaintiffs were the owners of the goods, or that Moll was *their agent*: and that, at the time of the said sale and delivery of the goods, and before the defendants knew that the plaintiffs were the owners of the goods, or that Moll was the plaintiffs' agent, Moll became, and continued indebted to the defendants, &c. Where a man buys of one whom he knows or has the means of knowing is selling as agent for somebody else, he cannot in an action by the principal for the price set off a debt due to him from the agent, though he did not at the time he bought the goods know *who* the principal was. It is perfectly consistent with all that is alleged in this plea that, at time of the sale and of the indebtedness, the defendants knew that Moll was selling as agent. [Willes, J. The allegation is that the goods were sold by Moll in his own name and as his own goods, with the consent of the plaintiffs.] It is not averred that the defendants bought them from Moll as his own goods, or that they did not know he was selling as agent for some unknown principal. This is the turning point, as is put by the court in *Purchell v. Salter*, 1 Q. B. 197, 1 Gale & D. 682. [Williams, J. Have not the defendants a right to say that they were justified in giving credit to the character which Moll with the plaintiffs' consent assumed?] Clearly not: if before Moll became indebted to them, [470] the defendants became aware that Moll was selling the goods as agent, they have no right of

set-off. In the notes to *George v. Clagett* (7 T. R. 359), in 2 Smith's Leading Cases, 5th edit. 108,—observing upon a passage in the judgment of the court of Queen's Bench in *Sims v. Boud*, 5 B. & Ad. 389, 393, "It is a well established rule of law that, where a contract not under seal is made with an agent in his own name for an undisclosed principal, either the agent or the principal may sue upon it; the defendant, in the latter case, being entitled to be placed in the same situation at the time of the disclosure of the real principal, as if the agent had been the contracting party,"—the learned editors say: "However, the latter part of this rule only applies where the party contracting has not the means of knowing that the party with whom he contracts is but an agent. If he have the means of knowing, and, though he may not be expressly told, still must be supposed to have known, that he was dealing, not with a principal, but with an agent, the reason of the above rule ceases, and then, cessante ratione, cessat lex. Thus, in *Baring v. Corrie*, 2 B. & Ald. 137, Coles & Co., who were brokers and also merchants, sold to Corrie & Co. in their own names sugars belonging to Baring & Co., who brought an action for the price. The true nature of the contract was entered by Coles & Co. in their broker's book, which the defendants might if they pleased have seen: nor had Coles & Co. the possession of the sugars, which were lying in the West India Docks, whence by the usage of the docks they could not have been taken without the order of the plaintiffs, whose principal clerk signed the delivery order. Under these circumstances, the court held that the defendants had no right to set-off against the plaintiffs' demand for the price of the goods a debt due to them from Coles & Co. 'It is to be observed,' said Bayley, J., 'that the plaintiffs did not trust the brokers with either the muniments of title or the possession of the goods, as was done in both the cases of *Rabone v. Williams*, 7 T. R. 360 (a), and *George v. Clagett*, 7 T. R. 359. There is another circumstance by which the defendants might easily have ascertained whether Coles & Co. acted as brokers or not. According to the usual course of dealing, a broker is bound to put down in his book an account of the sales made by him in that capacity, so that, if the defendants had asked to see the book, they would instantly have discovered whether Coles & Co. acted as brokers or not. I therefore think that the plaintiffs did not by their conduct enable Coles & Co. to hold themselves out as the proprietors of these goods, so as to impose on the defendants: that the defendants were not imposed on; and, even supposing that they were, they must have been guilty of gross negligence. I cannot think that the defendants believed when they bought the goods that Coles & Co. sold them on their own account; and, if not, they can have no defence to this action.'" And, after referring to *Maunss v. Henderson*, 1 East, 335, and *Moore v. Clementson*, 2 Campb. 22, the learned editors go on,—“In the case of *Warner v. McKay*, 1 M. & W. 591, it was held that a purchaser might set off payments made to a factor, if he believed that the factor had a right to sell, and did sell, to re-pay himself advances: but see the observations on this case in the judgment in *Smart v. Sanders*, 3 C. B. 399, and per Cresswell, J., in *Fish v. Kempton*, 7 C. B. 694, where it was held that knowledge by the purchaser of goods that the vendor sold them as factor, disentitled him to set off a debt due by such factor in an action by the principal. The set-off, however, to be available, need not exist at the time of the sale: if it arises before notice of the real ownership, it is sufficient." Here, [472] the defendants do not say that they bought the goods as the goods of Moll, or supposing him to be the owner of them. [Keating, J. The pleader has followed the precedent in Bullen & Leake, 2nd edit. 580.] But not that given in 3 Ch. Pl. 122, 123, and in *Purchell v. Salter*, and *Carr v. Hinchliff*, 4 B. & C. 551, 7 D. & R. 42. In *Maunss v. Henderson*, an English subject, in time of war, who had received orders to effect an insurance for a neutral foreigner, opened the policy with his usual broker in his own name, but informing him at the same time that the property was neutral: and it was held that this was a sufficient indication to the broker that the party acted as agent, and not on his own account, and therefore that the broker had no lien on the policy so effected for his general balance against such agent, as between such broker and the principal. In *Moore v. Clementson*, Lord Ellenborough said: "A man who is in the habit of selling the goods of others may likewise sell goods of his own: and, where he sells goods as a principal, with the sanction of the real owner, the purchaser who is thus led to give him credit shall on no account afterwards be deprived of his set-off by the intervention of any third person. But here there was express notice to the purchaser before the contract was completed, that Green in this particular transaction acted only as a factor." That

is the true rule. The mere knowledge that the seller is a factor or agent does not deprive the buyer of his right of set-off: but, if he knows at the time of the purchase that the seller is acting as a factor in the particular transaction, the right to set off does not attach. [Erle, C. J. Does not the plea come up to the doctrine laid down in *George v. Clagett*?] Not if the defendants were aware (and it is consistent with all that is alleged in this plea that they were aware), at the time they bought the goods of Moll, that he was really selling them as agent of a third person.

[473] Watkin Williams, *contra*. The two points suggested do not properly arise. The plea alleges a sale and delivery of the goods to the defendants by Moll, then being the agent of the plaintiffs and intrusted by them with the possession of the goods as apparent owner thereof; that Moll, having possession of the goods, sold and delivered them to the defendants in his own name and as his own goods, with the consent of the plaintiffs; that, at the time of the said sale and delivery, the defendants did not know and had not the means of knowing that the plaintiffs were the owners of the goods, or were interested therein or in the sale thereof, or that Moll was the agent of the plaintiffs; and that, *at the time of the said sale and delivery of the goods*, and before the defendants knew that the plaintiffs were the owners of them, or that Moll was the plaintiffs' agent, the set-off accrued. The difficulty arises entirely from the use of superfluous words. [Erle, C. J., suggested that the plea should be amended, by eliminating the allegation that the two sales were contemporaneous (a thing to the last degree improbable), and the allegation that the defendants did not know that Moll was agent *to the plaintiffs*; or that the parties should go down to trial on the pleadings as they stood, the question of costs being reserved. But this was not assented to.] The only question is, whether the defendants had a right of set-off at the time of the sale. *George v. Clagett*, and the notes thereto in 2 Smith's Leading Cases, 108, lays it down broadly that, if the owner of goods accredits an agent, and puts it in his power to sell the goods as his own, one who purchases them from him without knowledge of the agency, is entitled to set off a debt due to him from the agent. [Erle, C. J. Believing him to be the owner.] It is not so stated. In all the cases, whatever was the language used by the court, the defendant knew, or had [474] the means of knowing, that the plaintiff was the principal. In *Fish v. Kempton*, 7 C. B. 687, Wilde, C. J., says: "Where goods are placed in the hands of a factor for sale, and are sold by him under circumstances that are calculated to induce and do induce a purchaser to believe that he is dealing with his own goods, the principal is not permitted afterwards to turn round and tell the vendee that the character he himself has allowed the factor to assume did not really belong to him. The purchaser may have bought for the express purpose of setting off the price of the goods against a debt due to him from the seller. But the case is different, where the purchaser has notice at the time that the seller is acting merely as the agent of another. In that case, there would be no honesty in allowing the purchaser to set off a bad debt at the expense of the principal. This I consider to be clear and settled law: and I think we are bound not to exhibit any doubt where none should exist, by granting a rule." And Cresswell, J., says: "If a factor sells goods as owner, and the buyer *bonâ fide* purchases them in the belief that he is dealing with the owner, he may set off a debt due to him from the factor against a demand preferred by the principal. Lord Mansfield so lays down the rule distinctly in *Rabone v. Williams*. 'Where,' he says, 'a factor, dealing for a principal, but concealing that principal, delivers goods in his own name, the person contracting with him has a right to consider him to all intents and purposes as the principal; and, though the real principal may appear and bring an action upon that contract against the purchaser of the goods, yet that purchaser may set off any claim he may have against the factor in answer to the demand of the principal. This has been long settled. The distinction between a factor and a broker is noticed by Abbott, C. J., and [475] Bayley, J., in *Baring v. Corrie*, 2 B. & Ald. 137. Abbott, C. J., says: 'The distinction between a broker and a factor is not merely nominal, for they differ in many important particulars. A factor is a person to whom goods are consigned for sale by a merchant residing abroad, or at a distance from the place of sale, and he usually sells in his own name, without disclosing that of his principal: the latter, therefore, with full knowledge of these circumstances, trusts him with the actual possession of the goods, and gives him authority to sell in his own name. But the broker is in a different situation: he is not trusted with the possession of the goods, and he ought not to sell in his own name. The principal, there

fore, who trusts a broker, has a right to expect that he will not sell in his own name. In all the cases cited, the factor was in actual possession of the goods, and the purchasers could not know whether they belonged to him or not; and, at all events, they knew that he had a right to sell the goods." The decision of this court in *Napwood v. Dresser*, 14 C. B. (N. S.) 574, as far as it goes, is in favour of the present defence. The Exchequer Chamber, in overruling that decision (see 17 C. B. (N. S.) 466), held that the knowledge of Dresser's agent was the knowledge of Dresser himself, though acquired long before he became such agent. The substance of this plea is, that the goods in question were sold by Moll as the owner, and bought by the defendants in the belief, induced by the plaintiffs' conduct, that he was the owner: and that brings the case within the rule in *Carr v. Hinchliff*, 4 B. & C. 551, 7 D. & R. 42.

Sir G. Honyman, in reply, was stopped by the court.

WILLES, J., now delivered the judgment of the court:—

[476] This was an action for goods sold and delivered. The sixth plea, the validity of which is in question, alleged a set-off against one Moll, who is stated to have been the factor or agent of the plaintiffs. To that plea the defendants demurred, on the ground that it did not allege that the defendants did not know or had not the means of knowing that Moll was merely an agent, but only that they did not know, and had not the means of knowing, that he was agent *for the plaintiffs*: and the plaintiffs joined in demurrer.

The case was argued in the course of the last term, before the Lord Chief Justice, my Brother Keating, and myself; and the court took time to consider.

The question is whether the plea sufficiently identifies Moll with the plaintiffs, so as to shew that a set off against him is available in an action brought by them. It was attempted to sustain it by a reference to a series of authorities, beginning with the case of *George v. Clagett*, 7 T. R. 359, commented upon in 2 Smith's Leading Cases, 5th edit 359. The plea alleges that Moll was intrusted by the plaintiffs with the possession of the goods as apparent owner thereof, and, so having possession of them, sold them to the defendants in his own name and as his own goods, with the consent of the plaintiffs: it then goes on to allege that, at the time of the said sale and delivery of the goods, the defendants did not know, and had not the means of knowing, that the plaintiffs were the owners of the goods or were interested therein or in the said sale thereof, or that Moll was the agent of the plaintiffs, and that at the time of the sale and delivery of the goods, and before the defendants knew that the plaintiffs were the owners of the goods, or interested therein, or that Moll was their agent in the sale thereof, Moll became and continued indebted to the defendants in the amount which they seek to set off.

[477] It is necessary to consider whether the averments in this plea satisfy the conditions under which a set-off of a debt due from a factor against a claim for the price of the goods by his principal is allowed. The rule of law upon this subject is well stated in the marginal note to the case of *George v. Clagett*, viz. that, if a factor sells goods as his own, and the buyer knows nothing of any principal, the buyer may set off any demand he may have on the factor against the demand for the goods made by the principal. One may observe, as has often been suggested, and as was very clearly pointed out by Holroyd, J., in *Carr v. Hinchliff*, 4 B. & C. 547, 6 D. & R. 42, that the difficulty was, not in setting up as a defence against the principal that which would be a defence against the factor, by way of extinguishment of the claim of the former, but in applying the statute of set-off, and saying that the terms of that statute were satisfied, so as to say that the debt of the factor should for the purpose of the action be considered as the debt of the principal. That difficulty, however, was got over, and the factor and the principal were identified by that decision, for the purpose of the statute: and it was held that the existence of the set-off, without any knowledge of the agency, entitled the debtor to set up as against the principal the defence of set off as a quasi extinguishment, notwithstanding the words of the statute of set-off.

In order to make a valid defence within the rule above stated, it is obvious that the plea should shew that the contract was made by a person whom the plaintiff had intrusted with the possession of the goods, that that person sold them as his own goods in his own name as principal with the authority of the plaintiff, that the defendant dealt with him as and believed him to be the principal in the transaction, and that [478] before the defendant was undecieved in that respect, the set-off accrued

Upon the true construction of this plea, taking all the averments together, it is quite consistent that the seller, Moll, was a factor, and sold the goods in his own name, as is usual with factors, and yet that the defendants may have bought the goods well knowing that Moll was not the owner, but that he had a principal, though they did not know who that principal was. This would satisfy all the averments in the plea. Indeed, the plea studiously avoids averring that which is the gist of a defence of this sort, viz. that the defendant knew nothing of any principal. We think that the principle laid down in *George v. Claggett* cannot be extended to such a case as this, where the buyer is dealing with a known agent, though he does not at the time know who the particular principal is.

We regret that we are obliged to decide this case upon the construction of the plea. But Mr. Williams declined to accede to the suggestion of the court that he should amend his plea, and Sir George Honyman has not applied to strike it out as being embarrassing. Under these circumstances, therefore, we are bound to put the best construction we can upon it; and, for the reasons above stated, we hold that it does not amount to a defence.

The plaintiffs will do well to have the facts specially found at the trial; so that, if it should be thought that we have put too rigid a construction upon the plea, it may be set right in a court of error.

Judgment for the plaintiffs.

[479] SWIRE v. LEACH. Jan. 29th, 1865.

[S. C. 34 L. J. C. P. 150; 11 L. T. 680; 11 Jur. N. S. 179; 13 W. R. 385. Followed, *Miles v. Furber*, 1873, L. R. 8 Q. B. 77. Referred to, *Johnson v. Lancashire and Yorkshire Railway*, 1878, 3 C. P. D. 507; *The Winkfield*, [1902] P. 57.]

1. Goods deposited with a pawn-broker in the way of his trade, are privileged from distress; and this though they may have been pledged more than twelve months.
- 2. And, held, that the proper measure of damages was, the value of *the goods*, and not merely that of the plaintiff's interest therein.

This was an action of trover for goods which had been deposited with the plaintiff in the way of his trade of a pawn-broker. The declaration alleged for special damage, injury to the plaintiff's trade, &c. Plea, not guilty by statute, the statute referred to in the margin being the 11 G. 2, c. 19, s. 21.

The cause was tried before Pigott, B., at the last Assizes at Liverpool. It appeared that the plaintiff carried on the business of a pawn-broker at Manchester; and that, under a warrant of distress for rent in arrear, the defendant as broker seized amongst other things a quantity of unredeemed pledges, which it was contended on the part of the plaintiff were privileged from distress. There was conflicting evidence as to the value of the articles so seized and so alleged to be protected, but, according to the evidence of the plaintiff's witnesses, they were worth between 30l. and 35l.

On the part of the defendant it was insisted that unredeemed pledges in the hands of a pawn-broker are not privileged,—the protection only applying where the goods are in the hands of a person who has something to do to them in the way of his trade: and, as to the measure of damages, it was submitted that the plaintiff, at all events, was not entitled to recover the value of the goods themselves, but only the value of his interest in them: and, further that, assuming that the privilege existed, it was inapplicable to those goods which had been in pledge for more than twelve months, these being by the provisions of the Pawnbrokers Act, 39 & 40 G. 3, c. 99, s. 17, forfeited: *Walter v. Smith*, 5 B. & Ald. 439, 1 D. & R. 1.

The learned judge over-ruled the objection: and he [480] directed the jury to find for the plaintiff for the value of the goods so seized, distinguishing between those which had been pledged more and those which had been pledged less than a year.

The jury accordingly returned a verdict for the plaintiff, damages 30l., subject to a motion to enter a nonsuit, or to reduce the damages.

Monk, Q. C., in Michaelmas Term last, obtained a rule calling upon the plaintiff to shew cause why a verdict should not be entered for the defendant, or a nonsuit; or for a new trial, on the ground that the learned judge misdirected the jury in

holding that the plaintiff's goods were exempted from distress for rent; or why the damages should not be reduced to such sum as the court should direct.

W. Sanders and Holker now shewed cause. The goods in question are clearly privileged from distress, according to the second rule stated in the notes to *Simpson v. Hartopp* (Willes, 512), in 1 Smith's Leading Cases, 368, 373,—as being “things delivered to a person exercising a public trade, to be carried, wrought, worked up, or managed in the way of his trade or employ.” In *Adams v. Grant*, 1 C. & M. 380, 387, 3 Tyrwh. 326,—where goods sent to the premises of an auctioneer for sale were held to be privileged, Bayley, J., in giving judgment, says: “The privilege in question has been established for a very considerable period of time. Lord Coke (Co. Litt. 47 a.) treats of it as being well known, and the principle of exemption, according to him, is that it is for the benefit of trade. Among other instances put by him is the instance of ‘goods going to a fair or market.’ Now, why should they be privileged? They are privileged because interest reipublicæ that buyer and seller should [481] be brought together, that a man should have an opportunity of going to some particular place to which goods might be brought for the purpose of sale; and therefore it is one of the old established principles, that goods on their way to a fair, or on their way to a market, shall be privileged, for the benefit which results to the public from there being a settled place at which the articles may be bought. It is highly beneficial to the manufacturers of goods, to the handicraftmen, and to many others, who are encouraged to make goods at their own premises by the facility in disposing of them. Where will they be likely to dispose of them? Why, at those places to which purchasers will from time to time resort. They will resort to a fair or to a market; and therefore the privilege and the exemption from distress at that place is of great importance to the person who is the proprietor or the original manufacturer of the goods. The privilege has from time to time been extended according to new modes of dealing established between parties; and one of the modern modes is the case of a factor; and I should observe what is said by Mr. Justice Blackstone in his Commentaries (vol. 3, p. 8), that there is no hardship in the privilege which is allowed to exist in these cases, because the privilege generally arises to goods which no one could suppose to be the property of the individual from whom the rent was due. The rent is due in respect of premises for the hiring of which the person who acts in that place is the person amenable for the rent; and, if you were to seize the goods of a third person, you would enforce payment, not from the man who had contracted to pay, but from a perfect stranger; and in reality you would be taking the goods of one man to pay the debt of another. The case of a factor is a case strongly analogous to the case in question: and the two cases which have been mentioned, [482] of *Thompson v. Mashiter*, 8 J. B. Moore, 254, 1 Bingh. 283, and *Gilman v. Elton*, 3 Brod. & B. 75, 6 J. B. Moore, 243, establish the position that, in the case of a factor, the goods of the principal on the premises of the factor are exempted from distress for rent issuing out of the premises in which the goods are deposited, and yet those goods are, generally speaking, deposited for a much greater period of time than goods at an auction-room. But, why are they protected? Why, interest, reipublicæ that the goods of the principal should find their way to a place where there will be a resort for sale: and, if you have goods in the hands of a factor, you will be more likely to sell those goods, because the factor's premises will be a place of resort for those very persons who have occasion for goods in which that factor deals.” And Vaughan, B., says: “In the case of *Gisbourn v. Hurst*, 1 Salk. 249, the rule was laid down with a great deal of correctness, and it has been acted on in all the courts in Westminster Hall whenever this question has arisen. The rule as laid down in that case, and adopted afterwards in *Gilman v. Elton*, 6 J. B. Moore, 243, 3 Brod. & B. 75, and all the subsequent cases, is that, wherever goods were delivered to a person carrying on a public trade or employment, to be carried, wrought, or managed in the way of trade, they should be privileged. It does not appear to me that those words are to be scanned with any critical nicety. I should be disposed, certainly, rather to enlarge than to narrow or cripple in any manner the construction of the words ‘carried, wrought, or managed in the way of trade or employment.’” Blackstone says,—3 Comm. 8,—“Goods delivered to a man to be used by him in the way of trade shall not be liable to distress. As, a horse standing in a smith's shop to be shod, or in a common inn; or cloth at a tailor's house; or corn sent [483] to a mill or a market. For all these are protected and privileged, for the benefit of trade,

and are supposed in common presumption not to belong to the owner of the house, but to his customers." This is adopted from Gilbert on Distresses, 35. The right of the landlord to distrain for rent in arrear is an exception on the common law of England: and that right is properly limited where it interferes with the interest of the public,—where the goods must be well known not to belong to the tenant, but to be intrusted to him in the way of his trade. That is the foundation upon which all the cases rest. In *Gibson v. Ireson*, 3 Q. B. 39, materials in the house of a manufacturer for the purpose of his trade, were held not to be distrainable. "The principle of the exemption," says Parke, B., in *Muspratt v. Gregory*, 1 M. & W. 633, Tyrwh. & G. 1086 (a), "is the public good: that is, that all men may freely and without interruption or danger of the loss of their goods deal with those who carry on trades or businesses for the benefit of all indiscriminately, or buy or sell in fairs or markets, and thus supply themselves with the commodities of life. Such being the principle, it appears to me that, in order to give it full effect, we ought to hold that not merely chattels are privileged from distress which are placed on the lands chargeable with it, in order to have something done with them by the person there carrying on his trade, but that all are exempt which are necessarily placed there, and whilst they are there, in order to enable their owner to enjoy the full benefit of the trade or business as it is there carried on. It is not, I think, because the chattels are to be worked upon the lands so chargeable (though that is the most familiar case), but because they are necessarily placed [484] on those lands, that the privilege is allowed by the law: and, if the goods are necessarily placed there, in order to enjoy the benefit of the trade, it is immaterial what is to be done with them. I may also observe, with reference to one part of this proposition, that there appears to be no dispute but that the word 'public' is to be understood to refer to every trade or employ carried on *generally* for the benefit of any persons who choose to avail themselves of it, as distinguished from a special employment by one or particular individuals; although it be not 'public' in the sense that all the King's subjects have a right to insist on the trader accepting their goods, and that an indictment or action would lie if he did not,—a predicament which is peculiar at this day to an innkeeper, or perhaps a carrier also; though Lord Holt, in 12 Mod. 484, considered it to belong to all other trades which a man professed to carry on for all persons indiscriminately. And, after an elaborate review of the authorities, the learned Baron concludes,—“I think, for the reasons above given, it [the exemption] applies to every case in which a chattel is necessarily brought on the premises of the trader, in order to enable the owner to enjoy the benefit of the trade.” Patteson, J., in *Gibson v. Ireson*, says: “I do not know what is meant by the phrase 'public trade.' It is said in *Simpson v. Hartopp*, Willes, 515, that 'materials sent to a weaver, or cloth to a tailor to be made up, are privileged for the sake of trade and commerce: but the trade of a tailor is not public, any more than that of a silk-weaver. If he were obliged, as a carrier is, to receive whatever is sent to him, the case might be different: but he is under no such obligation.'” In *Muspratt v. Gregory*, the barge was on the premises for the convenience of the owner, and not for the purpose of trade and commerce. So of the brewer's casks sent to the [485] publican's premises with beer: *Joule v. Jackson*, 7 M. & W. 450. The rule is thus stated in the notes to *Poole v. Longueville*, 2 Wms. Saund. 290 a., n. (q): “The exemption from distress appears to be an accessory to the privilege allowed by the law to cattle or other goods going to, or at, fairs and markets, for affording encouragement and protection to persons frequenting them. But it has been held that this privilege does not extend to mere customers resorting to the shop, warehouse, or manufactory of individuals: and, accordingly, in a case where salt was manufactured and publicly sold at certain salt works, and carried away in boats of the purchasers, which came for the purpose of being loaded with it into a cut or canal on the premises, communicating with a public navigation, it was held that the boat of an alkali manufacturer, which was lying in this cut or canal for the purpose of receiving and carrying away salt bought by him for the purpose of his manufacture, was not privileged from distress: *Muspratt v. Gregory*, 1 M. & W. 633, Parke, B., dissentiente: affirmed in Cam. Seacc. 3 M. & W. 677. In this case the boat had been left by the owner for his own convenience in the place where it was distrained, and it was not brought or left there for the purpose

(a) Affirmed on error in the Exchequer Chamber, *Muspratt v. Gregory*, 3 M. & W. 677.

of being taken care of, managed, or in any way dealt with by the tenant of the land : and therefore the case was held not to fall within the privilege from distress established in favour of things delivered to a person exercising a public trade, to be carried, wrought, or managed, in the way of his trade or business, as in the instances put in the older books, of a horse standing in a smith's shop to be shod, or in a common inn, or cloth at a tailor's shop, or corn sent to a mill or market (3 Bl. Comm. 8) ; which privilege has been extended by modern authorities to the cases of goods delivered to factors,—*Gilman v. Elton*, 3 B. & B. [486] 75, 6 J. B. Moore, 243 ; and wharfingers,—*Thompson v. Mashiter*, 1 Bingh. 283, 8 J. B. Moore, 254, *Matthias v. Mesnard*, 2 C. & P. 353 ; auctioneers,—*Adams v. Grant*, 1 C. & M. 380, 3 Tyrwh. 326 ; and, lastly, carcase-butchers,—*Brown v. Sherill*, 2 Ad. & E. 138, 4 N. & M. 277 ; but has not been allowed to carriages standing at livery,—*Francis v. Wyatt*, 3 Burr. 1498 ; nor to stocking-frames sent with materials to a weaver (though the materials themselves would be privileged),—*Wood v. Clarke*, 1 C. & J. 484, 1 Tyrwh. 314 ; nor to a threshing-machine let to the tenant,—*Fenton v. Logan*, 9 Bingh. 676, 3 M. & Scott, 82 ; nor to brewers' casks sent to a public-house with beer, and left there till the beer is consumed,—*Joub v. Jackson*, 7 M. & W. 450." In *Findon v. McLaren*, 6 Q. B. 891, goods in the hands of a commission-agent for sale in the way of his business, were held exempt from distress. In *Brown v. Armadell*, 10 C. B. 54, goods sent to an auctioneer for sale on premises occupied by him, were held to be privileged from distress for rent, although the place of sale was merely hired for the occasion,—or even where the occupation had been acquired by the auctioneer by an act of trespass. The like was held in *Williams v. Holmes*, 8 Exch. 861.

The proper measure of damages, where goods have been taken by a wrong-doer out of the hands of a bailee, is their value. [Erle, C. J. The plaintiff would be liable over to that extent to the true owner.] There is no substantial distinction in this respect between pledges which were forfeited by lapse of time and those which were not. Until sold, the property in the pledge continues in the pawnor, notwithstanding the lapse of twelve months. In *Walter v. Smith*, 5 B. & Ald. 439, 1 D. & R. 1, it was expressly held that a pawn-broker has no right to sell unredeemed pledges after the expiration of a year from the time the goods [487] were pledged, if the original [?] owner tender him the principal and interest due. The mode of conducting the sale is regulated by the 39 & 40 G. 3, c. 99, ss. 17, 18, 20 ; but the property is unchanged until actual sale.

Monk, Q. C., in support of his rule. It is assumed that all goods delivered to a tradesman in the course of his trade are protected from distress. That, however, is not the principle upon which the exemption rests. To entitle the goods to the privilege, they must be upon the premises for the purpose of being carried, wrought, or manufactured by the person upon whose premises they are found : *Read v. Barley*, Cro. Eliz. 549, 596 ; *Gishbourn v. Hurst*, 1 Salk. 249. The business of a pawn-broker is not, to carry or to do any work upon goods, but merely to grant loans on the deposit of goods. In the case of the carcase-butcher,—*Brown v. Shevill*, 2 Ad. & E. 138, 4 N. & M. 277,—there was something to be done with the beast. In the case of the wharfinger,—*Thompson v. Mashiter*, 8 J. B. Moore, 254, 1 Bingh. 283,—the goods were deposited for the purpose of being "managed" by the wharfinger, and kept safely. In the case of the pawnbroker, the goods are held only as collateral security for the re-payment of the loan. The true principle is that laid down by Alderson, B., in *Muspratt v. Gregory*, 1 M. & W. 645 ; and it is not to be extended. "The boat," said that learned judge, "is clearly not within the description of goods delivered to a trader to be carried or wrought (i.e. worked up into another form) in the way of his trade or employ : for there is nothing to be done to it ; it is not brought to be repaired or altered in any way. Then, is it delivered to be managed in the way of the trade or employ of the person to whom it is so delivered ? In *Simpson v. [488] Harlopp*, Willes, 512, the word 'managed' appears to be used as synonymous with 'manufactured.' But that is too limited a sense of the expression ; for the courts have held that goods sent to a factor by a merchant are privileged from distress under this head. I think, therefore, that it extends both to the working up of goods from their unwrought state into a new form, as a manufacturer ; and also to the dealing with the goods as articles of trade, in their original or their wrought state as articles of commerce, as a factor. And the true principle seems to be that, where, in order to the exercising such a public trade at the place in question, it is necessary that the

goods should be delivered into the custody of the person carrying it on there, the law in consideration of the benefit which the commonwealth derives from the carrying on of the trade, protects from distress the goods so delivered." In *Joule v. Jackson*, 7 M. & W. 450, Parke, B., says: "Primâ facie, every deposit of goods upon the premises where the trade is carried on would have relation to that trade, and an exemption from distress would in that view be for the public good. But, to hold all such goods to be exempt, would be establishing a very wide principle: and, the case of *Muspratt v. Gregory* having decided that the principle of exemption already laid down in the books ought not to be extended, we are bound by that decision." There is quite as much notoriety in the course of business of a livery-stable keeper as in that of a pawn-broker; and yet it is settled that horses and carriages standing at livery are not exempted from distress for rent: *Parsons v. Gingell*, 4 C. B. 545. "The question," says Wilde, C. J., "in all these cases is, whether the goods are placed in the hands of the tenant merely with the intent that they shall remain upon the premises, or with a view of having labour or skill bestowed upon [489] them,—which is the principal object, and which is incidental? If the goods are sent to the premises for the purpose of being dealt with in the way of the party's trade, and are to remain upon the premises until that purpose is answered, and no longer, the case falls within one class; but, if they are sent for the purpose of remaining there merely at the will of the owner, there being no work to be done upon them, it falls within a totally distinct consideration. The case of a horse sent to a livery-stable *merely* to be cleaned and fed, is very different from one where he is sent to remain during the owner's pleasure, the feeding and grooming being only incident to the principal object. Considering this as the case of a horse that is sent to remain upon the premises, and that all the livery-stable keeper has to do, is to bestow upon it such feed and management as are requisite to the health and comfort of the animal while there,—under which class does it range itself? The general principle of law undoubtedly is, that all goods found upon the premises are liable to be distrained for rent. Upon that general rule, two exceptions only are engrafted. The first is, where the article is sent for the sole purpose of having the labour or skill of the artisan performed upon it, and is to be returned to the owner as soon as that purpose had been accomplished. Such is the case of the horse sent to the farrier to be shod: the horse is necessarily taken there for the purpose, and necessarily remains there while it is being performed. Such likewise is the case of the tailor, who, it seems, formerly received the materials from the employer, to be fashioned into garments. The cloth, or other material, was sent to the shop for the mere purpose of having work done upon it, and was to be returned in an altered shape. These remarks embrace a very considerable range of cases, in which goods are re-[490]-ceived for the purpose of having something done to them, not for the purpose of occupying the premises. The second exception is, where goods are sent to the party's premises in the way of his trade, for the purpose of sale. It appears to me that all the cases cited that profess to range themselves under this head, strictly do so. Upon what precise ground the privilege of goods at a wharfinger's rests, does not very distinctly appear. I incline to think it arose from the circumstance of there having in former times existed only certain wharfs, at which all persons were *obliged* to land their goods, and at which it does not appear that goods were landed for any other purpose than that of sale. *Thompson v. Mashiter* was the case of goods consigned by the owner to a factor for sale, and deposited by the latter in a warehouse belonging to, and part of, a public wharf, at a weekly rent, until such sale could be effected; and they were held not liable to be distrained. If I am correct in saying that these two classes embrace all the cases of exemption, to which of them does the present case attach itself? Was the mare sent to Thurkettle's stable for the mere purpose of being fed and groomed, or was she sent there for the purpose of being kept on, and occupying, the premises? It appears to me that all beyond the occupation of the premises by the mare was merely incidental to her remaining there." That is the distinction relied on here. [Keating, J. What labour or skill does a wharfinger exercise upon goods which are intrusted to him in the way of his trade?] His character of wharfinger imposes upon him the duty of receiving, storing, and safely keeping, and of forwarding the goods. [Keating, J. These are rather the duties of a warehouseman and of a carrier or forwarding agent.] *Johnston v. Stear*, 15 C. B. (N. S.) 330, shews that the value of the goods is not necessarily the mea-[491]-sure of the damages for their conversion.

By the statute, the pledge is declared forfeited if not redeemed within twelve months: the plaintiff, therefore, at all events could only be entitled to recover the value of those pledges which had not so become forfeited. There are many cases where the landlord may seize and sell goods which the tenant could himself have no right to dispose of.

ERLE, C. J. I am of opinion that the rule in this case ought to be discharged. The action is brought by a pawn-broker against his landlord for distraining for arrears of rent goods which had been pledged with him in the way of his trade of a pawn-broker. The governing point is, whether goods which have been deposited with a pawn-broker as security for advances are protected from distress. By our law, goods intrusted to persons carrying on public trades, to be by them dealt with, wrought, or managed in the way of their trade, are exempted from distress; and many judges have attempted to lay down a rule which should embrace all the exemptions: but no very well defined principle is to be found in any of the cases; and in applying it we must be guided as well as we can by the specific instances which have from time to time occurred. It seems to me that the goods now in question fall within the description of goods intrusted to one who carries on a public trade, to be managed and dealt with by him in the way of his trade, and which he had a right to hold until the sums advanced by him upon them were re-paid to him. I must confess I am unable to discover any difference in principle between the case of a pawn-broker and that of a wharfinger, factor, or warehouse-keeper. In most cases, these latter have nothing more to do with the goods than to keep them safely,—the ordinary duty of a simple bailee. [492] So, the pawn broker is bound to take care of and safely keep the goods intrusted to him, and he receives a profit for so doing in the high rate of interest allowed by the statute. I am clearly of opinion that these goods were exempted from distress, on the principle above stated. Then, was the plaintiff entitled to recover damages to the full value of the goods seized and sold? It is said that a pawn broker only holds the pledge for the money advanced upon it, and the interest, and therefore that that is the true measure of damages in an action by a wrong-doer for taking them: and for this the case of *Johnston v. Stur*, 15 C. B. (N. S.) 330, was referred to. In that case, my Brother Williams differed from the rest of the court: he being of opinion that the wrong-doer had no answer to the claim of the plaintiff for damages to the extent of the value of the goods wrongfully taken. The majority of the court, however, were of opinion, under the peculiar circumstances of that case, that the interest of the owner of the goods was nominal only, and therefore that, as against the defendant, he was only entitled to nominal damages for the conversion. That case does not appear to me to have the slightest approximation to the point in issue here. In distraining these goods, the defendant was an absolute wrong-doer. The landlord had no colour of right to take them. The bailee, therefore, is entitled to the full value of the goods. He may retain out of that the sums he has advanced upon them and the interest, and he will be liable to hand over the surplus to the respective owners of the goods. For these reasons, I am of opinion that the rule should be discharged.

WILLIAMS, J. I am of the same opinion. I think that the goods in question were privileged from distress, on the general ground that they were intrusted [493] to the plaintiff as a pawn-broker, to be taken care of and dealt with by him in the way of his trade,—like goods deposited with a wharfinger, to be kept (*Thompson v. Mashiter*, 8 J. B. Moore, 254, 1 Bingh. 283), or with an auctioneer, for sale (*Adams v. Crane*, 1 C. & M. 380, 3 Tyrwh. 326), or beasts sent to a carcase-butcher to be slaughtered and dressed (*Brown v. Sherill*, 2 Ad. & E. 138, 4 N. & M. 277). As to the damages, it is clear that, as against a wrong-doer, the plaintiff was entitled to recover the full value of the goods at the time of the wrongful seizure. As to the argument founded on the pawn-broker's statutory right to sell forfeited pledges at the end of the year, I must confess I see no foundation for it.

KEATINGE, J. I am of the same opinion. I think goods deposited with a pawn-broker fall within the second clause of the rule in the notes to *Simpson v. Hartopp*, 2 Smith's Leading Cases, 373,—"things delivered to a person exercising a public trade, to be carried, wrought, worked up, or managed in the way of his trade or employ." These goods were clearly delivered to the plaintiff, to be managed by him, he carrying on a public trade, in the way of that trade. A pawn-broker is to keep safely all goods pledged with him, and to restore them on demand to the owner, on being paid the money he has advanced upon them and interest. As to the measure

of damages, I concur with my Lord and my Brother Williams that the plaintiff is entitled to the value of the goods.

Rule discharged.

[494] ELWOOD AND ANOTHER v. CHRISTY AND ANOTHER. Jan. 27th, 1865.

[S. C. 34 L. J. C. P. 130; 13 W. R. 498.]

In an action for the infringement of a patent, the court will only direct an account to be taken, under the 42nd section of the 15 & 16 Vict. c. 83, of the profits which have been actually made by the defendant, and not of *the loss which the plaintiff has sustained by the infringement*: and, in the case of an assignee of the patent, the account will only be taken from the date of the registration of the assignment under s. 35.

This was an action for the infringement of a patent for an improved hat or helmet for hot climates.

The cause was tried before Erle, C. J., at the sittings in London after last Trinity Term, when a verdict was found for the plaintiffs. In Michaelmas Term following, the defendants obtained a rule nisi for a new trial, on the ground that the verdict was against the weight of evidence, and upon affidavits. This rule came on for argument in the course of the same term, and was discharged. On a subsequent day,—and before final judgment signed,—

Aston, for the plaintiffs, moved for a rule, in the terms of that granted in *Walton v. Lavater*, 8 C. B. (N. S.) 191, calling upon the defendants to shew cause why an account should not be taken before one of Masters of this court of *all profits which the plaintiffs had been deprived by means of the infringement by the defendants of the letters-patent in the declaration mentioned*, and why the defendants should not pay to the plaintiffs the amount of such profits, and why a writ of injunction should not issue to restrain the defendants from continuing to infringe the plaintiffs' patent in the declaration mentioned, and from the repetition and continuance of the injury caused to the plaintiffs by such infringement, and from the committal of any injury of a like kind relating to the said patent right. He submitted to the court whether, on the authority of *Holland v. Fox*, 3 Ellis & B. 977, the rule should not be absolute in the first instance. Lord Campbell, in delivering the judgment of the court, there says: "We conceive the meaning of the legislature in the enact-[495]-ment relied upon (*a*) to have been, to vest in the courts of common law, in which actions for the infringement of patent rights may be brought, the power to order an injunction, inspection, and account, heretofore exclusively exercised by courts of equity: so that suitors may be saved the vexation, delay, and expense to which they had before been exposed, in being obliged to go to a court of equity for an injunction, then being sent to law to establish their legal right by an action, and then being compelled to go back to equity for full redress. The court in which the action is commenced may now by its own authority do complete and final justice between the parties, by this combination of judicial powers." [Erle, C. J. We must hear the other side.] Aston further asked for a rule to inspect the manufactories and warehouses of the defendants, in order to see if there were any hats or parts of hats or helmets in course of manufacture in violation of the plaintiffs' patent. [Erle, C. J. That would be holding a sort of inquisition in the shop of the manufacturer, for which I find no warrant. As far as Lord Campbell went in *Holland v. Fox* we will go, but no further.]

The rule was granted, substituting for the words in italics the following,—“all

(*a*) 15 & 16 Vict. c. 83, s. 42, which enacts that, “in any action in any of Her Majesty's superior courts of record at Westminster and in Dublin, for the infringement of letters-patent, it shall be lawful for the court in which such action is pending, if the court be then sitting, or, if the court be not sitting, then for a judge of such court, on the application of the plaintiff or defendant respectively, to make such order for an injunction, inspection, or account, and to give such direction respecting such action, injunction, inspection, and account, and the proceedings therein respectively, as to such court or judge may seem fit.”

profits made by the defendants by means of the infringement of the plaintiffs' patent."

[496] Murray now shewed cause, upon affidavits stating, amongst other things, that the whole profits the defendants had made from the sale of hats said to be a violation of the plaintiffs' patent-right did not exceed 15l., which they were ready to pay over to them. Under these circumstances, it was submitted that there was no necessity for going into an expensive inquiry before the Master, and that the court would, in the exercise of its discretion, order the sum so admitted to have been received as profit to be paid over at once to the plaintiffs. It was further submitted that the plaintiffs at all events were only entitled to have the account taken from the date of the registration of the assignment of the patent to them under the 35th section of the act, viz. the 15th of February, 1863.

Hindmarsh, Q. C., and Aston, in support of the rule. The rule ought, as did the amended rule in *Walton v. Lavater*, to embrace the loss which the plaintiffs had sustained by reason of the infringement. [Erle, C. J. No cause was shewn there: the case is therefore hardly an authority.] The court of Chancery has over and over again held that a patentee is to be compensated in the amount for the loss he has actually sustained, and is not to be limited to the profit made by the wrongful act of the infringer. [Willes, J. Can you refer us to an instance?] In a case of *Betts v. De Vitry*, it was urged that the profits made by the defendant were an inadequate compensation for the wrong, and the court gave the plaintiff an issue or an account in the terms now suggested. [Murray. The form of the rule as granted does not ask this.] The court may mould it. The plaintiffs are clearly entitled to recover from the defendants all the profits they would have made but for the infringement. The statement that the profits actually made do not exceed 15l. is ex [497] parte. Both sides ought to be heard on that. The defendants may have purposely kept down the profits, for the purpose of deteriorating the value of the patent. [Willes, J., referred to *Vidi v. Smith*, 3 Ellis & B. 969. Pending an action for an infringement of a patent for an invention, the plaintiff obtained, under the Patent Law Amendment Act, 1852, a rule nisi that the defendant should render on oath an account of the sale of the articles (alleged to be pirated) sold before the action, and of the profit made therefrom, and keep an account of the articles to be sold and of the profits therefrom, and that the plaintiff might inspect the defendant's books. The rule was drawn up on an affidavit that the plaintiff had the patent, and that the defendant had infringed it after notice. On cause being shewn, it was held that no retrospective account of profits made by sales before the action ought to be ordered before final judgment: and that the inspection mentioned in s. 42 of the act was, an inspection of the articles, and not of the books: and so much of the rule was discharged. But it was held that the court had jurisdiction to order an account to be kept in future, though no injunction was asked for, it appearing that there was a *prima facie* case of infringement: and the court ordered that the rule should be absolute for such an account, on condition that the plaintiff elected not to claim damages at the trial, and undertook, if he failed in the action, to pay the defendant the expense of keeping the account so ordered.]

ERLE, C. J. I think substantial justice would be done in this case if the rule were discharged. But I pause on the ground put by the counsel for the plaintiffs: and I scruple so to decide, because it would be determining in favour of the one side, without giving [498] the other an opportunity of being heard. The rule must, therefore, be absolute to refer it to the Master to take an account of the profits which have been actually made by the defendants subsequently to the date of the assignment of the patent to the plaintiffs. The assignees of the patent are clearly not entitled to anything beyond the profits which the defendants have actually made by the infringement of the patent. If the plaintiffs do not succeed in surcharging the defendants to the extent of one sixth beyond the amount admitted by them in their affidavit, the plaintiffs must pay them all the costs of the inquiry before the Master and of this rule: and if they do succeed in satisfying the Master that they are entitled to more than the sum so admitted, such costs will be in the discretion of the Master.

WILLIAMS, J. It does not appear from the report of *Walton v. Lavater*, that the court absolutely sanctioned the amended form of rule. The matter was not contested.

WILLES, J. I am of the same opinion. We do not decide that the plaintiffs could not recover in the case any damages they may have sustained by the course of conduct suggested by the counsel who have argued in support of this rule. All we decide is,

that such damages can only be recovered at the hands of a jury, and not by means of an account taken before the Master under the 15 & 16 Vict. c. 83, s. 42.

Rule absolute accordingly (a)¹.

[499] FIELDING v. LEE AND ANOTHER. Feb. 6th, 1865.

A county-court judge (sitting as a commissioner in bankruptcy) made an order under the 125th section of the 12 & 13 Vict. c. 106, "that the household goods, furniture, and effects being in or about the messuage or dwelling-house and premises in the occupation of the said T. T. (the bankrupt) in C. Street, M., and known as the Cross Keys, be sold and disposed of by the assignees, for the benefit of the creditors of the said T. T." There was a minute of this order in the court book, which was produced:—Held, that this order was a valid order, and sufficiently specific.

This was an action for the wrongful conversion and for seizing and selling certain household furniture, &c., of the plaintiff.

The defendants pleaded,—first, not guilty, by statute (the statutes referred to in the margin being the 12 & 13 Vict. c. 106, s. 159, 13 & 14 Vict. c. 61, s. 19, and 15 & 16 Vict. c. 54, s. 6), secondly, a denial that the goods were the property of the plaintiff,—thirdly, that, after the passing of the Bankruptcy Act, 1861, [500] one Thomas Taylor was duly declared a bankrupt, and that a warrant of seizure was duly issued by the judge of the court having jurisdiction in the matter of the said bankruptcy, whereby the bailiffs of the said court and others were required to *enter into and upon the house of the said bankrupt*, and then and there *to seize the goods of the said bankrupt*, and in case of resistance or of not having the key or keys of any door or lock of any premises belonging to the said bankrupt where any goods of his were or were suspected to be, to break open or cause the same to be broken open, for the better execution of the said warrant; that John Harper, a bailiff of the court, entered into the house of the bankrupt, and took peaceable possession of certain goods: that Harper was afterwards ejected therefrom; and that the defendants thereupon entered the said house for the purpose of enabling the said John Harper to assist in the execution of the said warrant, and seized, took, and carried away the goods in the declaration mentioned, which were the grievances complained of,—fourthly, that the plaintiff had given the defendants no notice of action, as required by the statutes (a)².

The plaintiff took issue on the first and second pleas, and new-assigned to the others that the grievances complained of were committed on the other and different occasions, &c. The defendants pleaded not guilty to the new assignment.

The cause was tried before Mr. Serjt. Atkinson, at the last Summer Assizes at Manchester. The facts which appeared in evidence were as follows:—In September, 1863, the furniture, &c., of one Taylor were seized under a writ of *fi. fa.*, and sold by public auction. The plaintiff bought the furniture, &c., at the [501] sale, and paid for them: but he allowed them, at the request of and for the accommodation of Taylor's family, to remain in Taylor's house. They were afterwards removed by

(a)¹ The rule was drawn up as follows:—

"It is ordered that one of the Masters of this court do take an account of all profits actually made by the defendants by means of the infringement of the plaintiffs' patent, from the date of the registration of the assignment, and that the said defendants do pay to the plaintiffs the [499] amount of such profits: And it is further ordered that, unless the amount stated by the said defendants in their said affidavit to be due to the plaintiffs for such profits be increased by one sixth of the said amount, upon the taking of the said account by the Master, the said plaintiffs do and shall pay to the defendants, or to their attorney, their costs of and occasioned by this application to the court, and of the said reference to the Master, to be respectively taxed, &c.: but, in the event of such amount so stated by the said defendants being increased by one sixth of the amount thereof, then it is ordered that the before-mentioned costs be in the discretion of the said Master: And it is further ordered that a writ of injunction do issue forth of this court to restrain the said defendants from continuing to infringe the patent-right of the plaintiffs in the declaration in this clause mentioned, and from the repetition and continuance of the injury caused to the said plaintiffs by such infringement, and from the committal of any injury of a like kind relating to the patent-right."

(a)² 9 & 10 Vict. c. 95, s. 138, 13 & 14 Vict. c. 61, s. 19, and 15 & 16 Vict. c. 54, s. 6.

Taylor to a beer-shop called the Cross Keys, at Middleton, near Manchester, where he and his family went to live. They were seized there in the month of June following by the two defendants, as hereafter mentioned. There was evidence to shew that Taylor was the real occupier of this beer-shop, and that his sons-in-law (Ogden and Kenyon) were only ostensibly so.

On the 1st of April Taylor was declared a bankrupt; and the defendant Lee was appointed creditors' assignee.

On the 6th of June, upon the application of Lee, an order was made by the judge of the county-court, sitting in bankruptcy, the operative part of which was as follows:—"That the household goods, furniture, and effects, being in or about the messuage or dwelling-house and premises in the occupation of the said Thomas Taylor, in Cross Street, Middleton, and known as the Cross Keys, *be sold and disposed of by the assignees, for the benefit of the creditors of the said Thomas Taylor.*"

The admissibility of this order was objected to; but the learned Serjeant received it.

A warrant was also issued. It was in the terms set forth in the third plea. Under this warrant the high bailiff of the county-court seized all the furniture and effects in the Cross Keys (including that which had been bought by the plaintiff in September, 1863), and left one Harper in possession. Harper was turned out, but, with the aid of the two defendants, regained possession. A few days after this, viz. on the 8th or 9th of June, the two defendants caused all the furniture, &c., to be removed from the Cross Keys, and taken to [502] the auction-room of the defendant Aspinall, who, in the presence of the other defendant, and by his direction, sold them. The bailiffs of the county-court were indemnified by Lee.

It was admitted that the defendants had received no notice of action; and it was contended on their behalf,—first, that they were entitled to notice,—secondly, that the goods had been bailed to Taylor, and that the action should have been brought in his name,—thirdly, that the goods were in the possession, order, and disposition of Taylor at the time of his bankruptcy, and that the defendants were justified in *seizing and selling* them.

The learned Serjeant ruled,—first, that the action was rightly brought, if the goods were the *bonâ fide* property of the plaintiff,—secondly, that the statutes referred to did not apply to the *sale* by the defendants in June. He said that the new-assignment gave, as it were, the go-by to the facts alleged in the third and fourth pleas, and put the plaintiff's cause of action upon a new and different ground from what was relied on in those pleas, viz. upon the *sale* in June; and to this, he said, the bailiffs could not offer any justification under the warrant, which only authorized a *seizure*, and not a *sale*; much less could two persons *sell*, who had no authority at all. But, as the learned Serjeant thought that the order of the county-court, if admissible in evidence, might warrant the sale, he reserved the whole matter for the consideration of the court above, —leaving them to deal with the issues on the third and fourth pleas as they might under the circumstances think fit.

The defendants' counsel then went to the jury, contending that the whole transaction was a juggle for the purpose of defeating the creditors of Taylor: and several witnesses were called.

[503] In his summing-up, the learned Serjeant told the jury that, as the *sale* by the defendants in June was not disputed, the only question, under the circumstances, was, whether the goods were the *bonâ fide* property of the plaintiff at the time they were sold by the defendants, or his only colourably, they being in reality the property of Taylor: and that the fact of their being left in Taylor's possession or under his control after the plaintiff bought them at the sale in September, 1863, was to be regarded not as a matter of order and disposition, but as a circumstance affording material evidence of their being Taylor's property, and not the *bonâ fide* property of the plaintiff.

The jury returned a verdict for the plaintiff, damages 17l. 15s. 9d.

S. Temple, Q. C., in Michaelmas Term last, obtained a rule calling upon the plaintiff to shew cause why a nonsuit should not be entered, on the ground that no notice of action was proved to have been given; or why the verdict entered for the plaintiff on the third issue should not be set aside, and instead thereof a verdict be entered for the defendants, pursuant to the leave reserved, on the ground that the third plea was proved; or why there should not be a new trial, on the ground of misdirection on the part of the learned Serjeant, in telling the jury,—first, that no notice of action

was necessary,—secondly, in telling them that, upon the pleadings, the defendants could not set up as an answer to the action that the goods were in the order and disposition of the bankrupt as reputed owner.

E. James, Q. C. Baylis, and Pope, now shewed cause. It is the county-court act (9 & 10 Vict. c. 95, s. 138) that requires notice of action. Under the Bank-[504]-ruptcy Act, 1849, none is required. If, therefore, this was a proceeding in bankruptcy, the plaintiff was not bound to give any notice. The powers conferred upon the county-court judges to act in bankruptcy under the 24 & 25 Vict. c. 134, s. 3, create an additional and separate jurisdiction, giving to those judges all the duties and authorities possessed by commissioners in bankruptcy, but not annexing the privilege here contended for. Persons acting under the metropolitan commissions are not entitled to notice of action: there can be no reason, therefore, why persons acting under the orders of county-court judges whilst sitting as commissioners in bankruptcy should have greater privileges. The 19th section of the 13 & 14 Vict. c. 61, refers to warrants issued under the authority of *that* act; and the provisions of that section are not incorporated in the Bankruptcy Act, 1861. Now, in September, 1863, the plaintiff became the owner of the goods in question. It was so found by the jury, and cannot now be disputed. In June, 1864, those goods were *seised* and *sold* by the defendants. There was a *minute of an order* in the court book which directed the bankrupts' goods, or any goods in his order and disposition, to be sold. There was also a *warrant* directed to certain bailiffs, authorizing them to *seize* them. But neither the one nor the other justified the sale by the defendants. Again, as regards the order, assuming it to be an order empowering the defendant Lee, as assignee, to sell under the 125th section of the Bankrupt Law Consolidation Act, 1849, which provides that, "if any bankrupt at the time he becomes bankrupt shall, by the consent and permission of the true owner thereof, have in his possession, order, or disposition any goods or chattels whereof he was reputed owner, or whereof he had taken upon himself the sale, alteration, or disposition as owner, the court shall have [505] power to order the same to be sold and disposed of for the benefit of the creditors under the bankruptcy,"—that affords the defendants no justification. To entitle the assignees to take goods as being in the order and disposition of the bankrupt at the time of his bankruptcy with the consent of the true owner, not only must there be an order under this section, but it must specify and accurately ascertain whose and what are the goods to which the order is directed: *Heslop v. Baker*, 8 Exch. 411; *Quartermaine v. Bittleston*, 13 C. B. 133. In the last mentioned case, it was held that an order by a commissioner in bankruptcy, "that all goods and chattels which at the time the said A. B. became bankrupt, were, by the consent and permission of the true owner thereof, in the possession, order, or disposition of the said A. B., whereof the said A. B. was reputed owner, or whereof he had taken upon himself the sale, alteration, or disposition as owner," should be sold for the benefit of the creditors, was not a compliance with the 125th section of the 12 & 13 Vict. c. 106: it must specify the particular goods which are to be so sold. *Jervis, C. J.*, there says: "Without particularizing what ought to be stated in the order, I am of opinion that a mere general order for the sale of all goods which were in the possession, order, or disposition of the bankrupt with the consent of the true owner, does not satisfy the requirements of the statute. I think, considering that the order for sale may be made *ex parte*, as is now settled by *Ex parte Barlow*, *In re Marygold*, 2 De Gex, M'N. & G. 921, it should at all events be specific as to the goods upon which it is to attach. If that be necessary, this order, which professes to authorize in general terms the sale of all goods which were in the order or disposition of the bankrupt at the time of his bankruptcy, is clearly insufficient. That it was the in-[506]-tention of the legislature to require a specific order, may I think be gathered from one or two sections subsequent to the 125th, where similar words are used, which clearly would not be satisfied without a specific order. Thus, the 126th section enacts, 'that, if any bankrupt, being at the time insolvent, shall (except upon the marriage of any of his children, or for some valuable consideration) have conveyed, assigned, or transferred to any of his children, or to any other person, any hereditaments, offices, fees, annuities, houses, goods, or chattels, or have delivered or made over to any such person any bills, bonds, notes, or other securities, or have transferred his debts to any other person, or into any other person's name, the court shall have power to order the same to be sold and disposed of for the benefit of the creditors under the bankruptcy; and every such

sale shall be valid against the bankrupt and such children and persons, and against all persons claiming under him.' There, it is plain, the specific hereditaments or chattels which are to be operated upon by the order must be distinctly pointed out. A general order like this clearly would not do. Upon petition, it must be: upon an *ex parte* application, as the Lords Justices have decided, it may be: but it must be specific. The commissioner must be satisfied that some property or some chattels have been assigned or delivered or made over, and must order the sale of that specific property or those specific chattels." And, after referring to the similar language of the 127th and 128th sections, his Lordship adds: "It seems to me, therefore, that, viewing the 125th section in connection with those which follow, and taking it with the explanation afforded by the court of Exchequer in *Heslop v. Baker*, as there must be an order of the commissioner to vest property like that in question in the assignees, it must, in order to satisfy the re-[507]quirements of the statute, be a specific order, pointing to the particular goods intended to be so vested." And Maule, J., says: "This provision of the new Bankrupt Act varies from those of the former statutes relating to bankrupts. Under those, all property of which the bankrupt was the reputed owner, and which he had in his possession, or of which he had taken upon himself the order and disposition as owner, with the consent of the true owner, vested at once in his assignees, as much as if it had really and actually been the property of the bankrupt. That certainly was a provision which dealt much more favourably with the interests of the creditors than with those of the true owner. The main object of the legislature was, to cause to be distributed amongst the creditors all property which ought to be so distributed. There was, however, in that state of things, danger that the true owner might suffer considerable vexation. It was uncertain, when the assignees seized the goods, whether they claimed them as the general property of the bankrupt, or under the reputed-ownership clause. It constantly happened, when a question arose between the assignees and one who claimed the goods as owner, that the assignees could make out their case either by shewing that the goods were actually the property of the bankrupt, or by claiming them as being in his order and disposition as reputed owner with the consent of the true owner. The depriving a man of his property under these circumstances was certainly rather hard,—more particularly as it was considered a species of delinquency in the true owner of the goods to concur with the bankrupt in obtaining a false credit, by enabling him to pass for the owner of goods which in truth were not his. Now, the object of the 125th section of the 12 & 13 Vict. c. 106, was to prevent the assignees from taking goods so circumstanced, unless [508] they were in a position to make it appear before a competent jurisdiction that there was a *prima facie* case for seizure of the goods. In the case of a trial before a jury, the inquiry must necessarily be directed to certain specific goods: it would be, whether certain specific goods were at the time of the bankruptcy in the order and disposition of the bankrupt with the consent of the true owner. The order in this case does not mention any specific goods, or name any specific owner. I do not say that the latter would be necessary in all cases. But there should be some specific description of the goods intended to be dealt with under the order." [Byles, J. How would you have had the goods described here?] As "the goods seized by the bailiff," or "the goods claimed by Mr. Fielding" (a).

Temple, Q. C., Wood, and Torr, in support of the rule. The first and main question is, whether the learned Serjeant was justified in presenting the case to the jury as he did. The true question was this,—were the goods in the order and disposition of Taylor or not? If they were, Lee was justified in selling them. The plea of not guilty by statute refers to all the grievances complained of in the declaration. There was no new-assignment which touched the plea of not guilty by statute: therefore, the reason given by the learned Serjeant for saying that the *sale* in June was not under the circumstances justifiable, was wrong. The issues were not, as he said, co extensive. It might be wrong to have a general and also special pleas on the record together: but that was not and could not be a question at the trial. As to the form of the order, [509] it is difficult to see how it could under the circumstances be more specific than it was here. [Byles, J. It is said the commissioner has never exercised his discretion as to the particular goods.] In *Graham v. Furber*, 14 C. B. 134,

(a) At the trial no objection was made to the generality of the order: the objection was to its admissibility in evidence,—a fact not noticed in the argument.

156. Maule, J., says: "Formerly, if goods were in the order and disposition of the bankrupt at the time of the bankruptcy, they might be dealt with as any other goods of the bankrupt. Now, if the assignees wish to sell goods so circumstanced, they have the same power as they had before, only their discretion is to be guided by the court or the commissioner. It may be that, if the assignees cannot find out what or where the goods are, the commissioner might be authorized to make a general order to sell all the goods in such a place, or all the goods in the hands of the bankrupt: but, where it is known whose and what the goods are, the order ought to specify them. I think that is the sort of thing that was intended. I think it would be a strange thing, and a monstrous hardship, if, when from the time of the Statute of James downwards there had existed no right of depriving a man of his goods, without giving him an opportunity of being heard, they should be finally lost to him by means of an affidavit made behind his back, alleging the goods to have been with his consent and permission in the possession, order, and disposition of the bankrupt at the time of the fiat or petition. That would be depriving him of his trial by jury, without giving him an equivalent for it. The legislature does not divest persons of their rights without express words." In *Quartermaine v. Bittleston*, it was taken for granted that the order may be obtained upon an ex parte application. The order here was as specific as it could be. It clearly was not necessary to mention the name of Fielding as the owner of the goods. [Byles, J. The substance of the objection is, [510] that the order does not mention the nature or value of the goods to be seized: it is,—“Take and sell all the goods in the possession of Taylor in the Cross Keys.”] It would impose incalculable hardship and difficulty upon assignees, if they are held bound to ascertain before-hand who will thereafter appear as claimant, and what the specific goods are that are not absolutely the bankrupt's property. The very thing suggested in the judgment in *Quartermaine v. Bittleston* has happened here. The assignee did not know and had not the means of knowing who was the true owner of these goods. In *Freshney v. Carrick*, 1 Hurlst. & N. 653, it was expressly determined by the court of Exchequer that an order under the 125th section of the 12 & 13 Vict. c. 106, is sufficient, if it specifies the goods ordered to be sold, without referring by name to the persons supposed to be the true owners of such goods. Martin, B., there says: “As to the order, it follows the words of the act; and, unless there are cases directly the other way, we are bound to hold that it vests the goods mentioned in it in the assignees. In *Quartermaine v. Bittleston*, there was a general order, not giving particulars of the goods: the court of Common Pleas held that it was bad, and rightly so. The attention of the commissioners ought to be called to the particular goods, but the order need not state that it is made against different parties, some of whom claim one part, some another part of the goods.” The order here is quite as specific as the order was in that case.

ERLE, C. J. I am of opinion that the rule should be made absolute for a new trial. The action is in trover and trespass, and is brought by Fielding, the alleged owner of the goods in question, against Lee the assignee in bankruptcy of one Taylor, and the other de-[511]-fendant, who acted as Lee's agent. The defendants have pleaded not guilty by statute. The evidence was, that Lee caused the goods to be seized under the rights he had as assignee of Taylor. Assuming that the plaintiff was the true owner of the goods, and that they were at the time of the seizure in the possession, order, or disposition of Taylor, Lee had a right to seize and sell them for the benefit of the creditors, provided he qualified himself so to do by a proper order of the judge of the court of bankruptcy, under the 125th section of the 12 & 13 Vict. c. 106. By the 159th section of the act it is provided that, in any action for anything done in pursuance of the act, the defendant may plead the general issue and give the act and the special matter in evidence at the trial, and that the same was done by authority of the act. If these three matters are given in evidence, they establish a defence to the action, inasmuch as they prove affirmatively that the alleged wrongful act was done under the authority of the statute. Now, there was evidence to go to the jury that Fielding was the true owner of the goods, and that they were in the possession, order, and disposition of Taylor at the time of his bankruptcy, with Fielding's consent; and there was, I think, some evidence of an order of a judge in bankruptcy. The argument, however, has turned chiefly on the validity of the order which was made. The course taken at the trial seems to have been to regard the issues raised under the general plea and under the special pleas as the same in kind and degree. I am of opinion that they were not, under the circumstances. If the order was admissible

under not guilty by statute, and there was evidence that the goods were in the order and disposition of the bankrupt at the time of his bankruptcy, there were the ingredients of a defence. Then, was there a valid order under [512] s. 125? The order was in these terms,—"That the household goods furniture, and effects now being in or about the messuage or dwelling-house and premises in the occupation of the said Thomas Taylor, in Cross Street, Middleton, and known as the Cross Keys, be sold and disposed of by the assignees for the benefit of the creditors of the said Thomas Taylor." Is that a sufficient order under s. 125? In *Heslop v. Baker*, 8 Exch. 411, it was held that an order under that section was sufficient though it did not state positively that the person who claimed to be the true owner of the goods was in fact the true owner. In *Quartermaine v. Bittleston*, 13 C. B. 133, the order was in the most general terms,—in the nature of a general warrant: it directed that "all goods and chattels which at the time the trader became bankrupt were by the consent and permission of the true owner thereof in the possession, order, or disposition of the trader, whereof the bankrupt was the reputed owner, or whereof he had taken upon himself the sale, alteration, or disposition as owner," should be sold for the benefit of the creditors: and this court held that it was not a compliance with the statute, inasmuch as it did not specify the particular goods which were to be so sold. Here, the order is more specific than that: it does in some degree make it clear what it is that the assignees are to sell, viz. all the household goods, &c., in the possession of the occupier of the Cross Keys. I cannot help feeling that there is much force in the argument which has been urged on the part of the defendants, that the object of this enactment was to protect persons dealing with a trader from claims which are too often put forward by the bankrupt's friends to shield him in his difficulties; and that, if it were held necessary in every case to find the true owner, and that he and the goods which are to be seized must be described and specified [513] in the order with absolute accuracy and minuteness, the very object of the statute would be frustrated. I therefore think this order *constat de corpore* to some extent. It is a direction to go to the Cross Keys and seize all the household furniture and effects found there. Some identification is given. I should have come to this conclusion without any authority: but, if necessary, *Freshney v. Carrick*, 1 Hurlst. & N. 653, fully warrants it. Baron Martin in his judgment there expresses himself very much in the terms in which I have attempted to express myself here. There is particularity enough in this order to prevent the objection which arose as to the generality of the orders in the cases cited. For these reasons, I am of opinion that there should be a new trial.

BYLES, J. I am of the same opinion. The goods were in the possession of the bankrupt at the time of the bankruptcy. There was evidence that there was a true owner, as contradistinguished from the apparent owner, and that the goods were in the possession of the bankrupt with the consent of the true owner: and there was, I think, some evidence of an order of a commissioner under the 12 & 13 Viet. c. 106, s. 125, that the household goods, furniture, &c., in the messuage or dwelling-house occupied by the bankrupt (describing it) be sold and disposed of by the assignees for the benefit of the creditors. If the jury believed that evidence, they should have found a verdict for the defendants if the pleadings had been right. Some embarrassment has arisen from the form of the order: and we are much obliged to Mr. Wood for the authority which he brought to our notice. Such an order as that which was relied on in *Quartermaine v. Bittleston*, 13 C. B. 133, must be wrong. It contained no description whatever of the goods upon [514] which it was to operate. But here the goods are described to a certain extent,—“the goods in and about the messuage, &c., in the occupation of Taylor, in Cross Street, Middleton, and known as the Cross Keys.” It is objected that it is not stated who the claimant is, or whose goods they are. The observations of Martin, B., in that case (*Freshney v. Carrick*, 1 Hurlst. & N. 653) are specially applicable to this. “The attention of the commissioners,” he says, “ought to be called to the particular goods, but the order need not state that it is made against different parties, some of whom claim one part, some another part of the goods.” Here, there were two claimants to the goods, namely, Kenyon and Fielding. It seems to me that, in such a case as this, the commissioner was not bound to give the names of the owners. As to the goods themselves, it seems to me to be sufficient to describe them as they are virtually described in this order,—“all the household goods, &c., in a certain public-house in the occupation of the bankrupt, part of which belong to the bankrupt and part to a claimant.” It may be that that was the best

description which could be given. If this objection had been urged at the trial, it might peradventure have been answered. Then, are the defendants embarrassed by the state of the pleadings? I agree with all that has been said by my Lord as to the issue on not guilty by statute. The 159th section of the 12 & 13 Vict. c. 106, enables the defendant to plead the general issue and give the act and the special matter in evidence. I am not prepared to say that the defence was not also admissible under not possessed.

KEATING, J., had gone to Chambers.

Rule absolute (a).

[515] REBECCA BOURNE, BY JOHN BOURNE, HER FATHER AND
NEXT FRIEND, v. FOSBROOKE. Feb. 11th, 1865.

[S. C. 34 L. J. C. P. 164; 11 Jur. N. S. 202; 13 W. R. 497; Referred to,
Cochrane v. Moore, 1890, 25 Q. B. D. 62.]

1. A mere parol gift of a chattel, unaccompanied by delivery of possession, passes no property therein.—2. A wife, though living apart from her husband, cannot lawfully dispose by gift (even accompanied by actual delivery of possession,) of chattels acquired by her during the coverture. But, in an action by the donee against a wrong-doer, for the conversion of chattels so given, it is not competent to the defendant to set up the title of the husband.—3. A., as executor of B., seized and sold as the goods of his testator a watch and several articles of dress and jewellery which C., the niece of B.'s deceased housekeeper, claimed to be hers by gift, some of them from her aunt, and some from B., in whose house she had for many years lived with her aunt as a sort of adopted member of the family. The jury having found upon sufficient evidence that the articles in question had in fact been given to C., and were in her "possession" at the time of the conversion,—Held, that C. was entitled to recover their value; and that it was not competent to A., who was a mere wrong-doer, to urge that, as to those articles which came to C. by gift from her aunt, the latter, having a husband living (who, however, made no claim to them), had no authority to dispose of them.

The first count of the declaration was for the detention, the second for the conversion and wrongfully depriving the plaintiff of the use of certain goods.

The defendant pleaded,—first, to the first count, that he did not detain the goods, as alleged,—secondly, to the second count, not guilty,—thirdly, to the whole declaration, that the goods were not the goods of the plaintiff. Issue thereon.

The cause was tried before (Chamell, B., at the last Summer Assizes at Leicester. The facts which appeared in evidence were as follows:—

The defendant was executor under the will of one William Fosbrooke, of Lockington, in the county of Leicester, who died on the 13th of January, 1864. The plaintiff, a young lady about seventeen years of age, was the daughter of one John Bourne, and niece of one Susan Philips who had lived with the testator as his housekeeper for many years. In the year 1853, the plaintiff, who was then between six and seven years of age, went to the house of the testator, on a visit to her aunt. During her stay there, the testator became much attached to her, and (having no children of his own) ultimately in a manner adopted her as one of the family, sending her to school, first at Donnington, and afterwards at Oxford, and making his house her home during her holidays. In 1863, Susan [516] Philips died, and the plaintiff continued to reside at the house of the testator, on the same footing as before, down to the time of his death.

During the life-time of Susan Philips, she had from time to time made the plaintiff presents, consisting of silk dresses, a shawl, a watch, and some brooches, rings, and other articles of jewellery. Some of these had been gifts from the testator to Susan Philips. The testator also had made the plaintiff various presents, including, as was alleged, a piano-forte. All these articles were left by the plaintiff in the house of the testator whilst she was at school: those things which her aunt had given being placed

(a) Upon the second trial the result was the same, and there was no attempt to disturb the verdict.

in boxes and a drawer, which were kept locked, the keys being labelled, in the hand-writing of the testator, "Becky's keys," and being retained by the plaintiff in her own possession when at Lockington for her holidays, but hung up on a nail in a cupboard in her room when she was absent. Some of the articles in these boxes and drawer were also labelled, in the testator's hand-writing "Becks"; others were not.

It appeared that Susan Philips had in the year 1861 married one William Hogg, but had lived with him only three weeks or a month, when he deserted her and went to reside at Bethnal Green, where he had ever since continued to reside, cohabiting with another woman. On the death of Susan Philips, Hogg (the husband) went to the testator's house at Lockington, and claimed the things which belonged to her. His claim, however, was repudiated by the testator, who told him there were many heavy expenses for him to pay before he could claim them, and that they had been given to the plaintiff and her mother; and moreover that he (the husband) had no right to them, as he was living in a state of adultery with another woman. Hogg never made any further claim to the property.

[517] After the death of the testator, his effects were taken possession of by the defendant as his executor: and all the articles which he found labelled as belonging to the plaintiff he gave up to her or to her mother: the rest of the articles (including the piano-forte, which fetched 30l.) were sold by the defendant's direction.

On the part of the defendant it was insisted that, though there might have been a verbal gift of some of the articles in question from the testator to the plaintiff, they had never been so reduced into possession by the latter as to pass the property in them to her; and, as to the articles which were given to her by her aunt, Susan Philips, that, she being a married woman, they were the property of her husband, and she could not lawfully dispose of them.

For the plaintiff it was submitted that she had a sufficient title to and possession of the goods to entitle her to maintain an action against a wrong-doer for the conversion of them, and that it was not competent to the defendant under the circumstances to set up the title of Hogg, the husband.

The learned judge told the jury that the property in a chattel would not pass by a mere verbal gift without actual transfer of possession: and, in answer to questions put to them, the jury found, in respect of the goods claimed by the plaintiff as having been given to her by her aunt, that, supposing she had been a single woman, there was a sufficient transfer of possession: and they assessed the value of them at 25l.: and, as to the goods claimed as gifts from Mr. Fosbrooke, the testator (viz. the piano and other articles) the jury found that there had been no transfer of possession, though there was a verbal gift.

His Lordship thereupon directed a verdict to be entered for the defendant, but reserved leave to the plaintiff to move to enter a verdict for her for 25l., if, [518] upon the finding of the jury, the court should be of opinion that the plaintiff was entitled to recover, notwithstanding her aunt, Susan Philips, the donor, was a married woman.

O'Malley, Q. C., in Michaelmas Term last, obtained a rule nisi accordingly.

David Keane, Q. C., and Merewether, now shewed cause. *Prima facie*, the husband is entitled to all personal property of the wife. A court of equity will, under some circumstances, interfere to protect the interest of the wife; but never a court of law. There was, however, no evidence here upon which even a court of equity could see such a trust on the part of the husband as would give Susan Philips a right to dispose of these goods as she assumed to do. The husband's misconduct, or a sentence of divorce, are said to raise an implied trust: but here there is nothing but the fact of the husband and wife living apart, without any evidence of the circumstances under which the separation took place. In *Lamplin v. Credit*, 8 Ves. 599, a married woman living in trade without the interference of her husband, residing in a different part of the kingdom, advanced money for the purchase of a share in a lottery-ticket, upon an agreement with the plaintiff that half should be considered as a loan to him, and that they should be jointly concerned in the adventure: and it was held that, the money belonging to the husband, the produce was his. In *Bright on Husband and Wife*, vol. 2, p. 220, it is said: "With respect to personal estate, it has been settled since the case of *Pellplace v. Gorges*, 1 Ves. jun. 46, 3 Bro. C. C. 8, that, when personal property is actually given or settled, or is agreed to be given or settled, to the separate use of a married [519] woman, she may dispose of it as a feme sole to the full extent

of her interest." But here there was no settlement or agreement to settle; nothing whatever to interfere with the undoubted rights of the husband. In *Carne v. Brice*, 7 M. & W. 183, the property in wearing apparel bought for herself by a wife living with her husband, out of money settled to her separate use before marriage, and paid to her by the trustees of the settlement, was held to vest by law in the husband, and to be liable to be taken in execution for his debts. The same rule must prevail where the husband and wife are living apart, as here. In *Messenger v. Clarke*, 5 Exch. 388, a husband and wife separated by agreement, and at that time the husband agreed to allow the wife a certain sum weekly for her support, which was paid: she saved a portion of her allowance, and invested it in stock, but, a few days before her death, she sold out the stock, and disposed of the proceeds by way of gift: and it was held that the husband was entitled to recover back the money so given, in an action for money lent against the person who received it. Rolfe, B., there says: "All the cases which have been cited are cases in equity, and there is no doubt that a wife may dispose of her separate property. And this is so, although trustees may not have been appointed; for, in such a case, in a court of equity the husband may be looked upon as trustee for his wife, according to the well-known rule in those courts, that a trust shall never fail for want of a trustee." So, Platt, B.: "The authorities cited are cases in the courts of equity, where the property in question was that of the husband in point of law, but where he was considered as trustee for his wife by the courts of equity, which interfere to compel him to perform the trusts." In *Tugman v. Hopkins*, 4 M. & G. 389, 5 Scott, N. R. 464, certain stock in the Long Annuities was by a marriage-settlement [520] vested in trustees for the separate use of the wife for life, and after her death they were to pay over the principal sum, together with the interest and dividends then due and growing thereon, to such person as she might by will appoint. By her will (reciting the settlement, she appointed executors, and directed them to sell the principal stock. The proceeds thereof she bequeathed to different parties. At her death (for some time previously to which she had lived apart from her husband), a sum of money was found at her lodgings, which was taken possession of by the defendant, the son of one of the executors, at the request of his father, to whom he immediately paid it over: and it was held that, assuming the money in question to consist of the accumulations of the wife's dividends, the will did not dispose of it; that, as the executors did not take jure representationis, they were not entitled to the money; that the money vested in the husband at his wife's death, without his taking out administration; and that, as the defendant was a wrong-doer in taking the money, he was liable in an action for money had and received at the suit of the husband. Tindal, C. J., in giving judgment, after referring to Comyns's Digest, *Baron and Feme* (E. 3) (a), said,—“It has been admitted in the course of the ar-[521]-gument that, if this money had been taken away during the life-time of the wife, the action must have been brought by the husband alone. Perhaps in such a case he would have been considered in equity as a trustee for the wife; but, at law, the action must have been brought by him. The case of *Carne v. Brice* is a strong authority in favour of the husband's right to the money: and *Molony v. Kennedy*, 10 Simons, 254, shews that he was entitled to the possession of it, without taking out administration to his wife. These authorities, therefore, dispose of the first part of the case, and establish that the husband was, at law, entitled to the money sought to be recovered in this action.” In *Bird v. Peagram*, 13 C. B. 639, a married woman deposited with the defendant the savings of certain rents of leasehold property which had on her marriage been conveyed by her, with the consent of her intended husband, to trustees, upon trust to pay or permit her to receive the rents, &c. to her sole and separate use: and it was held that, the trust being discharged on the rents coming to

(a) The passages referred to in Comyns's Digest are as follows,—"All chattels personal which a wife has in possession in her own right, are vested in her husband by the marriage, though he do not survive. So, chattels personal not in possession at the time of the marriage, if they are reduced into possession during the coverture. So, chattels personal of a mixed nature, partly in possession and partly in action, the husband shall have if he survives; as an avoidance of a church which falls during the coverture. So, if chattels are given to the wife after the coverture, the interest vests in the husband, though he has not possession of them before the death of his wife."

the wife's hands, the trustees ceased to have any interest in or control over them; and that, upon the wife's death, her husband was entitled to bring an action, in his own right, to recover the money so deposited. In the course of the argument (see 22 Law J., C. P. 169), Williams, J., says:—"Can it be contended that a court of law recognizes a married woman's right to have money of her own in her possession? Where goods and chattels,—furniture, for instance,—are settled on a married woman, without the intervention of a trustee, it cannot be doubted that, in the eye of the law, they belong to the husband, although in a court of equity he would be considered as a trustee for his wife." According to the authority of *Bradshaw v. Board*, 12 C. B. (N. S.) 344, the expenses of the wife's funeral [522] might have been set off against the husband's claim to this property. If it be said that these things might be considered as the wife's paraphernalia (*a*), the wife being dead, that doctrine can have no application. In no view of the case could the wife have any *jus disponendi* as against the husband. There must be a complete divesting of the husband's right, before there could be a power of disposition on the part of the wife,—*Walter v. Hodge*, 2 Swanston, 92. There was no evidence to shew a divesting of the property in question out of the husband. As soon as he heard of his wife's death, he appeared and claimed the property: and there is nothing to prevent the defendant from setting up his title against the right of the plaintiff to maintain this action.

O'Malley, Q. C., and Markby, in support of the rule. The only question is, whether Susan Philips had a right, as against this defendant, who is a mere wrong-doer, to dispose of the articles of dress and trinkets as she did; for, if she had, they had clearly passed into the possession of the plaintiff. All the cases relied on by the defendant are cases where an execution-creditor claimed, standing upon the rights of the husband, or where the husband or the husband's executors came into direct collision with the wife; and all of them were cases where the property had not been disposed of by the wife during her life-time. Here, it must be assumed that the husband gave the wife power to dispose of the goods at her free will and pleasure; and that is a sufficient answer even to a claim by the husband, under not possessed: *Ringham v. Clements*, 12 Q. B. 260. This is the simple case of a wrong-doer taking the goods out of the possession of one who is [523] *prima facie* the rightful owner of them. There is no pretence for saying that the husband makes any claim, or that the defendant has a right to set up his title as against the plaintiff. In *Sutton v. Buck*, 2 Taunt. 302, it was held that possession of a ship under a transfer void for non-compliance with the ship's registry acts, is a sufficient title in trover against a stranger. "There is enough property," said Lawrence, J., "in this plaintiff to enable him to maintain trover against a wrong-doer: and, although it has been urged that the contract is void with respect to the rights of third persons as well as between the parties themselves, yet, as far as regards the possession, it is good as against all except the vendor himself. There is a difference made in the books between a wrong doer and one acting under the colour of a title. In the case of *Armory v. Delamirie*, 1 Stra. 505, the bare possession was held sufficient in order to recover against a wrong-doer; yet that boy had no more title to the jewel than the plaintiff to this ship." So, in *Fyson v. Chambers*, 9 M. & W. 460, it was held that a party who has taken possession of the goods of an intestate after his death, cannot set up as a defence to an action of trover by the administrator, that the intestate had been first insolvent and then bankrupt, and had not paid 15s. in the pound under the fiat, and that therefore the property in the goods vested absolutely in the assignees,—the goods having been acquired by the intestate after the bankruptcy, and he having been allowed by the assignees to retain possession of them (*a*)². In giving the judgment there, Lord Abinger says: "The defendant in this case is not the assignee, and has no right to set up a title of third persons to cover his own default." *Herbert v. Sayer*, 5 Q. B. 965, is an authority to the same effect. In *Buckley v. Gross*, 32 Law J., [524] Q. B. 129, a distinction was taken, because the plaintiff never had lawful possession of the tallow at all.

ERLE, C. J. I am of opinion that this rule should be made absolute. The plaintiff claims to recover from the defendant the value of certain articles which the latter had taken possession of and disposed of. The defendant was the executor of one Philip Fosbrooke, and dealt with the goods in question (which were found in the house of

(a)¹ As to these, see the case of *Graham v. Lord Londonderry*, 3 Atk. 393.

(a)² And see *Morgan v. Knight*, 15 C. B. (N. S.) 669.

the testator) meaning to perform his duty as executor. It appears that the aunt of the plaintiff had lived with the testator as his housekeeper for many years, and that the plaintiff had at a very early age been invited to stay with her aunt, at first as a visitor, but ultimately she became almost adopted into the family. In 1863 the plaintiff's aunt died, but the plaintiff remained in the house on the same footing as before. The plaintiff's claim embraced many articles of female dress and jewellery which she alleged to have become her property during the life-time of the testator. The great contest at the trial was, whether the property therein passed to the plaintiff or not. As to some of the articles, the jury found that it did not pass: but, as to a class, the value of which was assessed at 25*l.*, the jury found that they had been given to the plaintiff by her aunt and the property in them transferred to her in the aunt's life-time. It being a rule of law that personal chattels cannot pass by parol gift, without actual transfer of the possession, a contest arose as to whether or not these articles were actually transferred by the aunt to the niece. The jury found that they had been. It was, however, objected on behalf of the defendant,—and the objection was sanctioned by the judge,—that Susan Philips, the aunt, was at the time she made the alleged gifts a married woman, and that the articles [525] were the property of the husband, and consequently that the gift of the aunt operated nought, for that the husband might at any time come and take them. I think my Brother Channell was right in saying that such is the law of England. I abstain from saying anything as to the authority of the wife to give away articles of this sort, which had been received by her as gifts after she had been deserted by her husband. It will be time enough to deal with that question whenever it shall come properly before us. But I am inclined to think that the plaintiff did not derive any property in the articles in question *as against the husband of her aunt*. If the husband had come and claimed the goods, I think the plaintiff could not have relied upon the gift by the wife as an answer to such claim. But I am clearly of opinion that she may maintain this action against the present defendant, because the rule of law is that a person who is in lawful and quiet possession of an article has a right to recover its value if a wrong-doer comes and takes it away. A person who takes away and disposes of an article with the authority of the owner cannot be a wrong-doer: but one who does so without any colour of title or authority is a wrong-doer, and is liable to an action at the suit of the party whose possession is so invaded. So is the law laid down in the well-known case of *Armory v. Delamirie* (1 Stra. 505), commented on in 1 Smith's Leading Cases, 5th edit. 301, where the plaintiff, a chimney-sweeper's boy, having found a jewel, carried it to the shop of the defendant, a goldsmith, to know what it was, and delivered it into the hands of the apprentice, who, under pretence of weighing it, took out the stones, and calling to the master to let him know it came to three half-pence: the master offered the boy the money, who refused to take it, and demanded to have the thing again; whereupon the apprentice [526] delivered him back the socket without the stones; and, in trover against the master, it was ruled by the court "that the finder of a jewel, though he does not by such finding acquire an absolute property or ownership, yet he has such a property as will enable him to keep it against all but the rightful owner, and consequently may maintain trover." The same familiar principle is illustrated by the case put by Mr. Markby. It seems to me that the plaintiff, who was a school-girl, going backwards and forwards to the house of the testator, and receiving these things as presents, and leaving them at what might be considered her home during her temporary absences, was in legal intentment in possession of them all the time. "Possession" is a word of ambiguous meaning. In most instances, it is considered to import the manual custody of the chattel; though a man may also be said to be in possession of an article which he has not at the moment about his person. It appears that these things which the jury have found to belong to the plaintiff were from time to time given to her by her aunt, and were placed by her, some in boxes which she left when she went to school in the house in which she had almost been adopted as one of the family, and others were handed by her to the testator to keep for her, and by him placed in a drawer for safe custody. They were therefore in her possession by the hands of the testator: and the place of deposit was as much under her control as the circumstances would admit of. As far as the real rights of the parties are concerned, the articles were as much in the plaintiff's possession as were the goods in the case of *Fyson v. Chambers*, 9 M. & W. 460: and the defendant, having taken and sold them, believing them to be the property of his testator, and intending to do his duty, is nevertheless

liable for the wrongful conversion. We should probably have felt some difficulty in coming to this conclusion, if the husband of Susan Philips had come forward and claimed these goods from the defendant. In that case, possibly, he might have sheltered himself under the husband's title. But, considering the language used by the testator when the husband first asserted a claim, however mistaken he might be as to his legal rights, the terms upon which he was holding the goods were perfectly apparent. Under these circumstances, I feel bound to come to the conclusion that the defendant cannot set up the husband's title, and that the plaintiff is entitled as against him to recover the value of the goods as ascertained by the finding of the jury.

KEATING, J. I am of the same opinion. If the defendant had been in a position to avail himself of the title of the husband, he would probably have had a good answer to this action. That is the only opinion which was expressed by the learned Baron at the trial. But the defendant is not in a position to do that, because his testator repudiated the husband's claim when urged by him. The defendant must, therefore, rely on the absence of title in the plaintiff. The jury have found that, as to the articles now in question, the possession was transferred by Susan Philips to her niece. The legal title to them, therefore, was in the plaintiff; and there was nothing to shew that the defendant had obtained a possession which can prevail against that. It is unnecessary to say more than that I entirely concur with my Lord in thinking that the plaintiff is entitled to succeed to the extent of the 25*l.* which the jury found to be the value of the goods wrongfully taken by the defendant.

MONTAGUE SMITH, J. I am of the same opinion. It [528] is clear that the defendant had no right to these goods. Neither he nor his testator had any title to them: and, when the goods were claimed by the husband of Susan Philips, he repudiated his right to them. The only question, therefore, is, whether the plaintiff had a sufficient possession to entitle her to maintain this action. I think it is impossible to say that she had not a title as against every person but the husband. He, however, never interfered. The wife handed the articles to her niece. The latter had a possession which was innocent as against all but the true legal owner. According to the finding of the jury she had absolute possession of them: and nothing has occurred to divest her right. The things were left by her in the house of the testator with his permission, and upon a distinct understanding that they were hers. The case of *Buckley v. Gross*, 32 Law J., Q. B. 129, does not in my opinion at all interfere with the judgment we are pronouncing. "No doubt," says Crompton, J., in that case, "bare possession is sufficient to maintain trover or trespass as against a wrong-doer who takes the article from the person having possession. It does not, however, appear to me that the plaintiff was 'the finder,' within the case of *Armory v. Delamirie*: he rather became possessed of the tallow feloniously or fraudulently (whichever his dealing with it may be called), and he was not a mere innocent finder: but, nevertheless, he would still be able, perhaps, to maintain an action against a person wrongfully taking the tallow from his possession. But, before the defendants dealt with the tallow, the possession of the plaintiff had been divested, and he cannot revert to his previous possession, in order to maintain the action, unless he had the property. But here the plaintiff had no property, and his possession was lawfully divested, and the tallow was ultimately converted by a person who [529] does not claim through a wrong-doer." Here, the plaintiff is a perfectly innocent holder. The only doubt I have entertained has been whether the point was taken, and whether it was open on the leave reserved. But it is clear from what Mr. Markby has said, that the attention of the learned judge was distinctly called to it; and I think we are not precluded by anything that has passed from giving effect to the law. For these reasons, I am clearly of opinion that the plaintiff is entitled to recover to the extent found by the jury.

Rule absolute.

End of Hilary Term.

[530] MEMORANDUM.

The following gentlemen, were in the course of Hilary Vacation, appointed Her Majesty's Counsel learned in the Law:—Thomas Webster of Lincoln's Inn; Clement Milward, of the Middle Temple; Joseph Brown, of the Middle Temple; James Redfoord Bulwer, of the Inner Temple; John Peter De Gex, of Lincoln's Inn;

Joshua Williams, of Lincoln's Inn; Edward Francis Smith, of Lincoln's Inn; George Jessel, of Lincoln's Inn; Sir Thomas Phillips, Knt., of the Inner Temple; Hardinge Stanley Giffard, of the Inner Temple

Benjamin Coulson Robinson, of the Middle Temple, was called to the degree of the Coif. He gave rings with the motto, "Ex sese."

[531] CASES ARGUED AND DETERMINED IN THE COURT OF COMMON PLEAS, IN EASTER TERM, IN THE TWENTY-EIGHTH YEAR OF THE REIGN OF VICTORIA.

The Judges who usually sat in Banco in the present Term, were,—Erle, C. J., Byles, J., and Keating, J.

THE OVERSEERS OF THE POOR OF THE PARISH OF SUNDERLAND-NEAR-THE-SEA, *Appellants*; THE GUARDIANS OF THE SUNDERLAND POOR-LAW UNION, *Respondents*. May 10th, 1865.

[S. C. 34 L. J. M. C. 121; 13 L. T. 239; 11 Jur. N. S. 688; 13 W. R. 943. Adopted, *Bradford-on-Avon Assessment Committee v. White*, [1898] 2 Q. B. 634.]

1. In the parish of S. were certain breweries the occupiers of which were respectively possessed, as owners or lessees, of a number of public-houses known as "tied houses," some of which were in the parish of S. and some in other parishes. These public-houses were let to tenants at smaller rents than they would have been let at if they had been free public-houses, the tenants being bound by contracts with the landlords (assumed to be contained in the instrument of demise,) to purchase from them all the malt and other liquors consumed in their respective houses, —and so (probably) paying a higher price for their liquors than they would have paid had they been free.—In valuing these breweries and public-houses for the purpose of making the valuation-list under the Union Assessment Committee Act, 1862, 25 & 26 Vict. c. 103, s. 14, the overseers applied to them the same principles of valuation as to the other rateable hereditaments in the parish, pursuant to the Parochial Assessment Act, 6 & 7 W. 4, c. 96.—The union assessment committee (under the Union Assessment Committee Act, 1862), having ascertained that the overseers, in arriving at the gross estimated rental and rateable value of the breweries, had not taken into their consideration the advantages which the occupiers of such breweries derived from the before-mentioned contracts with their tenants, the publicans, and having obtained the numbers of such "tied public-houses" attached to each brewery increased the gross estimated rental and the rateable value of such breweries respectively by such an increased sum as the committee in their opinion considered the breweries might reasonably be expected to let for, with the advantages attending the contracts with the "tied public-houses." They, however, made no reduction in the valuation-list in respect of the value of the several "tied public-houses:—Held, by Erle, C. J., and Montague Smith, J. (dissentiente Byles, J.), that the union assessment committee had done wrong in so increasing the rateable value of the breweries, such rateable value not being effected by these personal contracts with the tenants of the tied public-houses. 2. Held also, that the "rateable value" of the public-houses was not to be decreased by reason of the burthen cast upon the tenants by their contracts with the brewer landlords.—3. In making out the valuation-list in a parish which has adopted the Small Tenements Rating Act, 13 & 14 Vict. c. 99, the reduction to be made under s. 4 of that act and s. 3 of the 14 & 15 Vict. c. 39, to the owners of small tenements who are rated instead of the occupiers, should be made, not from the "rateable value" of the hereditaments assessed, but from the rate in the pound to be levied and collected.

In the matter of an appeal by the overseers of the poor of the parish of Sunderland-near-the-Sea, in the county of Durham, to the general quarter sessions of [532] the peace for the said county, holden on the 27th of June, 1864, against the valuation-list of the said parish, delivered by the Sunderland Union Assessment Committee to the said overseers.

This was a special case stated, after notice of appeal given, and by the consent of

the parties, and by a judge's order under the provisions of the 12 & 13 Vict. c. 45, s. 11, for the opinion of this court.

The notice of appeal was as follows:—

“To the guardians of the Sunderland Union.

“Take notice that we, the undersigned, being the overseers of the parish of Sunderland-near-the-Sea, intend, with the consent of a vestry of the said parish, which has been summoned for the purpose of giving such consent, to appeal to the next general quarter sessions of the peace to be holden in and for the county of Durham, at the city of Durham, against the valuation-list of the said parish of Sunderland-near-the-Sea: and further take notice that the grounds of such our appeal are as follows, that is to say,—

“1. That the rateable hereditaments comprised in the said valuation-list of the said parish of Sunderland-near-the-Sea are valued at sums beyond the rateable value thereof:

“2. That certain rateable hereditaments within the said parish in respect whereof the owners thereof are liable to be assessed and are assessed under the Small Tenements Rating Act, 13 & 14 Vict. c. 99, in-[533]stead of the occupiers thereof, are in the said valuation-list valued at sums beyond the annual rateable value thereof:

“3. That, in the said valuation-list, the rateable value of the hereditaments mentioned in the next preceding paragraph is arrived at merely by making deductions from the gross estimated rental thereof for repairs and insurance; whereas, the rateable value thereof ought further to be reduced by deducting therefrom one fourth, (or, in the case of hereditaments compounded for by the owners, one half,) of the amount thereof, pursuant to the 4th section of the said Small Tenements Rating Act, 13 & 14 Vict. c. 99. Dated, &c.

<p>“GEORGE BARNES, “EDWARD EVANS, “R. T. GREENWELL, “JOHN WALTON,</p>	}	Overseers of the said parish of Sunderland-near-the-Sea.”
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The parish of Sunderland-near-the-Sea is one of the parishes included in the Sunderland poor-law union, the board of guardians of which union have in accordance with the Union Assessment Committee Act, 1862, 25 & 26 Vict. c. 103, appointed an assessment committee for the purposes of the act.

The overseers of the said parish, in pursuance of the said act, made a list of all the rateable hereditaments in the parish in so much of the form shewn in the schedule of the act 6 & 7 W. 4, c. 96, as set out in the schedule in the act now reciting, which list was duly deposited for inspection, published, and afterwards transmitted to the committee, as required by the act. This valuation-list, as so transmitted, and as afterwards confirmed and approved by the committee, was to be referred to as forming part of this case.

The committee, after receiving the valuation-list, [534] made alterations in the values of certain hereditaments, and then caused the list to be deposited for inspection, as required by the act, and appointed a day for hearing any objections thereto. The overseers of the poor of the parish of Sunderland gave notice of objection, and appeared before the committee and stated their objection to the alterations: but the committee adhered to their original views, and approved and confirmed the list.

The overseers, having reason to think that the parish was aggrieved by the decision of the committee, and having duly obtained the consent of the vestry, gave the notice of appeal hereinbefore set forth.

Previous to the quarter sessions, the respondents gave notice to respite, which was done; and ultimately an arrangement was entered into, that the questions of law should be settled by a special case for the opinion of this court.

The first ground of appeal is that the rateable hereditaments comprised in the valuation-list are valued at sums beyond the rateable value thereof. This ground of appeal has reference to the valuation of certain breweries in the parish; and the facts are as follows:—

In the parish there are five breweries, three of which are occupied by the owners, and the remaining two by lessees. The occupiers of these five breweries are respectively possessed of, as owners, or as lessees are entitled to, a great number of public-

houses known as "tied houses," some of which are situate in the parish of Sunderland-near-the-Sea, and some in other different parishes. All these public-houses are let to tenants at smaller rents than they would be let at if they were free public-houses; the tenants being bound to purchase from the brewers all malt and other [535] liquors which they sell in their public houses: the brewers thus securing to themselves a certain large trade, and being enabled to charge higher prices for their liquors than they would charge the occupier of a free public-house.

In valuing these breweries and public-houses for the purpose of making the valuation-list, the overseers applied the same principles to the breweries and public-houses as to the other rateable hereditaments in the parish, pursuant to the Parochial Assessment Act, 6 & 7 W. 4, c. 96; and, in the case of the breweries, without any regard or reference to the advantages derived by the occupiers from the before-mentioned contracts with the occupiers of the several "tied public-houses:" and, in the case of the said "tied public-houses," without any regard or reference to the smaller rents paid by the occupiers to the brewers, and as if such occupiers were at liberty to purchase their liquors in the open market.

The assessment committee, having ascertained that the overseers, in arriving at the gross estimated rental and rateable value of the breweries, had not taken into their consideration the advantages which the occupiers of such breweries derived from the before-mentioned contracts with their tenants, the publicans, and having obtained the numbers of such "tied public-houses" attached to each brewery, increased the gross estimated rental and rateable value of such breweries respectively by such an increased sum as the committee in their opinion considered the breweries might reasonably be expected to let for, with the advantages attending the contracts with the "tied public-houses."

The following extract from the valuation-list will shew the nature of the alteration made by the union assessment committee in the case of one brewery:—

[536] *Valuation-list for the Parish of Sunderland-near-the-Sea, in the county of Durham.*

Name of occupier.	Name of owner.	Description of property.	Name or situation of property.	Gross estimated rental.	Rateable value.
Fenwick & Co.	Fenwick & Co.	Brewery, malt-ing, vaults, warehouses, and offices.	Low Street.	£426 0 0 327 0 0	£355 0 0 254 0 0

The second line of figures shews the amounts at which the brewery was returned by the overseers: the figures entered above shew the increased amounts charged by the union assessment committee.

The committee, however, made no reduction in the valuation-list in respect of the value of the several tied public-houses.

The overseers, in objecting to the increase made in the value of the breweries, insisted that, if the valuation of the breweries was to be increased by reason of the advantages derived from the tied public-houses, the occupiers of the tied public-houses should be valued only in respect of the smaller rents actually paid by them, and at the reduced value of the premises resulting from their obligations to purchase their malt liquors of their landlords, and not at the full annual value of the premises without reference to such obligation.

The committee, however, being of opinion that they were bound by the case of *Allison v. Monkwearmouth Shore*, 4 Ellis & B. 13, and the cases therein referred to, refused to alter their decision.

As to the second and third grounds of appeal, the following were the facts:—

In the parish of Sunderland-near-the-Sea, the Small Tenements Rating Act, 13 & 14 Vict. c. 99, was duly adopted in the year 1850, and is still in force.

By s. 4 of this act, it is enacted that, whilst such [537] order as firstly therein-before mentioned is in force, the owner of every tenement in every parish, the yearly rateable value whereof shall not exceed 6l., shall be assessed to the rates for the

relief of the poor, and to the rates for the repairs of the highways, in respect of such tenement, at three fourths of the amount at which such tenement would be liable to be rated in case the act had not passed.

It is further enacted by the same section, "that, whilst such order as firstly thereinbefore mentioned is in force, if any owner of any one or more of such tenements shall be desirous of paying a rate for one year in respect of all such tenements in any parish, whether such tenements be occupied or unoccupied, and shall give notice in writing of such his desire to the overseers of the poor and to the surveyor of the highways, as therein mentioned, then and in such case such owner shall be assessed to the rates for the relief of the poor and to the rates for the repair of the highways in respect of such tenements respectively, whether the same be occupied or unoccupied, at a sum not being less than one half of the amount at which such tenements respectively would be liable to be rated, if occupied, in case this act had not passed."

In the parish there are upwards of 4000 tenements, the yearly value of each of which does not exceed 6l.: and in making out the valuation-list, the overseers entered the rent of these tenements respectively in the column of the valuation-list headed "gross estimated rental," at the rent at which the said tenements might reasonably be expected to let from year to year, free from all usual tenants' rates and taxes, and from the tithe commutation rent-charge, as required by the 6 & 7 W. 4, c. 96, s. 1, and the Union Assessment Committee Act, 1862, s. 15. From this gross estimated rental, the overseers made the usual deductions for the [538] average annual cost of repairs and insurance, thus arriving at the sum at which the said tenements would have been liable to be rated, if the Small Tenements Rating Act had not been adopted. Then, in order to arrive at the reduced amount at which the owners should be assessed, instead of the occupiers, the overseers, in those cases where the owners had not compounded, deducted from such last-mentioned amount (that is, the amount at which the property would have been liable to be rated if the Small Tenements Rating Act had not passed,) one fourth part thereof, and entered the remainder in the column of the valuation-list headed "Rateable value." In those cases where the owners had compounded, the overseers deducted one half instead of one fourth from the amount at which the property would have been liable to be rated if the Small Tenements Rating Act had not been adopted, and entered the remainder in the column headed "Rateable value."

The following case shews the mode adopted by the overseers:—

In the case of a tenement for which the owner did not compound, from the "gross estimated rental" of 6l. one sixth was deducted as the average annual cost of repairs and insurance, leaving the sum of 5l. as the "rateable value," under the Parochial Assessment Act. From this sum of 5l. was then deducted one fourth, that is, 1l. 5s., leaving the sum of 3l. 15s. as the reduced amount or "rateable value" on which the owner was rateable under the Small Tenements Rating Act, and on which sum the rate was to be computed.

In cases where the owner had compounded, from the gross estimated rental of 6l. one sixth was deducted as the average annual cost of repairs and insurance, leaving the sum of 5l. as the rateable value under the Parochial Assessment Act. From this sum [539] of 5l. was deducted half, that is, 2l. 10s., leaving the sum of 2l. 10s., as the reduced amount or "rateable value" on which the owner was rateable under the Small Tenements Rating Act, and on which sum the rate was to be computed.

Upon these principles, the rates for the relief of the poor of the parish have been made ever since the adoption of the Small Tenements Rating Act, in 1850, and by which means the overseers have assessed the owners of the small tenements at the same uniform pound-rate, in common with the rest of the rate-payers.

The overseers contended that, by the increased valuation made by the committee in respect of the last-mentioned rateable hereditaments, the aggregate "rateable value" of the hereditaments within the parish was improperly increased to the extent of 3875l., and that such increase was contrary to the provisions of s. 2 of the 6 & 7 W. c. 96, and to the provisions of ss. 35 and 36 of the Union Assessment Committee Act, 1862.

The committee, being of opinion that the 14th section of the Union Assessment Committee Act, 1862, required the overseers in making out the valuation list to return the full "annual rateable value" of all the rateable hereditaments within the

parish, and that the reduction to be made in favour of the owners rated, instead of occupiers, should be made from the rate in the pound, and not from the rateable value, confirmed and approved the valuation-list accordingly.

The questions of law arising on the above statement, for the opinion of the court, were,—first, whether, under the special circumstances stated in this case, the breweries in question should be rated in any additional sum beyond their annual rateable value as breweries, for the advantages derived from the custom of those tied public-houses the occupiers of which are compelled [540] to purchase their liquors at such breweries; and, if so, whether the public-houses connected with the breweries, but situate in other parishes should be taken into account in calculating the gross estimated rental and rateable value, as well as those within the parish where the brewery is situate,—secondly, if the said breweries are in the opinion of the court liable to be assessed in respect of the advantages derived from the said tied public-houses, whether the said tied public-houses are liable to be assessed at a reduced “gross estimated rental” and rateable value, in consideration of being so tied to such breweries,—thirdly, whether the reduction to be made under the statute 13 & 14 Vict. c. 99, s. 4, and the 14 & 15 Vict. c. 39, s. 3, to the owners of small tenements who are rated instead of the occupiers, should be made from the rateable value of the hereditaments assessed, or from the rate in the pound to be levied and collected.

And the court was solicited, according to the power vested in the court by the said statute of the 12 & 13 Vict. c. 45, s. 11, to remit the case to the said court of quarter sessions for the said county of Durham with the opinion and judgment of the court thereon, or to make such order as to this case, and the said appeal and the costs thereof, respectively, as this court might deem fit,—the said parties having agreed that a judgment in conformity with the decision of the court, and for such costs as the court should adjudge, might be entered, on motion by either party, at the sessions next but one after such decision should have been given, pursuant to the said last-mentioned statute.

Lush, Q. C. (with whom was Prideaux), for the appellants. Two questions arise in this case,—first, what is the effect of the contracts between the brewers and the publicans or beer-shop keepers on the rateable [541] value of the respective premises?—secondly, what is the effect of the Small Tenements Rating Act, 13 & 14 Vict. c. 99?

1. By the Parochial Assessment Act, 6 & 7 W. 4, c. 96, the rate for the relief of the poor is to be made “upon an estimate of the net annual value of the several hereditaments rated thereunto, that is to say, of the rent at which the same might reasonably be expected to let from year to year, free of all usual tenants’ rates and taxes, and tithe-commutation rent-charge, if any, and deducting therefrom the probable average annual cost of the repairs, insurance, and other expenses, if any, necessary to maintain them in a state to command such rent.” It is the *property* and that which belongs to the property that is looked at. A personal contract between the landlord, the proprietor of a brewery, and the tenant, as to the supply of beer, cannot be allowed to increase the rateable value of the one property or diminish the rateable value of the other. Suppose the brewer occupied all the houses himself by means of agents, or secured a monopoly by any other means, would the rateable value be affected thereby? [Erle, C. J. Or, suppose A. carries on the business of a brewer, and B., his brother, is a large landed proprietor in the neighbourhood, and it is agreed between them that the latter shall give notice to quit to every tenant on his estate who declines to buy his beer of the former?] The brewery may be in one parish and the public-houses in another; and indeed such is the case with some of these public-houses. [Byles, J. Put the case of a brewery in the parish of A., with a well (without which the brewery would be utterly valueless) in the adjoining parish of B.] In the canteen case, *The King v. Bradford*, 4 M. & Selw. 317 (a), the rent of the premises was the [542] aggregate of the two sums of 15l. and 510l., Lord

(a) There, a canteen in barracks demised to B. by the barrack-board for a year, at a rent of 15l. for the canteen and buildings, and also the further sum of 510l. for the privilege of using the same as a canteen, and selling therein provisions and liquors, &c. usually sold by sutlers, with power of distress for the aggregate sum, was held to be one entire rent for the canteen; and therefore A. was held to be rateable to the relief of the poor as occupier of the canteen in respect of the 525l. aggregate rent, and not merely in respect of the 15l.

Ellenborough says: "I cannot look at the reservation in this indenture in any other point of view than as a mode which the parties have chosen of dividing the rent; for, it is in substance but one entire rent payable for the occupation of a real tenement, and for the enjoyment of the advantages belonging to it. From its vicinity to the barracks, it of course would attract to it almost all the custom of that neighbourhood, and this is the incident to the property which renders it valuable. If this could be separated from the value of the tenement, and the rent distributed accordingly, we should henceforth never see a demise of any public-house in which this form of distribution would not be observed: the lessor would let the tenement at the bare rent which it was worth, and the privilege of carrying on the trade at a separate and independent rent. And this would be a receipt for reducing the annual value of the tenement to a mere shadow. But we must judge of things as they really are, and not as they may appear to be; and therefore we are to consider here whether this be not substantially one entire rent in respect of one entire subject, though artificially divided into several payments. Now, it does appear to me that this is as much a profit appurtenant to the tenement arising from its local situation, as was the profit of the weighing (*a*) or carding machine (*b*), to the [543] tenements there rated. And it has not been improperly likened to the case of a soke-mill, which is let at a higher rent because it has a right to the sole culture of all the corn and grain in the neighbourhood." [Byles, J. How do you distinguish this case from *Allison v. The Churchwardens, &c., of Monkwearmouth Shore*, 4 Ellis & B. 13? There, A. being owner of a brewery and also of thirty-three public-houses, not all situated in the same township as the brewery, demised to B. the brewery, "together with the goodwill and trade" of the public houses, for seventeen years, B. "yielding and paying for and in respect of the said brewery" 300*l.*, and "for and in respect of the goodwill and trade" of the public-houses 150*l.* B. occupied the brewery, and, under the contract contained in this lease, was enabled to compel the lessees of the several public-houses to purchase their beer at the brewery: and it would have been a breach of the contract between B. and A. if their custom had been diverted elsewhere. The public-houses, in consequence of this agreement, fetched less rent than they would have done if the occupiers had been free to get their supplies where they would: and the advantage of their compelled custom to the occupier of the brewery was worth 150*l.* a year. On a case reserved, stating the above facts, the question being whether the occupant of the brewery was to be rated to the relief of the poor on the value of the brewery as enhanced by this advantage, or not,—it was held by the majority of the court that he was properly rated on the enhanced value, it being an advantage connected with the occupation which would be taken into calculation by a tenant in estimating the annual rent, and that it was not material that the origin of this advantage was in a personal contract.] If the decision in that case can be supported, it can only be upon the ground that the [544] tenant paid but one rent for the whole, including the privilege annexed to the premises. He did not make the contracts with the tenants of the public-houses. He took the brewery with the privileges. [Byles, J. Would it have made any difference if the occupiers had been tenants from year to year, in which case there would have been a demise each year by him?'] In *Allison v. Monkwearmouth Shore*, the stock or profits of trade were in effect rated; whereas it is only the actual value of the *property* which can be taken into consideration. The true principle is that which is laid down by Erle, J., in that case. The question, said that learned judge, is "whether premises are rateable for the price which the occupier thereof agrees to pay to a contractor for influencing customers to the business carried on thereon. And the answer must be in the negative: for, since the Parochial Assessment Act, 6 & 7 W. 4, c. 96, only hereditaments are rateable, that is, land with its appurtenances: and a contract between the occupier and another person is not a hereditament. It is true that the contractor here, who sells his influence over the customer, happens to be the landlord of the premises, and the contract for the influence is contained in the instrument of demise, and the price to be paid annually for the influence is called rent, and the persons to be influenced are also tenants of the same landlord: but, if a traveller with a good connection, agreeing to sell his influence to a tradesman who hired him, happened to be the landlord of

(a) *Rex v. St. Nicholas, Gloucester*, Cald. 262.

(b) *Rex v. Hogg*, Cald. 266, 1 T. R. 721.

that tradesman, and inserted the sale in the demise of the premises, and called the price of the influence rent, the accidental combination of traveller with that of landlord, and a misnomer in the use of the word rent, would not constitute rateability: nor would the rateability of the premises be affected by the source of his influence over his customers, whether from the compulsory power of landlord or creditor, or from more friendly ties. Also immaterial as to rateability would be the nature of the trade in respect of which the contract is made. Such a contract would not become land in the case of a brewer, more than in the case of a grocer or other tradesman. The rateability of a soke-mill, for the servitude of multure in the servient district, was supposed to be analogous: but the supposed servitude is, by the hypothesis, a legal appurtenance to the mill, and would pass with it upon a demise or sale of the land with its appurtenances. But, if the mill had no legal privilege, it would be rateable on ordinary principles, and the rateable value would not be altered by any personal contract for custom, or for influence over custom, which the miller for the time being might make with his landlord or any other person: and so of a brewery; if it had a seignory, and the publicans were bound *ratione tenure* to do service by buying beer at the brewery, the profit would be a profit on realty, and rateable: but, if this was obtained by contract or choice, the profit would be personal, and not rateable." Then, as to the tied public-houses, it is manifest that, if they are to be assessed at their full rateable value, without regard to the burthen imposed upon the occupier by the contract with the brewer, the assessment on the breweries ought not to be increased also; otherwise, the same property would be rated twice.

[The court desired to hear the argument for the respondents upon this point, before proceeding to the other part of the case.]

Liddell, Q. C. (with whom was Tomlinson), for the respondents. The case of *Allison v. The Churchwardens, &c. of Monkwearmouth Shore*, 4 Ellis & B. 13, was rightly decided, and is conclusive on this first question. Of the five breweries in this case, three are in the hands of the owners; the other two being held by lessees under leases with the tied public-houses annexed to them. They may, however, for the purpose of this argument, be assumed to stand on the same footing. The breweries are more valuable by reason of the assignable interest annexed to their occupation. In estimating the rent which a hypothetical tenant would give, all the advantages annexed to the occupation would necessarily be taken into consideration. [Erle, C. J. The obligation to take all their beer from the landlord's brewery is contract only, not running with the land. Suppose, instead of the publican being the brewer's tenant, the former had lent the latter money the repayment of which was secured by a bond with a covenant to take from the former all beer, &c. which should be consumed on certain premises,—how would that case differ from this?] The obligation to take beer is an obligation attached to each brewery. [Erle, C. J. To the brewer.] The public houses are said to be attached to the respective breweries, and bound to take all their beer from the brewery to which they are so respectively attached. It is immaterial how the obligation arises: the increased value is the same. Lord Campbell, in *Allison v. Monkwearmouth Shore*, says: "The criterion is, 'the rent at which the premises might reasonably be expected to let from year to year,' with proper deductions. But, in calculating this rent, regard must be had to the pecuniary value of all the advantages which the tenant will have as tenant and occupier of the demised premises, connected with his occupation. In this case, I consider it a fact that the tenant and occupier of the demised premises, in which he is to carry on the trade of a brewer, is entitled to have, and must have, during the term, the entire custom of thirty-three public-houses, i.e. [547] that the publicans carrying on business in these public-houses, are bound to buy from his brewery the whole of the beer, &c., which is to be consumed by their customers. They are bound to deal at his brewery; and it is only by occupying the demised premises that he is entitled to this advantage. I think that the advantage so to be derived from the occupation of the premises, is to be taken into consideration in estimating the assessable value; because it would be taken into consideration by a tenant in determining the rent which he would be willing to pay. I agree that *influence* in recommending customers is not rateable, and that *profits in trade* cannot be rated as an hereditament: nevertheless, I think that hereditaments are rateable according to the advantages which will be enjoyed from the occupation of them during the period for which the rate is to be imposed. It is admitted that the occupier of a soke-mill would be liable to be rated higher than

if there were no one under an obligation to grind corn at his mill and to pay him multure. But it is said this is because the law compels customers to deal with him. In my opinion, it depends upon the obligation alone, and not upon the origin of the obligation. If the owner of a large estate with a grist-mill upon it, were to insert in all his leases a covenant that his tenants shall grind at his mill all the corn grown on their farms, and should let the mill with this certainty of custom, in my opinion the miller would be rateable as if the mill were a soke-mill, because his profits would be as great and as certain: they would arise equally from the occupation of the mill: and the rent which he would be willing to offer would not be in the slightest degree influenced by the consideration that the obligation to deal with him arose from contract, instead of arising from immemorial usage. If there be a strong *probabil-*[548]
ity of custom coming to a house in which a particular trade is carried on from the local situation of the house, this would be taken into consideration by the tenant in calculating the rent he would give: and the rent which he agrees to give upon this *probability* would be the basis of the assessment upon him. If the additional rent in respect of *probable* custom is to be taken into consideration, I do not understand how the rent is to be excluded which is given in consideration of the custom which must *certainly* come to him as occupier of the premises assessed." In *Staley v. The Overseers of Castleton*, 33 Law J., M. C. 178, it was held that the occupier of a cotton-mill, which, owing to the scarcity of cotton was not kept at work, might be liable to be rated to the poor-rate upon the value of the building used as a warehouse for storing the machinery therein. Blackburn, J., there says: "The Parochial Assessment Act lays down the rule by which we must be guided, viz. that the rate is to be made upon an estimate 'of the rent at which the same might reasonably be expected to let from year to year, free of all usual tenant's rates and taxes, and tithe-commutation rent-charge, if any, and deducting therefrom the probable *average annual* cost of the repairs, &c. It is to be therefore such a sum as might *reasonably* be expected, and the *average annual* cost of repairs, &c. is to be deducted. Certainly, as was said by Lord Denman, C. J., in *The Queen v. Capel*, 12 Ad. & E. 382, 412, 4 P. & D. 87, 'the language is very inartificial, and loose to a degree which renders the discovery of a definite meaning to all its parts extremely difficult.' But the question which might be raised as to the relative liabilities of different properties, as relied upon by Mr Kay, in the proviso to the section, does not attach here. As it appears to us, the hypothetical tenant from year to year would give nothing [549] for it as a cotton-mill. Mr. Kay says that it is possible, and I may say that I hope it is probable, that the present state of things will improve, and that a tenant could be found who would be willing to take it for a term on a larger rent, reckoning that that supposition will be realized. But that is not the way the probable rent is to be arrived at. Mr. Kay would change the words of the statute, and, instead of the words to let 'from year to year,' would introduce the words 'for a reasonable term of years.' The result would be that, if a man was driving a shaft with the expectation of meeting a valuable vein of minerals, he would be rateable upon some probable value for those minerals before he ever reached them, and though he was deriving no benefit whatever from his labour and expense. The law is not so: but the legislature intended that the rate should be made upon the rent which might be reasonably expected from a tenant who took the property from year to year, *rebus sic stantibus*." So, in *The Queen v. Williams*, 23 Law T. 76, it was held that, where the tenant of a farm pays an increased rent for the privilege of killing game on the farm, he is liable to be rated for that increased value. Again, in *The Queen v. The Inhabitants of Thurlestone*, 1 Ellis & Ellis, 502, 28 Law J., M. C. 106, where a tenant occupied land under a parol demise to him from year to year, the right to the game and of entering for the purpose of taking and killing it being reserved to the landlord,—it was held that the tenant was only rateable for the value of the land without the shooting. "As the reservation," said Wightman, J., "lessens the value of the tenant's occupation by the value of that which is so reserved, the effect is that what is reserved is separated from the beneficial occupation of the tenant, and that he is therefore rateable only in respect of such beneficial occupation: that is, in the present case, an [550] occupation as pasture land only." And Crompton, J., said: "Here, what the tenant took by the demise itself was, only the land, as pasture land, without the right of shooting; and therefore he is rateable only in respect of his occupation of the land as pasture land." That is precisely applicable here: the hypothetical tenant would not give so

much for the farm in the one case, or for the brewery in the other, without the privilege by which its value was enhanced. The same principle will apply to the tied public-houses. The tenant would not give so much for the house as he would if it had been free from the obligation imposed by the brewer's contract.

Lush, Q. C., was heard in reply.

ERLE, C. J. This question is one of great importance and some difficulty. We will therefore take time for deliberation.

Lush, Q. C. The next question arises upon the Small Tenements Rating Act, 13 & 14 Vict. c. 99, and is, whether the reduction to be made under the 4th section of that act and the 3rd section of the 14 & 15 Vict. c. 39, to the owners of small tenements who are rated instead of the occupiers, should be made from the rateable value of the hereditaments assessed, or from the rate in the pound to be levied and collected. It is submitted that the former is the true construction of the statutes. By the 1st section of the 13 & 14 Vict. c. 99, the vestry of any parish are empowered from time to time to declare and order that the *owners* of tenements in such parish the yearly rateable value whereof shall not exceed 6l., shall be rated and assessed to the rates for the relief of the poor in respect of such tenements, instead of the *occupiers* [551] thereof. The 2nd section provides for the rescinding of the order: and s. 3 enacts that, whilst any such order as firstly thereinbefore mentioned is in force, the respective owners of such tenements shall be rated and assessed (instead of the occupiers thereof) to the rates for the relief of the poor and to the rates for the repairs of the highways, which otherwise such occupiers might by law be rated to. Then comes the 4th section, which enacts that, "whilst such order as firstly hereinbefore mentioned is in force, the owner of every tenement in every parish the yearly rateable value whereof shall not exceed 6l., shall be assessed to the rates for the relief of the poor, and to the rates for the repairs of the highways, in respect of such tenement, at *three fourths* of the amount at which such tenement would be liable to be rated in case this act had not passed; and further that, whilst such order as firstly hereinbefore mentioned is in force, if any owner of one or more such tenements shall be desirous of paying a rate *for one year* in respect of all such tenements in any parish, whether such tenements be occupied or unoccupied, and shall give notice in writing of such his desire to the overseers of the poor and the surveyors of the highways within fourteen days next after the 25th of March in that year, then and in such case such owner shall be assessed to the rates for the relief of the poor, and to the rates for the repair of the highways, in respect of such tenement or tenements respectively, whether the same be occupied or unoccupied, from thenceforth till the 25th day of March following, at a sum not being less than *one half* of the amount at which such tenement or tenements respectively would be liable to be rated, if occupied, in case this act had not passed." It is the "rateable value" that is to be reduced,—to three fourths in the one [552] case, and one half in the other,—and not, as the union assessment committee assume, the rate. The 3rd section of the 14 & 15 Vict. c. 39 extends that provision to borough-rates. The importance of the question is that the mode adopted by the union assessment committee will materially increase the contribution of this parish to the common fund of the union. [Byles, J. The parish has the option of coming under the operation of the Small Tenements Act or not.] Every one knows the difficulty of collecting rates from the occupiers of small tenements. In *Easton v. Alce*, 7 Hurlst. & N. 452, words much less strong than the words here were held to be referable to "rateable value." The 1 W. 4, c. cxxxv., s. 2, provided that, amongst others, "twelve inhabitant householders resident in the town or parish of Rye, *rated to the relief or maintenance of the poor of the said parish by one or more rate or rates to the amount of 10l. per annum*," should be appointed commissioners of the harbour of Rye: and it was held that the *rateable annual value*, and not the rates payable, conferred the qualification. "If," said Pollock, C. B., in the course of the argument, "the act meant what is contended for on the part of the plaintiff,"—that the party must be rated to the relief of the poor in such an amount as rendered him liable to pay 10l. a year,—“it would stand alone among the acts relating to qualification by rating.” The Union Assessment Committee Act, 1862, in ss. 35 and 36, carefully provides that all these rights shall remain unaltered. Section 35 enacts that "nothing herein contained shall be construed to prevent the owners of tenements from compounding for the rates to be assessed on the same, in such manner as they were by any statute or statutes enabled

to do before the passing of this act : " and s. 36 enacts that " nothing herein contained shall extend or be taken to render liable to be rated any [553] property, or any person in respect of any occupation not now by law rateable, of any property, or to deprive any property, or the occupier of any property, of the benefit of any exemption, in whole or in part, to which such property or occupier is now by law entitled, from any poor-rate or other rate which by law is required to be based upon the poor-rate, or to render liable to be rated according to the annual rateable value thereof, any property which under any local act or otherwise is entitled to be rated upon a fixed amount, or according to any special or exceptional principle of valuation, whether such property shall or shall not be included in any valuation list in force under this act."

Liddell, Q. C. contra. This question turns on the way in which the Parochial Assessment Act is dealt with by the Union Assessment Committee Act, 1862. The object of the last-mentioned act is declared by the preamble to be, the "securing uniform and correct valuations of parishes in the unions of England." The earlier sections of the act relate to the appointment of the assessment committees, and defines their duties and their authority. By s. 13 the committee may require the overseers, &c., to make returns to them of all such particulars as they may direct in relation to any taxes, rates, or valuations, or any property included therein. By s. 14 the overseers of each parish in the union are to make a list of all the rateable hereditaments in such parish, with the annual valuation thereof respectively, in the form in the schedule annexed to the act. The last two columns of this schedule are to contain the "gross estimated rental" and the "rateable value." The 15th section contains a definition of what those rentals are. It enacts that "the gross estimated rental for the purpose of the schedule to this act shall be, the rent at which the hereditament might reason- [554] ably be expected to let from year to year, free of all usual tenants' rates and taxes, and tithe commutation rent charge, if any: Provided that nothing herein contained shall repeal or interfere with the provisions contained in the 1st section of the 6 & 7 W. 4, c. 96, defining the *net annual value* of the hereditaments to be rated," - that is, the rent at which the same might reasonably be expected to be let from year to year, free of all the usual tenants' rates and taxes, and tithe commutation rent-charge, if any, and deducting therefrom the probable average annual costs of the repairs, insurance, and other expenses, if any, necessary to maintain them in a state to command such rent. The 16th section empowers the committee to extend the time for the return of the valuation-lists, to direct the valuation-lists to be revised, to appoint with consent of the board of guardians a person to value property in a parish, and to make and sign the valuation-list to be delivered to the overseers. By s. 17 the valuation-lists are to be deposited for inspection, and afterwards transmitted to the committee. The 18th section enacts that "any overseer or overseers of any parish in any union who shall have reason to think that such parish is aggrieved by the valuation-list in any parish within such union, or any person who may feel himself aggrieved by any valuation list on the ground of unfairness or incorrectness in the valuation of any hereditaments included therein, or on the ground of the omission of any rateable hereditament from such list, may at any time after the deposit as aforesaid of such list, and before the expiration of twenty-eight days after the notice of the deposit as aforesaid, give to the committee and to the overseers a notice in writing of his objection, specifying the grounds thereof: and, where the ground of any objection shall be unfairness or incorrectness in the valua- [555] -tion of any hereditament in respect of which any person other than the person objecting is liable to be rated, or the omission of such hereditament, also give notice in writing of such objection, and of the ground thereof, to such other person." Section 19 requires the committee to hold meetings for hearing objections: and section 20 enables the committee to alter and correct the valuation list, and, with the consent of the guardians, to appoint a valuer to enable them to do so, and requires them to approve of the valuation-list when corrected. The 24th section declares that "every valuation-list approved by the committee and delivered to the overseers of the parish to which the same relates, shall, with and subject to the alterations and additions for the time being made therein or thereto by any supplemental valuation-lists so approved and delivered, be the valuation-list in force in such parish," except in parishes governed by local acts. The 25th section enacts that, "when and so often as any property not included in the valuation-list in force in any parish becomes rateable, or where, by reason of any

alteration in the occupation of any property included in such list, such property becomes liable to be rated in parts not mentioned in such list as rateable hereditaments, and separately valued therein, and when and so often as it shall appear to the overseers that any rateable property included in such list has been increased or reduced in value since the valuation thereof, whether by building, destruction of building, or other alteration in the condition thereof, or otherwise, the overseers of the parish in each of the cases aforesaid shall, as soon as conveniently may be, make a supplemental valuation-list shewing the *annual rateable value*, according to the judgment of the overseers, of the property so become rateable, or of the parts so become liable to be rated separately, or of the [556] property so increased or reduced in value, as the case may be." By s. 26 the committee are empowered from time to time, on the application of any person aggrieved, or on their own judgment, to order a new valuation-list, to be made in substitution of the whole, or a partial one as a supplemental list. The 28th section enacts that, in every parish where a valuation-list under this act has been approved and delivered to the overseers, no rate for the relief of the poor, or other rate which by law is required to be based upon the poor-rate, shall be of any force, unless the hereditaments included in such rate, except as hereinafter provided, be rated according to the *annual rateable value* thereof appearing in the valuation-list in force in such parish." It is the actual annual rateable value that is to be looked at, and nothing else. The 30th section is important: it enacts that, "when the assessment committee for any union shall have approved valuation-lists for all the parishes comprised within such union, the guardians of such union, in computing the amount of contribution to the common fund for the several parishes, shall thenceforward take the annual rateable value of the property in such parishes respectively from the valuation-lists for the time being lastly approved of for such parishes respectively." The only reservation of the Small Tenements Rating Act is in s. 35: the 36th section does not apply to it at all. Upon s. 35, Mr. Lumley, in the 2nd edition of his pamphlet on the Union Assessment Committee Act, 1862, at p. 42, n. (g), says,—“This is a clause of extreme caution, as the act applies only to the valuation of property, and in no respect interferes with the liability of the parties to be rated for that property. The general statutes referred to are, the 59 G. 3, c. 12, s. 19, and the 13 & 14 Vict. c. 99: but there are numerous local acts in parishes which provide for the rating of the owners in the [557] place of the occupiers. Those acts do not, however, prevent the committee from obtaining valuations of the rateable value in such parishes. The intention of the legislature was, to extend the area, and to secure equality and uniformity in the contributions of the different parishes to the union charges: and this intention would be frustrated if the argument of the appellants in this case were to prevail. And there is no hardship in adopting this construction. The parish accepts the Small Tenements Rating Act for its own convenience.

Lush, Q. C., in reply. The Union Assessment Committee Act, 1862, was intended merely to secure the due execution of the acts already in force, and uniformity in the valuation of rateable property, not to alter or affect the rights or liabilities either of parishes or individuals. The principle of contribution had already been laid down. The 24 & 25 Vict. c. 55, s. 9, reciting that it was expedient to alter the mode in which the contributions of parishes to the common fund of the union in which they are comprised are now calculated, enacts that, “after the 25th of March then next, the several parishes comprised in any union formed or thereafter to be formed under the provisions of the 4 & 5 W. 4, c. 76, shall contribute to the common fund thereof, in proportion to the annual rateable value of the lands, tenements, and hereditaments in such parishes respectively assessable by the laws in force for the time being to the relief of the poor, and in no other manner, whether the lands, tenements, and hereditaments shall be actually rated or not, and whether the rate levied shall be collected in full or upon any composition.” And s. 10 enacts that “the guardians of every such union, in computing the amount of contribution to the common fund from [558] the several parishes, shall take the annual rateable value of such property in every parish therein from the valuation upon which such parish was assessed to the county-rate, or, where there is no county-rate, to the borough or ward-rate, or other rate in the nature of a county rate, in the last assessment made not less than one month next preceeding the day when the order for such contribution is made.” The 4th section of the Small Tenements Rating Act refers to the value put upon the tenement, not to the amount of the rate: the owner is to be “assessed to the rates

for the relief of the poor, and to the rates for the repairs of the highways, in respect of such tenement, at three fourths (or one half, as the case may be), of the amount at which such tenement would be liable to be rated in case this act had not passed." The 35th section of the Union Assessment Committee Act, 1862, standing alone, would not have met all the cases intended to be provided for; the enactment in s. 36 was therefore necessary. The 43rd and 44th sections are not unimportant. The former enacts that, "in every parish, until a valuation-list has been approved, and delivered to the overseers under this act, every rate made for the relief of the poor in such parish shall be made in the form and contain the particulars required by the 6 & 7 W. 4, c. 96; and, after such valuation-list has been so approved and delivered, every such rate (except in any parish where the poor-rate or the assessment for the same is made under the provisions of a local act as aforesaid) shall shew the annual rateable value of each hereditament comprised therein, according to the valuation-list in force in such parish;" and the latter that "all the powers, authorities, provisions, clauses, and regulations now in force relating to the assessment (*a*)¹, collection, and levying of poor-rates (save so [559] far as the same are hereby repealed or altered) shall be good, valid, and effectual for the purposes of assessing, levying, collecting, and enforcing the payment of such rate, and for carrying this act into execution" (*a*)².

ERLE, C. J. Upon the point last argued, I am of opinion that our judgment should be for the respondents. At the first reading of the statute, the inclination of my opinion was the other way, conceiving that there was a hardship in the construction contended for by Mr. Liddell. Upon consideration, however, I think that it is not so. But, whether there be or be not any hardship, we are bound to give judgment according to the true effect of the language of the legislature as we understand it. Now, the legislature has required valuation-lists to be made out for every parish, for the purpose of acquiring uniform and correct information as to the value of all the rateable property in the different parishes. The question is, whether the seventh column of the list the form of which is given in the schedule to the 25 & 26 Vict. c. 103, and which is headed "Rateable value," is to shew the rateable value truly, or whether, in a parish which has adopted the Small Tenements Rating Act, the rateable value of the small tenements is to be set down in that column at the proportion which the owner is to pay upon under the 13 & 14 Vict. c. 99. s. 4, viz. three [560] fourths or one half, as the case may be. Giving effect to the words of the statute according to their plain literal meaning, I am of opinion that the true rateable value of the premises is to be inserted. It means rateable value simpliciter. All through the act, as pointed out by Mr. Liddell, until we come to section 35, each successive enactment seems carefully framed to indicate that there shall be one uniform survey and valuation of all the rateable hereditaments in the parish, and that the result of such survey and valuation shall appear upon the face of the valuation-list. I was much struck with the argument, that it is to be such a uniform correct valuation as a surveyor valuing the premises would arrive at upon viewing them and looking at the locality and the circumstances in which they stand; and that, if the rateable value of the small tenements is to be ascertained upon the principle contended for by the appellants (the overseers), such rateable value would not be that which the surveyor would arrive at upon a survey of the property as it stands, but upon a survey of the property coupled with an inquiry as to whether or not the owner had compounded with the parish, and whether he was to be assessed at three fourths or one half of the annual value: so that the entry in the column headed "rateable value" would be subject to two accidental circumstances, and also to the further accidental circumstance that the parish which had at one time adopted the Small Tenements Rating Act, might, by giving notice under the 13 & 14 Vict. c. 99. s. 2, return to the original

(*a*)¹ The statutes here referred to, 3 & 4 W. 4, c. 30, 6 & 7 Vict. c. 36, 16 & 17 Vict. c. 97. s. 35, 17 & 18 Vict. c. 104, s. 430, c. 105, s. 2, 18 & 19 Vict. c. 128, and 3 & 4 Vict. c. 89, continued by successive statutes to the present time, are all general acts which exempt property either wholly or partially from assessment to the poor-rate. See Lumley, 48 (*a*).

(*a*)² Upon this Mr. Lumley observes (p. 48 *b.*),—"When the provisions of this act are considered, it will be seen that they only seek to effect the correct and accurate valuation of property for the poor-rate, and that none of the powers above referred to are required for carrying this act into execution."

state of things. Shewing, therefore, the sum to be paid by the owner during the time the parish had adopted the Small Tenements Rating Act, would not shew the rateable value when the parish had ceased to adopt it. Thus construing the act according to its plain literal meaning, the whole tenor of the pro-[561]-visions directing these valuation-lists to be made is clear to command, without limitation or exception of any kind that I can see, that the rateable value of all the hereditaments in the parish is to be ascertained according to the well-known principles of the Parochial Assessment Act, 6 & 7 W. 4, c. 96, entirely independent of the Small Tenements Rating Act. I will presently refer to these acts, in confirmation of that opinion. The contention on the part of the appellants is that, under the 35th section of the Union Assessment Committee Act, the owners of small tenements have a right to compound as heretofore, and that under s. 36 all payments are to be made as heretofore. Mr Lush says that those sections would be wholly inoperative if the owner could not compound. But I give those sections their full operation, and hold that the owner has a right to compound as heretofore, and that when he does compound he is to pay the smaller sum: and, though the contribution of the parish to the common fund of the union would depend upon the amount that is set down in the seventh column, headed "rateable value," yet the sums collected in the parish would not be in the same proportion to the rateable values where the Small Tenements Rating Act had been adopted. I do not think there is any real hardship in that. The case put by Mr. Liddell has convinced me. Suppose two parishes adjoining one another, each having exactly the same quantity of rateable property, and the same proportion of small tenements, and one of them has adopted the Small Tenements Rating Act, and the other has not: in that case, it is agreed on all hands that the parish which has not adopted the Small Tenements Rating Act should have the small tenements put down at their actual value in the "rateable value" column. In that case, according to the experience I acquired when [562] counsel for a parish which contained a large number of poor inhabitants, the sum collected in the two parishes would be exactly the same. It is entirely impossible for the collectors to get the true amount from the small tenements, even after seizure and sale of everything the occupiers possess. The operation of s. 35 of the Union Assessment Committee Act, and of the Small Tenements Rating Act, together, applies to the collectability of the rate,—to create a convenient mode by which the rate can be collected. But the property in the parish which is subject to be rated, the gross estimated rental, and the rateable value, all those remain the same. But, in respect of the collectability of the rate, if the parish has adopted the Small Tenements Rating Act, the owner assures to the parish three fourths or half the amount, as the case may be. The Parochial Assessment Act confirms me in this view: for, the schedule to the Union Assessment Committee Act contains the same first seven columns that are contained in the schedule to the Parochial Assessment Act,—“Name of occupier,” “Name of owner,” “Description of property,” “Name or situation of property,” “Estimated extent,” “Gross estimated rental,” and “Rateable value,” but not the last, “Rate at 6d. in the pound.” I think the application of the privilege given by the Small Tenements Rating Act is to be confined entirely to the eighth column, which is called “rate”: and, in the case of an owner who has compounded, the sum put down would be one half the amount inserted for other premises of the same rateable value the owner of which had not compounded. Thus, to use the schedule to the Parochial Assessment Act as an example, set down “Rate at 6d in the pound,” 1l. 7s. 6d, add against a compounding owner’s name, “owner having compounded,” then, instead of 1l. 7s 2d. as the rate or sum to be collected, it would be 13s. 9d. [563] Upon a careful examination of the Union Assessment Committee Act, and referring to the Small Tenements Rating Act, and reading those acts together with the Parochial Assessment Act, it seems to me to be clear that the legislature intended that the “rateable value” in the valuation-list should be the true actual rateable value capable of being ascertained by a surveyor from the essential permanent qualities of the rateable subject, not depending on the accidental circumstance of an arrangement made between the owners and the parochial authorities for the more convenient collection of the amount to be paid by them in respect of the premises. Upon this point, therefore, the appellants fail.

BYLES, J. I am of the same opinion, though I must confess that, until I had heard Mr. Liddell, I thought otherwise. I now, however, entirely agree with my

Lord. It must not be forgotten, in considering these cases, that the tax is imposed, not on the land, but on the person occupying the land; for the statute of Elizabeth says that the money to be raised for the relief of the poor in every parish is to be raised "by taxation of every inhabitant, parson, vicar, and other occupier:" and so early as the case of *Thred v. Sharkey*, 8 Mod 314, it was decided that poor-rates are personal charges, not charges on the land, and therefore a covenant to pay taxes on the land does not extend to poor-rates. That being so, it seems to me that the words in the 13 & 14 Vict. c. 99, s. 4, may well be read as referring to the person, and not to the property. That section enacts that, whilst the order declaring that the owners of the small tenements shall be rated and assessed to the rates for the relief of the poor in respect of such tenements shall be in force, "the owner of every tenement in every parish the yearly rateable [564] value whereof shall not exceed 6l. shall be assessed to the relief of the poor, &c., in respect of such tenement, at three fourths of the amount at which such tenement would be liable to be rated in case that act had not passed," or at one half, if the owner elects to take the chance of the premises being occupied during the whole year. I admit that some slight violence will be done to the language of the act by this construction, and that, instead of the word "at," we must read "according to" or "in proportion to." But that must be so; for, if the rate were made on any other principle, the rateable value would appear to be of one third or one half less value than it really is. At the end of every rate I observe there is the following declaration by the overseers and churchwardens: "We ——— do declare the several particulars specified in the respective columns of the above rate to be true and correct, so far as we have been able to ascertain them, to which end we have used our best endeavours." Now, the effect of Mr. Lush's construction would be, that the overseers and churchwardens would be making a declaration which they knew to be false; whereas, if you read the word "rate," in the 4th section of the 13 & 14 Vict. c. 99, to mean what was really intended, viz. a charge on the person in respect of the land, then they put their hands to nothing which was not strictly correct and true. The gross estimated rental is put down, the rateable value is put down, and the rate upon the person, as pointed out by my Lord, is also put down. I am inclined to think that, even before the passing of the Union Assessment Committee Act, 1862, the proper mode of proceeding was, to put down the gross estimated rental, the true rateable value, and the amount of the rate charged upon the person of the occupier. But, however, that may be, the Union Assessment Committee Act is imperative with regard to [565] that which is the subject of this appeal, viz. the valuation lists. They are to be lists "of all the rateable hereditaments in such parish with the annual value thereof respectively;" that is, they are to be true valuation-lists. And they are to be made by persons who can have no knowledge of any circumstances which may render the annual value of the premises more or less than upon an ordinary survey they would appear to be. This is an appeal, not against the rate, but against the valuation-list. It appears to me that it would have been incorrect if it had been in any other form than it is. If the construction we put on the former act be the correct one, I do not know that there was any occasion for the enactment contained in the 35th section of the Union Assessment Committee Act. If there was, it applies to this case. The words are,— "Nothing herein contained shall be construed to prevent the owners of tenements from compounding for the rates to be assessed on the same" [that is, "assessed in respect of the same"], "in such manner as they were by any statute or statutes enabled to do before the passing of this act." Upon these grounds, therefore, I conceive that what has been done here has been rightly done. I lay very great stress on the fact that, if it were otherwise, first, on the original rate, then on the valuation-list, and afterwards on the rate made upon the valuation-list, we should be adopting a construction which would make the declaration of the overseers and churchwardens incorrect upon the face of it. The suggestion of hardship was disposed of by the answer given by the learned counsel for the respondents: and I will add nothing to what my Lord has said upon that subject.

MONTAGUE SMITH, J. I am entirely of the same opinion. The intention of the Union Assessment Com-[566]-mittee Act was, to ascertain and fix the full rateable value of all the rateable hereditaments in every parish; and I think it never was contemplated by the legislature that the rateable value to be inserted in the valuation-lists was to be affected by the accident of whether or not the Small Tenements Rating Act had

been adopted in any parish, and the further contingency of the owners of the small tenements having elected to compound. I agree with what has fallen from the rest of the court, that the proper form of rate under the Parochial Assessment Act and the Small Tenements Rating Act would have been, to have taken the form given in the former act, leaving all the columns unaltered except the last, in which the amount of the rate is mentioned. If that be so, there is really no difficulty whatever in the construction of the Union Assessment Committee Act. But, even if that be not the true construction of the Small Tenements Rating Act, and the rate should have been made in the form suggested by Mr. Lush, I think the intention of the legislature is so clearly and plainly expressed in the last statute, that there can be no room left for giving a different construction. It leaves untouched the liability of particular occupiers or owners in individual parishes; and it expressly enacts, in s. 30, that, "when the assessment committee for any union shall have approved valuation-lists for all the parishes comprised within such union, the guardians of such union, in computing the amount of contribution to the common fund for the several parishes, shall thenceforward take the annual rateable value of the property in such parishes respectively from the valuation-lists for the time being lastly approved of for such parishes respectively, any statute to the contrary notwithstanding." For the purpose of contribution those lists are made up. Then come the saving clauses, ss. 35, 36, which [567] were introduced for the purpose of preventing any injustice being done between the parishioners of individual parishes inter se. The 35th section supports the construction which the court is inclined to put on the mode in which the rate ought to have been made even before the 25 & 26 Vict. c. 103. It says "nothing herein contained shall be construed to prevent the owners of tenements from compounding for the rates to be assessed on the same, in such manner as they were by any statute or statutes enabled to do before the passing of this act,"—clearly treating it as a composition on the rate, and not as an alteration in the rateable value. The framers of the act evidently did not suppose that the column "rateable value" would be interfered with in cases where there was a simple composition for the rate. The case of *Euston v. Allen*, 7 Hurlst. & N. 452, does not at all interfere with our present decision. The case turned upon the construction of a clause in an act of parliament which gave a qualification to local commissioners. The court thought the language somewhat doubtful: but, upon the whole, they came to the conclusion that the words "twelve inhabitant householders rated to the relief or maintenance of the poor to the amount of 10*l.* per annum," were satisfied if the persons elected to be commissioners occupied property the rateable value of which was assessed at 10*l.* That was a decision really in favour of the qualification. Channell, B., in giving judgment, says: "I also think a reasonable construction ought to be put upon the act. A strict construction might favour the plaintiff's view: but, giving the act a reasonable construction, the defendant is entitled to judgment." Here, we are dealing with acts of parliament passed for a totally different purpose: and the only question for us is, whether this [568] valuation-list is right or wrong. The language of the act is so express and plain that I think we can give no other effect to it than by holding that the assessment committee have taken the right view, and that the true rateable value ought to be inserted.

The court being divided in opinion as to the first point argued, and upon which they took time for deliberation, their opinions thereon were now delivered seriatim, as follows (a):—

ERLE, C. J. The question relating to the rateable value of the small tenements was answered at the time of the argument.

The questions relating to the rateable value, first, of the breweries, and, secondly, of the tied public-houses, are now to be disposed of.

The case relates to five breweries and a number of public-houses tied to each brewery, some being in the same parish with the brewery to which they are tied, and some in a different parish. It seems from the case that all the breweries are rated on some principle known to the assessment-committee, without referring to the title deeds and leases. For the purpose of this judgment, I will take the case as if it

(a) The antient practice was,—and it is seldom departed from even in modern times,—for the junior puisne judge to deliver his opinion first, and the Chief Justice's opinion to come last.

related to one brewery in one parish, and one public-house tied thereto by a contract for beer in another parish : and then the facts relevant to the question before us are, that the occupier of the public-house holds it under a lease from the occupier of the brewery ; that in the lease he contracts to take beer from his landlord's brewery ; and that the rent to be paid for the public-house is adjusted by reference to this contract. Thus, [569] a loss is caused to the tenant in respect of the beer he buys, that is, he pays more for it than he would have to pay if he traded free from such contract. A gain also is caused to the landlord's brewery, for the same reason.

The case does not state that the gain to the brewery is greater, or less than, or equal to, the loss of the public-house : but, as nothing is stated to the contrary, I assume it to be equal.

Thus, the rent in money to be paid and received respectively, is less than it would be if the house was free, by the amount of such respective loss and gain ; but the value that passes between the landlord brewer selling beer on the one side, and the tenant publican buying beer on the other side, is the same as it would be if the house was free.

The overseers making out the valuation-lists for these parishes, and setting down the rateable value of this brewery and of this public-house, among the others, have obeyed literally the commands of the Union Assessment Act and the Parochial Assessment Act, that is, they have estimated the gross rent which each of those tenements would be worth to a free occupier, and, in making that estimate, they have excluded from their attention, as they were bound to do, any reference to special profits of trade by reason of special contracts in leases or otherwise.

The assessment-committee, in revising these valuation lists, have made an alteration, by increasing the estimate of the gross rent which the brewery could command. They do not state on what principle they have made this increase, or on what evidence they have acted ; but they have raised the rateable value from 254l. to 355l. in the example set out in the case, being nearly the ratio of increase which was approved of in the case of *Allison v. Monkwearmouth Shore*, [570] 4 Ellis & B. 13. It is further stated that, although they have followed that case in raising the rateable value of the brewery on account of the tie, they have not lowered the rateable value of the public-house by the amount of the loss caused by the tie, probably because the judgment in *Allison's case* does not refer thereto.

We are thus called upon to decide between the overseers and the assessment-committee : and in my opinion the overseers are right.

In support of that opinion, I would premise some observations before examining the application of the case of *Allison v. Monkwearmouth Shore*, on which the assessment-committee rely. I would premise that the Union Assessment Act now under consideration has a purpose ulterior to that of the Parochial Assessment Act, which alone was under consideration in *Allison v. Monkwearmouth Shore*. The purpose of the Parochial Assessment Act is, to provide for equality in the rating of each of the rateable subjects in one parish. The purpose of the Union Assessment Act is, to provide for equality in the rating of each aggregate of rateable values in each of the parishes of the union. This latter purpose is to be effected by applying with correct uniformity throughout every parish of the union the principles for estimating value as required by the Parochial Assessment Act. The valuation-lists are made a permanent standard of value, whereby to assess all the rateable subjects within the union, both to the parochial and to the union assessments, until an alteration shall have been made : and, although a mode of alteration is provided, yet, considering the expense and difficulty of a survey of the rateable property in a union, an alteration will not be easily made. It is therefore commanded by those statutes, as I understand them, that the estimate of the rental should be [571] confined to corporeal hereditaments, and should be founded on the more permanent elements of value found therein, excluding the effect of temporary contracts and other such accidents.

I would further premise that, as the case is stated, there is no ground for assuming that the aggregate value of the two tenements does not continue the same, whether they are held separately or jointly, there being no statement of any increase of value by reason of any combination. Then, if the brewery gains by the tie what the public-house loses thereby, and no more, the aggregate amount of the rateable values of the two tenements ought to be the same, whether they are rated together or separately, whether they are held under the same or under different landlords.

Under these circumstances, the notion that the rateable value of the brewery could be increased by the gain from the tie, without lowering the rateable value of the public-house to the same extent by reason of the loss from the tie, was so untenable that the counsel for the respondents did not offer to maintain it. By that admission, the question to be answered is narrowed to the point whether the whole rateable value of the public-house shall be set down in the list for the parish where it is situate, or partly therein and partly in the parish where the brewery is situate to which it is tied.

That question may be raised in respect of four changes of the relation between the respective occupiers of the brewery and of the public-house.

First, I would take the case where the owner of both is the occupier of both,—the brewer carrying on the public-house by a servant. Here there is no lease and no tie, and each rateable subject would be rated in the parish where situated, upon the ordinary principle, and the contingent possibility of a tie, in case [572] there should be a lease of each, would be immaterial. The value thus ascertained is the true rateable value for the list.

Secondly, I would take the case where the owner of both tenements occupies the brewhouse, worth say 200l. per annum, and lets the public-house to a publican, say at 20l. per annum, without any contract relating to beer. The house would be free, and the rateable values would be the same as in the last case, unaffected by a tie.

Thirdly, I would take the case where the owner of both tenements occupies the brewery, and lets the public-house with the tie, that is, with the contract for taking beer; the money rent being lowered, say to 10l., and the beer overcharged, say to the same amount. In this case also it seems to me that the rateable value of each remains the same, and would be rated in the parish where situate.

Fourthly, I take the case where the owner of both tenements makes a lease of each, first letting the public-house, assumed to be worth 20l., for 10l. monied rent, with a contract for taking beer, which is worth 10l. gain to the brewer, and then letting the brewery with the benefit of that contract, the brewery by itself being worth 200l. per annum, the benefit of the tie being worth 10l. per annum. Thus, the rent for the brewery with the contract is 210l. per annum. Under these circumstances also it seems to me that each tenement should be rated, in the place where it is situate, at the rent which it would command if let by itself without the tie, and that a decision that the rateable value in this fourth case is different from that of the former cases, would in effect hold that the rateable value depends on the actual occupation, not on the estimated rental, which is contrary to the Assessment Acts, as I understand them.

[573] Moreover, if the rateable value is altered by the tie, the overseers making the rate ought to know whether it exists. Its existence depends on the title-deeds and leases of the brewer and publican. If the overseers are to rate for the tie, it seems to follow that they ought to inspect and understand those documents of title; and this consequence seems to me absurd.

The assessment committee do not refer to any such source of knowledge. Perhaps they have increased the rate on every brewery to a large amount, assuming that the tie exists, and they expect the brewer to produce his deeds, to relieve himself if that assumption be wrong. But such a principle of rating cannot be sanctioned by any court of Westminster.

I now proceed to the case of *Allison v. Monkwearmouth Shore*. The facts of that case seem to me to be materially different from those here stated: and the statute here to be construed is different from the statute there in question, and therefore it is not necessary to decide whether an opinion given by a court by way of advice, from which there is no appeal, is as binding on co-ordinate courts as a judgment would be, where the same question is sent up to a second court for its opinion. I should think not. It seems to me that each court is in such case original, and bound to give its own judgment; just as, on a motion for a writ of habeas corpus [or a prohibition], each tribunal must give its own decision, without being swayed by other tribunals. But, as already observed, it may be that we are not called on here to say that any former case should be overruled.

In *Allison v. Monkwearmouth Shore*, the title-deeds and leases were produced by the brewer, and the facts relevant to the rating of the brewery for the supposed profit from the tie were taken therefrom. Those facts were, that Sir Marmaduke Williamson was owner of a [574] brewery of which the rateable value by itself was 350l., and

thirty-three public houses, of which the rateable value is not given. These public-houses he had let, with the contracts to take beer, at monied rents amounting in the aggregate to 150l. He then leased to Allison for seventeen years the brewery, with the goodwill of these public-houses, as it is called, subject to the payment of the rents theretofore received by Williamson, that is, yielding in respect of the brewery, and fixtures 350l., and *in respect of the public-houses* 150l. This sum of 150l. thus described as rent is found to have been in substance the rents of the public-houses collected by Allison for Williamson during the existing leases. When the tenancies changed, Allison let to the new tenants, and continued to receive during the term the same monied rent from those public-houses, amounting to about the sum of 150l. per annum, which he paid to Williamson under the above mentioned covenant. The lease of the goodwill of the public-houses is thus shewn by the case to have been in effect a lease of the public-houses. The court held that Allison was liable to be rated for this sum of 150l., being the amount of rents so received. The case also finds that all the tenants were assessed for their public-houses; but the value is not stated. These being the facts, the judgment affirming the rate on the brewer for the amounts of rents collected by him and paid over to the superior landlord, has the singular effect of holding that a rent collector may be rateable for the amount of rents which he collects, where the given relation of brewer and publican is found to exist.

The case is also singular in this, that, although, as a general rule, the province of the courts here is confined to deciding on rateability only, and does not extend to deciding on amount, yet the court, in thus holding the brewer liable to be rated for [575] the rents collected, refused to give permission to go into the question of the cost of the production of the supposed rateable value of 150l., and assumed that the covenant to pay that sum as rent of the brewhouse was conclusive of rateable value, although the deed shewed it was rent collected. The case also found that Mr. Allison rented other public-houses not of a brewer landlord, which he sub-let to publicans with the contract for beer. The notion of rating him for the rent he received from these publicans seems not to have been attempted: but, if he was liable for those he rented of Williamson, it is difficult to say why he was not liable for those rented of others. If the attempt had been made to rate him for every public-house under contract with him to take beer, it would have been the rating of a profit of trade; and yet the profit from beer to Williamson's public-houses was the same profit of trade as that from other public-houses.

Furthermore, there is sound distinction between that case and the present, on the ground that the valuation-lists relate to the whole union, and all the tenements are at once to be assessed. Under the former acts before the Union Assessment Act, there was a defect in deciding appeals on rates, because only one tenement was the subject of the judgment at a time, and, in apportioning the rateable value of two or more portions of the same rateable subject in two or more parishes, the injustice of doubly rating the same rateable subject might be inflicted in the apportioning process, unless all the portions were disposed of at once. Accordingly, in *Allison's case*, although it appeared that the tenants of the public-houses were rated, as well as the tenant of the brewery, yet the court had no power of inquiring, and did not inquire, whether the public-houses were rated at their full value, and whether the rating of Allison for the rents [576] which they paid to him was not in reality a double rating of the rent of these public-houses, that is, once on the tenant, and again on Allison.

Here, the overseers have rated all the public-houses, as well as the brewery, according to the principles of the Assessment Acts; and, according to those principles, the publican would have to pay a rate both on the lower money payment and higher beer charge which he pays to the brewer, his landlord, under the contract.

There is no suggestion that any further value is created by this relation of landlord and tenant. If the suggestion was made, it certainly could not be ascertained without taking an account of the profits of the beer trade, involving an account of all losses by insolvency and otherwise; and so it would be made apparent that it was an attempt to rate a profit of trade.

If the doctrine is established, that the supposed profit from a publican tenant taking beer by contract is rateable upon the brewer, the question would arise why the same profit arising by reason of a publican debtor contracting to take beer from the brewer creditor should not be also assessed. The tie is created as well by a loan secured by a bill of sale as by a covenant in a lease, that is, unless the publican can

pay off the loan, he may be broken up, as it is called, at any time; and yet the attempt to make such a profit of trade rateable has not been made. It is also clear that a brewer differs not in respect of this liability from a butcher, a baker, or the like. If the brewer landlord is to be rated as Allison was, other tradesmen landlords influencing custom by letting retail tenements with contracts for custom, ought to be rated; but such an item of rateable value has never been recognized.

For these reasons, the case of *Allison v. Monkwearmouth Shore* [577] seems to me distinguishable from the present. In the judgment delivered by me in that case, I endeavoured to distinguish the right of the occupier of a soke-mill derived from immemorial custom to the servitude of all within the soke, and the right of the occupier of a canteen placed in a populous locality, from a right derived under such a contract as that in *Allison's case*. I refer to the reasons there given, which appear to me to have more force when applied to a valuation-list fixing the rateable value of each rateable subject in the union on the principles above explained; and I will not increase the length of this judgment by repeating what I am reported there to have said.

I will only add, as to the soke-mill, that the prescriptive rights of the miller of that mill to the multure from the inhabitants of the soke, is a reality affecting the fee-simple of the whole locality, and the immediate profit fixed by the custom is subject to no risk of trade, if the miller may take his toll in kind; whereas, the right of the landlord to sue on the contract for taking beer is a personality, affecting only the persons of the contracting parties; and the profit therefrom varies, in proportion to the skill of the contracting parties, and is subject to all the risks of trade from insolvency, dishonesty, and the like. If this be correct, the profit to the mill from the prescription is rateable, and the profit to the brewer from the contract for beer is not.

Upon this review, I come to the conclusion that the judgment should be for the appellants.

BYLES, J. In this case, no question arises as to the aggregate rateable value of the whole brewery concern, including in that expression both the brewery, properly so called, and the restricted public-houses. The [578] question is, how that rateable value should be distributed between the brewery itself and those restricted houses.

It has been decided by the court of Queen's Bench in *Allison v. Monkwearmouth Shore*, 4 Ellis & B. 13 (by which decision I think we are bound), that the monopoly which a brewery enjoys over its tributary public-houses enhances the rateable value of the brewery. It is a necessary consequence that it diminishes the rateable value of the public-houses. It doubly affects, or may affect, their annual value to the occupiers, who not only pay more for their beer, but, being shut out from the benefit of buying in the open market, may be obliged to purchase an inferior article, and to suffer a diminution of the extent of their trade, as well as of their rate of profit. These public-houses do in consequence actually let at a lower rent than they would otherwise command.

It is objected that a mere personal contract cannot diminish the rateable value of land or houses. But the statute 6 & 7 W. 4, c. 96, establishes as the criterion of rateable value the rent (subject to the deductions there enumerated) which a tenant, not for a long term of years, but *from year to year*, would give.

The statute does not, it is true, make the actual rent reserved the criterion of rateable value, but the true theoretical rent, that is to say, the sum at which, making the statutable deductions, and having regard to all the surrounding circumstances, the tenement ought to command. Yet, the statute, by adopting a supposed tenancy from year to year, seems to exclude a valuation of distant future advantages or disadvantages of the property demised, and to regard its actual condition at the time of the rate, or, at furthest, in the immediate future.

Now, if the natural or ordinary advantages of a [579] tenement are taken away from it, and annexed to another tenement, that should seem to be a diminution of the value of the first tenement, and an augmentation of the value of the second. It seems to me that it makes no difference whether the severance arise from modern contract, or from prescription, which pre-supposes an antient contract.

In this case, the ordinary advantages of the tenement are by a permanent contract between landlord and tenant taken away from the tenant's tenement and annexed to the landlord's tenement.

If it be said that the surrender of these ordinary advantages by the tenant to the landlord is in effect *rent* paid by the tenant to the landlord, I should respectfully answer that it is straining the word "*rent*" as used in the statute, to give it this

extensive signification. Moreover, there are cases much nearer to a reservation of rent-service to the landlord than the case now under consideration, in which cases nevertheless the reservation of valuable privileges to the landlord on the one hand, or the enjoyment of them by the tenant on the other, have been held respectively to diminish or augment the rateable value of the tenant's occupation. Thus, it has been decided that, if the landlord allows to the tenant the right of shooting, the tenant will be rated at more, but, if the landlord reserves it to himself, the tenant will be rated at less: *The Queen v. Thurlstone*, 28 Law J., M. C. 196. Some ornamental squares in the metropolis must by mere private contracts for a long term of years be used as squares; and no one would hire them subject to those contracts. Their rateable value, though in itself very great for many purposes, is taken away by contract: and by contract it is transferred to the adjoining property, for it is included and rated in the increased value which the ornamental square confers on the [580] mansions that surround it. A house in Cheapside, let as a shop, for which it is adapted by situation and construction, would command a large rent: but, if it be subjected by the ground-landlord to a stipulation that it shall be used as a dwelling-house only, and not as a shop, its rateable value in the occupation of a tenant is reduced by the effect of a contract.

It is no objection that a portion of the value of the land may in some cases escape the rate altogether; for, the statute of Elizabeth imposes the rate, not on the *land*, but on the *person* of the occupying tenant, in respect of his ability, as tested by the annual value of the land: for, originally, an inhabitant and occupier was rated for personal property as well as real property: and it has been repeatedly held that the poor rate is no charge upon the land: *Thred v. Starkie*, 8 Mod. 314. Nor is there much danger of abuse: for, in ordinary cases, that method of letting which will produce most rent will be preferred by the landlord.

It is true that pecuniary charges on the land created by contract, as ground-rent, rent-charges, annuities, interest of mortgages, and the like, are not to be deducted from the rateable value of a tenement: but that is because the legal criterion of rateable value is, by the provision of the statute, the rent which a tenant from year to year would give for the land in its actual condition, subject to certain deductions, among which are tithes, rates, taxes, insurance, repairs, &c., but among which deductions pecuniary charges created by contract are not to be found. But, in truth, the statute of 6 & 7 W. 4, though not in form declaratory, made very little alteration in the principles of rating before accepted by courts of law.

For these reasons,—differing with respect and re-[581]-luctance from the judgment of the Lord Chief Justice and my Brother Montague Smith, —I think the assessment committee were right in their decision.

MONTAGUE SMITH, J. I agree with my Lord that the judgment on the first and second questions of this special case should be for the appellants. These questions in substance are,—whether the rateable value of a brewery to be inserted in a valuation list, under the Union Assessment Act, 1862, is to be increased beyond the ordinary rateable value of the like property, and the rateable value of certain public-houses is to be reduced, because the owner of both has made a contract with his tenants of the public-houses that they shall buy all their beer of him as brewer, at a price beyond the fair market-price of the beer.

It is contended by the counsel for the respondents, that the rateable value of the brewery should be increased, and as a consequence (which he admits) that the rateable value of the public-houses should be reduced by reason of these contracts; and this although the properties may happen to lie in different parishes.

It appears to me that this contention is not well founded, and that the contracts between the brewer and the publicans do not form a basis for either raising or diminishing the gross or net rateable value as defined by the statutes, for the purpose of the valuation-list under the recent act.

In estimating the rateable value, or “the rent at which these properties might reasonably be expected to let from year to year,” the value of the tenements as they stand and are fitted up, the use to which they may be applied, their local position, and other like circumstances, are to be considered. In the case of the brewery, the capacity of the building and premises for [582] carrying on trade, and also the fact that a trade corresponding to its capacity would *prima facie* be carried on in it, would be proper elements to include in the estimate, subject, however, in the case of the

latter element, to modification if it were shewn, as in the case of the idle cotton-mill (*Staley v. The Overseers of Castleton*, 33 Law J., M. C. 178), that the trade was not in fact carried on. But these contracts, if considered, would introduce personal and collateral matters into the estimate, not directly bearing on the occupation of the property and the uses to which it is applied. The contracts here are really modes by which the owner of the two properties chooses for the time, not to alter the nature or uses of the occupation of the properties, but to apportion and regulate his own rents and profits.

Assume that the owner and occupier of the brewery derives increased profit as a brewer from the contract, there is on the other hand a corresponding loss to him as owner of the public-houses: and, if this profit so purchased is held to add to the rateable value of the brewery, it would follow that that value must be reduced below the ordinary rateable value of the like property, in case the brewer chose to foster his public-houses at the expense of his trade as brewer by contracts to sell beer to his tenants at a loss. It seems to me that such grounds of raising and depressing rateable value are not warranted by the statutes.

The difficulty of importing such contracts into the estimate of rateable value is still more apparent when we are called on to reduce the rateable value of the public-houses below that of other like houses. I am unable to find a sound principle for such a reduction.

The public-houses are occupied, their capacity for trade exists, and a trade is actually carried on in them. These things afford the ordinary elements for [583] estimating rateable value: but neither the particular rent a tenant pays, nor the particular profits or losses of his individual trade depending on provident or improvident contracts in relation thereto, can, I apprehend, be imported. It may be assumed here that the profits of the publican's trade are cut down by the contract, with the consequences, as found in the case, that the publican pays less rent: but rateable value is not altered by the actual rent being more or less than the rent the premises would reasonably command from a yearly tenant. Rent is no more than presumptive evidence of value: and, this being so, I think the rateable value of the public houses remains unaffected, although the actual rent may be below what, without the contract in question, the house would let for. If it were to be held otherwise, and the contract of the publican happened to be so onerous in its terms that no new tenant would give more than a nominal rent for the public-house burthened with a like contract, it would follow from the argument of the respondents that the house must be rated at a nominal value only. But, in truth, in the case of these public-houses, the publicans are really paying a part of their rent in the extra price they are charged for the beer, and clearly the shape in which they pay cannot alter the rateable value of the house.

The facts of the case of *Albison v. Monkwearmouth Shore*, 4 Ellis & B. 13, differ in some respects from the present: and the question of reducing the rateable value of the public-houses was not in that case before the court for decision. Here, we have to decide that question, and to decide it upon the provisions of the recent statute. Notwithstanding the respect which I feel for the opinion of the two learned judges who formed the majority of the court, their decision which [584] could not be appealed from, ought not I think to be conclusive in this case.

On the first and second questions of this special case, I think the appellants are entitled to judgment.

Judgment for the appellants.

BILBEE v. THE LONDON, BRIGHTON, AND SOUTH COAST RAILWAY COMPANY.
May 9th, 1865.

[S. C. 34 L. J. C. P. 182; 13 L. T. 146; 13 W. R. 779; 11 Jur. N. S. 745. Considered, *Stubley v. London and North Western Railway*, 1865, L. R. 1 Ex. 13. Followed, *Stapley v. London, Brighton and South Coast Railway*, 1865, L. R. 1 Ex. 21. Referred to, *Skelton v. London and North Western Railway*, 1867, L. R. 2 C. P. 631. Commented on and explained, *Cliff v. Midland Railway*, 1870, L. R. 5 Q. B. 258. Referred to, *Clarke v. Midland Railway*, 1880, 43 L. T. 382.]

1. *Quere*, as to the extent of the obligation of a railway company to place guards at level crossings!—2 A railway crossed on a level a public carriage and footway at

a spot which, from the fact of there being a considerable curve in the line, and a bridge near, trains coming in one direction were not seen until very close, was peculiarly dangerous. There were gates across the carriage-way which were kept locked; but the footway was protected only by a swing-gate on either side, no person being there to caution people passing. The plaintiff while using the footway was knocked down by a passing train, and injured:—Held, that it was properly left to the jury to say whether or not the company had been guilty of negligence.

This was an action against the London, Brighton, and South Coast Railway Company, for negligence.

The first count of the declaration stated that, before and at the time of the committing of the grievances thereafter mentioned, the defendants were the proprietors of a railroad which crossed a highway for carts and carriages on a level, yet that the defendants did not employ any guard or proper person or persons, or any person whatever, to open and shut the gates next to the said highway, so that persons passing along the said highway should not be exposed to danger or damage by the passing of carriages and engines along the said railroad, nor did they take due or proper care of the said crossing or for the protection of persons using the same, but therein wholly failed and made default, contrary to the form of the statutes in such case made: by means of which premises, and of the neglect and default of the defendants in that behalf, the plaintiff, who was then lawfully using the [585] said highway where the said railroad crossed the same, was knocked down by an engine and carriages passing along the said railroad, and his arm was broken, and he was otherwise bruised, wounded, and injured, and became and was sick, and so continued for a long time, and was put to expense, and disabled from earning his living as a brick-maker, or otherwise, and was and is otherwise injured.

The second count stated that, before and at the time of committing the grievances thereafter mentioned, the defendants were possessed of a locomotive engine and train of carriages, which were then under the care, management, and direction of certain servants of the defendants, who were then driving the same across a highway; nevertheless, the defendants, by their said servants, so carelessly, negligently, and improperly drove, governed, and directed their said engine and carriages that, by and through the mere carelessness, negligence, and improper conduct of the defendants by their said servants in that behalf, the said engine and carriages of the defendants ran against and struck the plaintiff, who was then lawfully in and upon the said highway, and knocked him down, and bruised, wounded, and injured him; by means of which premises he became maimed, sick, and disordered, and disabled from earning his living as a brick-maker or otherwise, and was put to expense, and otherwise injured: Claim, 500l.

The defendants pleaded not guilty, whereupon issue was joined.

The cause was tried before Erle, C. J., at the sittings in London after last Hilary Term, when the following facts were given in evidence:—On the morning of the 11th of July last, the defendant, a labourer, was passing a level crossing about half a mile from the Thornton Heath station on the Croydon and Balham branch [586] of the defendants' railway, when he was knocked down by the 9.40 express train from Victoria station to Brighton, and had one of his arms broken, and received other injuries which rendered him unable to work for several weeks. The road in question is an accommodation road for the use of such persons as might occupy the houses then in the course of building thereon. There was a carriage way with gates on each side of the railway which were kept locked, and were opened only when carts or other vehicles were passing through: and there was also a foot-path with a swing-gate at each side for the accommodation of foot-passengers, which was not fastened. The plaintiff had resided for some time in the immediate neighbourhood.

On the part of the plaintiff it was proved that there was considerable traffic on this part of the railway; that there was no person in charge of the gates at the crossing in question, and no caution board; and that, there being a sharp curve in the line, and a bridge on the Victoria side a short distance off, a person crossing could not see a train approaching from that side until he was actually upon the rails.

On the part of the defendants witnesses were called who stated that an approaching train could be seen on the Thornton Heath side at a distance of about four or five hundred yards, and on the Croydon side about seven or eight hundred yards: and it

was further proved that there are numerous foot and carriage-ways crossing the company's line at various parts on a level, with gates like those at the crossing in question; and that, by reason of the great expense that would thereby be entailed upon the company, it was not the practice to station persons to guard them; nor was it usual to do so on other railways.

For the plaintiff it was insisted that the company were bound to keep some person at all level crossings, [587] to prevent injury to the public lawfully using them: and reliance was placed on the 2 & 3 Vict. c. 45, s. 1, which, after reciting the 5 & 6 W. 4, c. 50, s. 71, enacts "that, wherever a railroad crosses or shall hereafter cross any turnpike-road, or any highway or statute-labour road for carts or carriages, the proprietors or directors of the company of proprietors of the said railroad shall make and maintain good and sufficient gates across each end of such turnpike or other road as aforesaid at each of the said crossings, and shall employ good and proper persons to open and shut such gates, so that the persons, carts, or carriages passing along such turnpike-road or highway shall not be exposed to any danger or damage by the passing of any carriages or engines along the said railroad."

For the defendants it was insisted that there was no duty imposed upon the company by the common law to guard these crossings, and no statutory obligation save that created by the 47th section of the Railways Clauses Consolidation Act, 8 & 9 Vict. c. 20, which requires the company to have a person in charge of the gates, where "the railway crosses a *turnpike-road* or *public carriage-road* on a level,"—a provision which, it was submitted, did not apply to a road like this. It was further contended that the plaintiff had by his own negligence and want of caution materially contributed to the accident.

The learned judge intimated an opinion that there was no obligation on a railway company to have a person in charge of the gates where the level crossing is for the use of foot passengers only, the statute being confined to public carriage-ways: and he left it to the jury to say whether or not the company had been guilty of negligence.

The jury returned a verdict for the plaintiff, damages 60l.

[588] Bovill, Q. C., on a former day in this term, pursuant to leave reserved to him at the trial, obtained a rule nisi to enter a verdict for the defendants, on the grounds that, upon the facts proved, the plaintiff did not establish his case, and that there was no evidence of any neglect of duty or default by the defendants, that there was no statutable or other duty to keep a man at the foot-crossing, and that the accident arose from the plaintiff's own deafness and want of caution (a).

Parry, Serjt., and Joyce, now shewed cause. The question is, whether there was any evidence of negligence on the part of the company, or whether they were guilty of the breach of any duty imposed upon them by any statute or by the common law. [Erle, C. J. I thought that there was no such obligation on the company as suggested where the railway crossed a foot-way only, but only where it crossed a carriage way.] The plaintiff lawfully using the way in question,—which was proved to be a public way for carriages, horses, and foot-passengers,—was entitled to complain if it was kept in a dangerous condition. *Scott v. The London Dock Company*, 34 Law J., Exch. 17, is precisely in point. There, the plaintiff, a custom-house officer, was injured while on the defendants' premises in the course of his duty, by goods falling on him from a crane fixed over a doorway under which he was passing: no explanation was given of the cause of the goods falling: and it was held by Channell, B., and Pigott, B.,—following *Byrne v. Bowdle*, 2 Hurlst. & Colt. 722,—that it was for the defendants to shew that the accident was not the result of negligence on their part, and not for the plaintiff to make out that it was: Martin, B., [589] holding the contrary, upon the authority of *Hammack v. White*, 11 C. B. (N. S.) 588, 594. The special act, no doubt, empowered the defendants to lay down their rails in the manner they did: but that does not exonerate them from the duty of guarding against unnecessary inconvenience and danger to the public. Some means should be taken, either by keeping the gates locked or placing a person to warn the public when a train is coming: and this was more especially requisite at the spot in question, which was proved by the witnesses to be, from the construction of the line, and the obstruc-

(a) This latter would only be ground for a new trial as for a verdict against evidence.

tions upon it, more than commonly dangerous. A swing-gate like this, which a child might push open, was no protection at all. The statutory duty imposed upon railway companies by the 2 & 3 Vict. c. 45, is not repealed by the 8 & 9 Vict. c. 20. The 47th section of the last-mentioned act (*a*)¹, it is true, in terms applies [590] to "any turnpike-road or public carriage-road;" but a carriage-way includes a foot-way, and foot-passengers are entitled to the same protection. [Erle, C. J. We cannot lay it down as a general rule that a railway company must in all cases have a gate or a porter at every part of their line where a foot-way is crossed on a level.] In *Fawcett v. The York and North Midland Railway Company*, 16 Q. B. 610, the facts were these:—The York and North Midland railway crossed a highway on a level, and there were gates across each end of the road where it intersected the line of railway: the plaintiff's horses strayed from his field into the highway, through the gates (which were open) on to the railway, and were in consequence there killed by a train: and it was held that by the statute 5 & 6 Vict. c. 55, s. 9 (*a*)², an obligation was imposed on the company to keep the gates closed as well against cattle straying on the highway as against cattle travelling thereon (*b*), and that the plaintiff was entitled to recover the value of the horses. In *Marfell v. The South Wales Railway Company*, 8 C. B. (N. S.) 525, the defendants were the owners of a railway and also of a tramway which for some distance ran by the side of the railway, and was separated from it by a hedge or fence, also belonging to the defendants, down to a point where the tramway crossed the railway. At this point the company had placed swing-gates to separate [591] the tramway from the railway: but these were seldom, if ever, closed. The tramway was used by the public for drawing coals and other goods in trucks along it by means of horses, a toll being paid to the defendants for its use. The plaintiff's servant was proceeding along the tramway with certain horses and trucks, when one of the horses, alarmed by the noise of an approaching train, swerved on to the railway, and was knocked down and killed. In an action against the company, charging them with negligence in omitting to use reasonable or proper means to prevent their engines and carriages doing damage or injury to persons lawfully being upon and using the tramway,—the jury having found (as here) that the company were guilty of negligence,—it was held by Williams, J., and Byles, J. (Erle, C. J., dissenting), that the plaintiff was entitled to recover. It is impossible to distinguish that case from the present.

Bovill, Q. C., and Hannen, in support of the rule. It is scarcely possible to exaggerate the importance of this question to railway companies. The legislature having conferred upon them the right to cross turnpike-roads and highways on a level, the public must know that the use of the way is thereby rendered more dangerous, and consequently that it is necessary where the privilege is exercised to

(*a*)¹ Which enacts that, "if the railway cross any turnpike-road or public carriage-road on a level, the company shall erect and at all times maintain good and sufficient gates across such road on each side of the railway where the same shall communicate therewith, and shall employ proper persons to open and shut such gates; and such gates shall be kept constantly closed across such road on both sides of the railway, except during the time when horses, cattle, carts, or carriages passing along the same shall have to cross such railway; and such gates shall be of such dimensions and so constructed as when closed to fence in the railway and prevent cattle or horses passing along the road from entering upon the railway: and the person intrusted with the care of such gates shall cause the same to be closed as soon as such horses, cattle, carts, or carriages shall have passed through the same, under a penalty of 40s. for every default therein: Provided always that it shall be lawful for the Board of Trade in any case in which they are satisfied that it will be more conducive to the public safety that the gates on any level crossing over any such road should be kept closed across the railway, to order that such gates shall be kept so closed, instead of across the road, and in such case such gates shall be kept constantly closed across the railway, except when engines or carriages passing along the railway shall have occasion to cross such road, in the same manner and under the like penalty as above directed with respect to the gates being kept closed across the road."

(*a*)² Which recites the 2 & 3 Vict. c. 45, and which is substantially re-enacted by the 8 & 9 Vict. c. 20, s. 47.

(*b*) And see *The Midland Railway Company, App., Daykin, Resp.*, 17 C. B. 126.

use greater caution in crossing the line. No notice could have given this plaintiff, who resided in the immediate neighbourhood and was constantly passing and re-passing to and from his work across the line, more information than he already possessed. As far as concerns a foot-way, there can be no obligation or duty nor any power in the company to place an obstruction in the way. They may obstruct carriage-ways by proper gates, but not foot-ways. To require the company to keep a man at [592] every place where the railway crosses a foot-path, would be onerous in the extreme, and utterly impracticable. Assuming that the 2 & 3 Vict. c. 45, and 5 & 6 Vict. c. 55, s. 9, are not repealed by the 8 & 9 Vict. c. 20, s. 47, they relate only to highways for carts and carriages. There was no common-law duty and no statutory obligation on the company to do any more than they have done. And the plaintiff himself was clearly negligent. The case in this respect very much resembles that of *Cotton v. Wood*, 8 C. B. (N. S.) 568, where, in an action for alleged negligence in driving an omnibus, it was held that the judge was not justified in leaving the case to the jury, when the plaintiff's evidence is equally consistent with the absence as with the existence of negligence in the defendant.

ERLE, C. J. I am of opinion that this rule should be discharged. I am fully impressed with the duty of the courts not to impose upon railway companies burthens larger than the legislature has intended that they should bear: and I do not mean to lay it down as a rule that they are bound to place guards wherever a footway crosses the line on a level, or to interfere in any way with any statutory duties or obligations of railway companies. The ground upon which I decide in favour of the plaintiff on this occasion is, that the great degree of risk incurred by persons exercising their public rights on this particular spot, owing to the large number of trains passing daily, the sharpness of the curve, and the obstruction of the view caused thereby and by the adjacent bridge, should have induced the company to exercise more vigilance. Under all the circumstances, I am unable to say that the judge was bound to nonsuit the plaintiff.

BYLES, J. I entirely agree with my Lord in think-[593]-ing that this rule should be discharged,—confining myself, as my Lord has done, to the peculiar circumstances of the present case.

KEATING, J. I also think that the peculiar danger of the spot in question called for the exercise of greater caution on the part of the company than was shewn.

MONTAGUE SMITH, J. The frequency of the trains and the other circumstances referred to called for more vigilance than the company seem to have exercised.

Rule discharged.

LYNE v. WYATT. April 26th, 1865.

[34 L. J. C. P. 179; 12 L. T. 383; 11 Jur. N. S. 446; 13 W. R. 688.]

The defendant, to an action against him as the acceptor of certain bills of exchange, pleaded a composition-deed under s. 192 of the Bankruptcy Act, 1861, by which, reciting that he was indebted to *his creditors* in divers sums of money, and particularly to *the parties of the third part* in the several sums set opposite to their names in the schedule, and, being unable to pay them all in full, had agreed to execute an assignment, he conveyed all his estate and effects to trustees, in trust for distribution amongst *all his creditors*. Then came a covenant by *the parties of the third part* not to sue the debtor, and that, if any of them should do so, the debtor should be and he was thereby “acquitted, exonerated, and for ever discharged of and from all actions, suits, debts, and demands whatsoever, of the creditor by whom he should be so sued, and those presents might be pleaded in bar thereto as effectually as a release under the hands and seals of the creditors might or could be:”—Held that, if this clause by force of the Bankruptcy Act applied to non-assenting creditors, it was unreasonable, and, if it did not, there was no release by them, and therefore, in either view, it could not be pleaded in bar to an action by a non-assenting creditor.

This was an action by the plaintiff, the indorsee, against the defendant, as the acceptor of several bills of exchange, for 270l., 280l., 450l., and 200l. respectively; with a count upon an account stated.

The defendant pleaded,—thirdly, that, after the accruing of the said causes of action in the declaration mentioned, and after the 11th of October, 1861, and after the commencement of this suit, and before the [594] plaintiff declared therein, the defendant, being a debtor unable to meet his engagements, within the meaning of the Bankruptcy Act, 1861, a deed was made and entered into between the defendant of the first part, and certain parties, trustees, therein mentioned, of the second part, and certain creditors of the defendant of the third part, relating to the defendant's debts and liabilities, and his release therefrom, the same being a deed executed by the trustees, and by certain creditors of the defendant, and by the defendant, being such debtor, within the true intent and meaning of the Bankruptcy Act, 1861, and which said deed, without the schedule thereunder written, was in the words and figures following, that is to say,—“This indenture made the 29th of February, 1864, between George Wyatt, of, &c., builder (hereinafter styled debtor) of the first part, Thomas Parker, of, &c., William Hancock, of, &c., and Charles Richardson, of, &c. (hereinafter styled trustees), of the second part, and *the several other persons whose names and seals are hereunto subscribed and affixed in the schedule hereunder written*, being creditors of the said debtor in their own right solely, or in co-partnership with others, of the third part: Whereas, the said debtor is indebted unto his creditors in divers sums of money, and particularly unto the said several parties hereto of the third part in the several sums of money set opposite their respective names; and, being unable to pay all his creditors in full, he has agreed to execute the assignment hereinafter contained: Now, this indenture witnesseth that, in consideration of the sum of 5s., &c., he the said debtor doth hereby grant, bargain, sell, convey, assign, transfer, and set over to the said trustees, their heirs, executors, administrators, and assigns, all the freehold and leasehold estates wheresoever, and all and every the stock in trade, wares, mer-[595]-chandise, fixtures, household and other goods, chattels of every description, sum and sums of money, debts due and owing, ready moneys, and securities for money, books, papers, writings, and all other the real and personal estate and effects whatsoever and wheresoever of him the said debtor; except the wearing apparel of himself and family; and all the estate, right, title, interest, benefit, claim, and demand of the said debtor of, in, to, or out of the same respectively, To have, hold, receive, and take the same, and all benefit thereof, unto the said trustees, their heirs, executors, administrators, and assigns, Upon trust with all convenient speed absolutely to sell and dispose of all the said trust-estate and effects in their nature saleable, either by public auction or private contract, and either together in one lot, or otherwise, for the best price or prices and most money that can be obtained for the same, with power to sell the same on credit to any person or persons whomsoever with or without security as they may think proper, and to assign and convey the same accordingly, and to collect and receive all the debts and sums of money due and owing to the said debtor, and stand possessed of the money arising therefrom and under these presents, upon the trusts hereinafter mentioned: And the said debtor doth hereby make, ordain, constitute, and appoint the said trustees his attorneys, &c., &c. And it is hereby declared that the said trustees, their executors or administrators, shall stand possessed of the moneys which shall arise or be received under these presents, in trust, after payment and retention of all costs, charges, and expenses which shall have been and may be incurred in or about the preparation of these presents, and the execution of the trusts and powers hereof, *to pay, divide, and distribute the residue of the said moneys unto and amongst all and every the creditors of* [596] *the said debtor*, their executors, administrators, and assigns, respectively, in a rateable proportion, without any preference, and, in case of any surplus, to pay the same to the said debtor, his executors, administrators, or assigns: Provided always that the said trustees and trustee for the time being may, if they or he shall think fit, require any person claiming to be a creditor of the said debtor to prove his debt by statutory declaration, or otherwise, in such manner as is required by the law of bankruptcy: Provided that, notwithstanding anything herein contained, any creditor at the time of executing or assenting to these presents having for his demand or any part thereof any specific lien or security, or the suretyship of any person, may assent to and execute these presents without prejudice thereto: And the said debtor doth hereby, for himself, his heirs, executors, and administrators, covenant, promise, and agree to and with the said trustees, their executors and administrators, that he the said debtor shall and will to the best of his power forthwith make and deliver a true and exact account in writing of all

his estate and effects, and aid and assist the said trustees in the management of the affairs of the said trust-estate, and shall not receive or intermeddle with any of the said estate, but confirm and allow all and whatsoever the said trustees shall lawfully do or cause to be done in or about the premises: And it is hereby agreed and declared that it shall be lawful for the said trustees to employ the said debtor or any other person or persons in winding up the said trust-estate and premises, and in collecting, getting in, and disposing of the same, or any part thereof, and to allow to the said debtor or any other person or persons out of the said trust-estate, moneys, and premises, such sum and sums as to the said trustees shall seem proper: And the said several persons *parties hereto of the third part*, in consideration of the premises, do hereby for themselves severally and respectively, and for their several and respective heirs, executors, administrators, and partners, covenant and agree with and to the said debtor, his heirs, executors, and administrators, that they the said parties hereto of the third part shall not nor will at any time hereafter sue, arrest, attach, take in execution, or otherwise impede or incur the said debtor in any manner on account of their said several debts; and that, if any of them should do so, contrary to the intent and meaning of these presents, that then the said debtor, his heirs, executors, and administrators shall be and are and is hereby declared to be clearly acquitted, exonerated, and for ever discharged of and from all actions, suit, *debts, and demands* whatsoever of the creditor or creditors by whom they or he shall be so sued, arrested, attached, taken in execution, or otherwise impeded or incumbered, and these presents may be pleaded in bar thereto as effectually as a release under the hands and seals of such creditors respectively for that purpose might or could be: Provided always and it is hereby agreed that if it shall at any time hereafter appear that the said debtor has concealed any portion or portions of his estate and effects, or if he shall, when required by the said trustees, their executors or administrators, refuse or neglect to deliver upon solemn declaration such statement in writing of all his estate and effects as aforesaid, immediately thereupon and from thenceforth the covenant on the part of the said several creditors not to sue him the said debtor for the amount of their respective debts lastly hereinbefore contained, shall cease and be no longer binding, and it shall be lawful for the said several creditors forthwith to sue for the full amount of their respective debts or for such parts [598] thereof as they shall not actually have received by virtue of the trusts hereinbefore declared: Provided always that the said trustees shall be at liberty to make all fair and usual charges for all such matters and things as may be done by them relative to the said trust-estate, and shall not be charged with or accountable for any moneys or effects other than such as shall actually come to their hands by virtue of these presents, nor with or for any loss or damage which may happen in or about the execution of the trusts aforesaid without their wilful neglect or default. In witness, &c. Averment, that all conditions mentioned in the said act in that behalf were observed, and all things were done and happened, so as to render the said deed a valid deed within the Bankruptcy Act, 1861, and so as to render the same as valid, effectual, and binding on all the creditors of the defendant, including the plaintiff, as if he was a party to and had duly executed the same; and a majority in number representing three fourths in value of the creditors of the defendant whose debts respectively amounted to 10l. and upwards, in writing assented to and approved of the said deed; and the said trustees appointed by the said deed executed the same; and the execution of the said deed by the defendant was attested by an attorney; and, within twenty-eight days after the execution of the said deed by the defendant, the same was produced and left (having been first duly stamped) at the office of the chief registrar in bankruptcy, for the purpose of being registered; and, together with the said deed, there was delivered to the said chief registrar such affidavit and certificate as by the Bankruptcy Act, 1861, is in that behalf required; and such deed before registration bore such ordinary and ad valorem stamps as in the said last-mentioned [599] statute is provided; and, immediately on the execution of the said deed by the defendant, possession of all the property comprised therein of which the defendant could give or order possession, was given to the said trustees; and the said deed was within twenty-eight days from and after the execution thereof by the defendant duly registered in the court of bankruptcy, and notice of the filing and registration of the said deed was duly given as required by the said statute, and a certificate of the filing and registration of the said deed under the hand of the chief registrar and the seal of the court

of bankruptcy was duly granted to the defendant; and at the time of the execution of the said deed as aforesaid the plaintiff was a creditor of the defendant in respect of the claim herein pleaded to, within the meaning of the Bankruptcy Act, 1861; and all things had been done and had happened to cause the said deed to be and enure, and the same was and is, a release to the defendant of and from the said claim of the plaintiff in the introductory part of this plea mentioned.

The plaintiff demurred to the third plea, the ground of demurrer stated in the margin being, "that the composition deed is not a valid deed under the Bankruptcy Act, 1861, so as to bind non-assenting creditors." Joinder.

He also replied to the third plea, that the respective amounts of the debts due to the creditors parties to the said deed of the third part, were by the said deed admitted, by the same being on the said deed set opposite to their respective names, as stated in the said deed, without being proved by statutory declaration or otherwise in such manner as is required by the law of bankruptcy, while the amount of the debt due to the plaintiff was not so or in any other manner ad-[600]mitted; and so the plaintiff said that he was not by the said deed put on a footing of equality with the other creditors.

The defendant took issue on the above replication, and also demurred thereto, the ground of demurrer stated in the margin being, "that it does not appear from the said deed that the plaintiff was not by the said deed put on a footing of equality with the other creditors, and that no such consequence as is in the said replication in that behalf alleged necessarily follows from the terms of the said deed and the true construction of the provisions thereof." Joinder.

J. Brown, Q. C., for the plaintiff (a). The deed relied on as a bar to the further maintenance of the action is a deed between the debtor of the first part, [601] trustees of the second part, and scheduled creditors of the third part. It recites that the debtor was indebted to *his creditors* in divers sums of money, and particularly to *the parties of the third part* in the several sums set opposite to their names in the schedule,—a distinction being drawn throughout between "creditors" and "creditors parties to the deed,"—and, being unable to pay them all in full, had agreed to execute an assignment. The debtor then assigns all his estate and effects to the trustees, in trust for distribution amongst *all his creditors*, not merely those whose debts are mentioned in the schedule. Then comes the important covenant,—a covenant by *the parties of the third part* not to sue the debtor, and that, if any of them did sue, the debtor should be discharged of his debt, and the deed might be pleaded in bar as effectually as a release under seal. The first objection to this deed is, that the covenant not to sue is confined to the scheduled creditors,—the parties of the third part. [Byles, J. Is the release a necessary part of the deed?] To make a good plea in bar, it is essential that there should be either a release or a covenant not to sue: *Eyre v. Archer*, 16 C. B. (N. S.) 638. *Legg v. Cheesbrough*, 5 C. B. (N. S.) 741, is precisely in point. There, to an action against them as the acceptors of a bill of exchange, the defendants pleaded a plea founded upon a deed of arrangement made by the defendants with their creditors, under the 224th section of the Bankrupt Law Consolidation Act, 1849 (12 & 13 Vict. 106), which had not been signed by the plaintiff, but which was said on the part of the defendants to be nevertheless binding on him by reason of its being executed

(a) The points marked for argument on the part of the plaintiff were as follows:—

"1. That the deed relied upon, and set out in the defendant's third plea, is not binding upon the plaintiff, he not having executed the same:

"2. That the deed is not a binding deed of arrangement upon non-assenting creditors, within the meaning of the 192nd section of the Bankruptcy Act, 1861, and therefore shews no defence to the action:

"3. That the deed contains unreasonable clauses, covenants, and provisions, which create an inequality among the creditors: for example, the clauses admitting the debts of executing creditors, and improving the trustees to require proof of other debts by statutory declaration or otherwise, as in bankruptcy: and the clause discharging the defendant from the debts of creditors who may sue him, and making the deed a bar to an action: and the provision which makes the powers of the trustees pass to their executors and administrators:

"4. That the covenant not to sue the defendant only applies to those creditors who executed the deed, and is unreasonable if it applies to any others."

by six sevenths in number and value of their creditors. The instrument was not a composition-deed (a)¹; [602] but it contained a clause by which each of the creditors parties to or bound by the deed covenanted not to sue, impede, or molest the defendant; and then followed another clause, to the effect that, if any creditor by whom or on whose behalf the deed should have been actually executed should act contrary to that covenant, the defendants should be absolutely discharged from all claims and demands both at law and in equity by such creditor. It was held that this latter clause was not binding upon the plaintiff,—it being in its nature merely personal to the individual creditors who chose to sign the deed, and inapplicable to the creditors in general. Willes, J., in delivering the judgment of the court, after referring to *Gibbons v. Poulton*, 8 C. B. 483, to shew that the clause in question rendered the deed operative as a defeazance pleadable in bar to an action brought by a creditor, says: “The distinction is carefully made by the language of the instrument, between such creditors as are to be bound by the deed and such as actually execute it. As to the former, the deed is so worded that they do no more than covenant not to sue. But, as to the latter, the bringing an action is to amount to a defeazance. It was argued, however, on the part of the defendants, that such a distinction is precluded by the language of the 224th section, which says that every such deed shall be as effectual and obligatory in all respects on all the creditors who shall not have signed such deed as if they had actually signed the same.” On the other hand, it was contended that the clause in question was in its very nature merely personal to the individual creditors who chose to sign the deed, and inapplicable to the creditors in general. We are of that opinion. The expression so much relied upon by the defendants is used only to describe the operation and effect of the [603] power given to the majority of the creditors to bind the minority, when the intention to exercise that power is expressed in apt words, and not with the view of restraining or expanding the proper meaning of the words which have actually been used. We give the language relied upon full effect, by holding that those provisions of the deed which appear by the language used to have been intended, by the debtor and the creditors who sign, to bind the dissenting creditors shall bind them; whilst those which appear by the language used to have been intended to bind the creditors who ‘actually’ sign only, and not the dissenting creditors, shall not bind such creditors.” [Byles, J. There, the property remained in the debtor.] Yes. In the judgment the court refer to *Macnaught v. Russell*, 1 Hurlst. & N. 611, where Pollock, C. B. says: “It was objected that there was a provision set out relating to creditors not proceeding at law for their debts (a)², which was unreasonable, and which a creditor ought not to be required to enter into. We were at first much struck with this objection; but, upon consideration, we think it is not fatal to the plea. It is expressly confined to the creditors who are parties to the deed. The plaintiffs are in no way bound by it: they became affected by reason of six sevenths of the creditors having executed the deed; and we do not think that it is of any material consequence to them that the six sevenths who have signed have entered into a covenant which may impose a hardship upon them: this was a matter for their consideration, and the plaintiff is in no way injured by their voluntarily choosing to take this obligation upon them.” Mr. Commissioner Holroyd, before whom this question was raised in *Ex parte Smith, In re Wyatt*, 12 W. R. 692, [604] upon this very deed, said: “The main question here arises with regard to the construction to be put upon the covenant not to sue. The question is, whether it is binding upon dissenting as well as upon assenting creditors. Now, I certainly think that the covenant is binding upon assenting creditors only. The 197th section of the Bankruptcy Act, 1861, coupled with the cases of *Macnaught v. Russell* and *Legg v. Cheesbrough* are to my mind conclusive upon the matter. I am of opinion, therefore, that the covenant is binding on those creditors only who execute the deed, and I do not think the question of inequality of distribution arises at all. In *Dell v. King*, 2 Hurlst. & Colt. 84, the clauses were much more extended, and included all the creditors of the debtor.” If the covenant not to sue extended to non-executing creditors, it clearly would be unreasonable. That was expressly decided in *Dell v. King*, 2 Hurlst. & Colt. 84; *Ipsstones Park Iron Ore Company v. Pattinson*, 2 Hurlst. & Colt. 828. It is competent to parties to bargain as they will: but non-assenting

(a)¹ It was a deed of inspectorship.

(a)² Substantially the same as the covenant here.

creditors are not necessarily bound. [Byles, J. In *Dell v. King*, the deed was held bad, on the ground that the assenting creditors had no right to preclude non-assenting creditors from contesting its validity. In *Hudson v. Barclay*, 3 Hurlst. & Colt. 9, the covenant not to sue professed to bind "the creditors of the debtor who should have executed or otherwise acceded to or were bound by those presents;" and it was held to be unreasonable and void. This judgment was reversed in the Exchequer Chamber, 3 Hurlst. & Colt. 361. But, in delivering the judgment of that court, Blackburn, J., said: "A simple release by a creditor given to a debtor discharges all sureties and co-debtors, and it is therefore in general inexpedient to insert a simple release in a composition-deed. [605] But a covenant not to sue the debtor, except in so far as may be necessary for the purpose of enforcing remedies against others, only bars the covenantor from suing for himself, but does not discharge sureties or co-contractors. It has the operation of a release so far as it is expedient in a composition-deed to release the debtor, and no further; and it is therefore, as we think, a proper and reasonable provision to insert in a deed relating to the debts and liabilities of a debtor, and his release therefrom. We are not to be understood as in any way overruling the decision in *Jull v. King*, that a covenant not to sue, with a provision that the creditor infringing that covenant shall forfeit all benefit under the composition-deed, goes too far. We decide the present point in favour of the defendant, because we construe the eighth covenant in this deed as amounting to a simple covenant not to sue except so far as is necessary to prevent the discharge of third parties, and no more." Then, the scheduled debts are admitted, but non-assenting creditors are to be called on to prove their debts by statutory declaration before they can derive any benefit under the deed. This is clearly unequal.

Sykes (with whom was Mellish, Q. C.), for the defendant (*a*). A distinction has

(*a*) The points marked for argument on the part of the defendant were as follows:—

"1. That the deed set out in the third plea appears on the face of it to be for the equal benefit of all the creditors of the defendant, and is such as to enable all the creditors of the defendant to avail themselves of it:

"2. That the said deed is a valid deed within the 192nd section of the Bankruptcy Act, 1861, and binding on all the creditors of the defendant (including the plaintiff) as if they had been parties to and had duly executed the same:

"3. That, by the said deed, it is expressly provided that the said trustees may, if they shall think fit, require any person claiming to be a creditor of the said defendant to prove his debt by statutory declaration or otherwise, in such manner as is required by the law of bankruptcy; that this proviso applies to any creditor, whether he has executed the deed or not; and that therefore the plaintiff was not put on any footing of inequality with the other creditors who executed the deed, by its being recited in the said deed that the defendant was indebted unto the several parties thereto of the third part in the several sums of money set opposite their respective names in the schedule thereunder written, as they might have been called upon by the said trustees to prove their debts according to the said proviso, notwithstanding the said recital in the said deed:

"4. That there is nothing unreasonable in the proviso that the trustees may require a creditor to prove his debt by statutory declaration or otherwise in such manner as is required by the law of bankruptcy:

"5. That the plaintiff might at any time have come in and executed the said deed, and had his name and the amount of his debt inserted in the schedule of the said deed, in the same manner as the other creditors of the defendant who executed the deed; and that no distinction is drawn in the said deed between the creditors of the defendant who executed it and those who did not; but that the said deed was intended to apply to, and does apply to, all the creditors of the defendant, whether they executed the said deed or not:

"6. That the covenant by the creditors contained in the said deed, not to sue the defendant, &c., and that, if any of them should do so contrary to the said covenant, the defendant should be exonerated and discharged of and from all actions, suits, claims, and demands of the creditor or creditors by whom he should be so sued, &c., and that the said deed might be pleaded in bar thereto as effectually as a release under the hands and seals of such creditors respectively for that purpose might or could be, renders the deed operative as a *defiance* pleadable

always been drawn between those who are bound by the deed and those bound by virtue of the act of parliament. *Chapman v. Atkinson*, [606] 4 Best & Smith, 722 (in error, 730), and numerous other cases, have held that a deed which complies with all the conditions contained in the 192nd section of the Bankruptcy Act, 1861, is a good defence to an [607] action. There is nothing in the deed now in question which is repugnant to those provisions, or unreasonable. The covenant not to sue is limited to the creditors executing the deed. In *Wells v. Hacon*, 5 Best & Smith, 196, the release was held to enure as a release by the non-assenting creditors by virtue of the statute. Cockburn, C. J., in giving judgment, said: "The release of the debtor professes to be only by the executing creditors, who are parties of the fourth part; and no mention is made of a release by the creditors of the fifth part" (the non-executing creditors). "But, there being no negative words excluding them, the effect is the same as if the executing creditors had said 'we [608] release our debts,' and then, according to the decisions on the Bankruptcy Act, 1861, that release operates as a release of the debts of the non-executing creditors, who are in no sense parties to the deed, except by virtue of the statute. In *Legg v. Chesbrough*, the defeazance was in terms confined to those who actually executed the deed; and the court thought that the language shewed an intention to exclude those creditors who did not execute the deed. Here, it is as if the executing creditors had released on behalf of themselves and of those who are bound by the deed." And Blackburn, J., says: "We held in *Whitehead v. Porter*, 5 Best & Smith, 193, that a deed containing a release may be pleaded in bar to an action by a non-assenting creditor; and that is good law. Deeds which are trust-deeds only, and do not contain any release, but simply distribute the property of the debtor in bankruptcy, are not pleadable in bar: and, if this deed did not operate as a release by the non-executing creditors, it could not be pleaded in bar to this action. But s. 192 says that every deed made between a debtor and his creditors, or any of them, or a trustee on their behalf, relating to the debts or liabilities of the debtor and his release therefrom, or the distribution, inspection, management, and winding-up of his estate, or any such matters, shall be as valid and effectual and binding on all the creditors as if they were parties to and duly executed the same, provided the prescribed conditions are observed. The execution of a deed by one creditor cannot release the debt of another creditor who has not executed the deed. But the effect of s. 192 must be that, when the requisite majority execute a release of the debtor, and it appears on the face of the deed that it was intended it should be a release by all the creditors, those who do not execute are bound as if each of them had executed it, and released [609] his own debt." The decision in *Legg v. Chesbrough* turned on the particular language of the deed: the release was not intended to bind non-assenting creditors. *Macnaught v. Russell*, 1 Hurlst. & N. 611, was decided on the same ground: and in *Gardner v. Chapman*, 8 C. B. (N. S.) 317, a similar provision was treated as a covenant not to sue, for the purpose of keeping alive the remedies against sureties. In *Spitzer v. Chaffers*, 14 C. B. (N. S.) 686, it was held that a deed under the 224th section of the Bankrupt Law Consolidation Act, 1849, was not rendered void by the circumstance that the releasing parties were described to be "the parties hereto of the third part," viz. such of the creditors who had executed the deed,—the deed appearing to have been executed by the statutory number required to make it a deed binding upon non-assenting creditors. [Montague

in bar to any action brought by any creditor of the defendant; that such clause was intended to be binding, and is binding on all the creditors of the defendant, and is binding on the plaintiff, notwithstanding he did not execute the said deed:

"7. That such last-mentioned clause is not unreasonable, and does not render the said deed void, as it only enables the defendant, in case of his being sued by any of his creditors, to plead the said deed in bar as a release to such action; and such creditor suing the defendant will not thereby lose or forfeit his debt, but will still retain his right to prove the amount of his debt and claim his dividend thereon out of the defendant's property assigned to the said trustees by the said deed:

"8. That the clause in the said deed which makes the powers of the trustees pass to their executors and administrators, is a mere formal and usual clause in trust-deeds like the present, and does not in any way prejudice the creditors, but is rather for their benefit than otherwise; and that there is nothing unreasonable in such clause, so as to render such deed void."

Smith, J. The covenant here professes to release, not the action only, but the debt.] It is called at the end a covenant not to sue. [Erle, C. J. Our judgment must turn upon the true construction of the deed before us. Mr. Brown says that the party has lost his debt. The defendant denies that. The truth is to be gathered from the terms of the plea. But for the words "debts and demands," your argument might be good.] General words are to be restrained by the intention apparent upon the whole deed. This is clearly intended to operate only as a covenant not to sue. In *Walker v. Norill*, 3 Hurlst. & Colt. 403, it was held that a simple covenant not to sue for a limited time, is not pleadable in bar of an action: but a covenant not to sue for a limited time, and that the deed may be pleaded in bar and discharge of any action brought within that time, may be pleaded in bar of an action by a non-assenting creditor. General words of release are to be restrained by a particular recital: Com. Dig. *Release* (E. 5): *Payler v. [610] Homersham*, 4 M. & Selw. 423; *Simons v. Johnson*, 3 B. & Ad. 175; 2 Smith's Leading Cases, 5th edit. 451; *Lyall v. Edwards*, 6 Hurlst. & N. 337. Mr. Commissioner Holroyd's opinion in *Ex parte Smith, In re Wyatt*, 12 W. R. 692, was delivered before much light had been thrown upon the subject by the decided cases. *Dingwell v. Edwards*, 33 Law J., Q. B. 161, and *Garrod v. Simpson*, 3 Hurlst. & Colt. 395, were also referred to, for the purpose of shewing that a release is not necessary in the case of a composition-deed.

Brown, Q. C., in reply. If the covenant in question amounts to a release, it is unreasonable: if not, it affords no defence

ERLE, C. J. The question raised by this demurrer is, whether the deed which is pleaded to the further maintenance of this action is a valid deed under the 192nd section of the Bankruptcy Act, 1861, as against the plaintiff, a non-executing creditor. It is clear that a deed may be a valid deed to bring the estate of the debtor under the jurisdiction of the court of bankruptcy, and to be a protection to the debtor, without its containing a release. But, unless it contains a release, it cannot be pleaded in bar to an action: *Eyre v. Archer*, 16 C. B. (N. S.) 638. In this deed there is a clause of release: and, if that had been merely a covenant not to sue, I consider the deed would have been a good bar to the action. I take the judgment of Blackburn, J., in *Hilson v. Barclay*, 3 Hurlst. & Colt. 361, and also the decision of this court in *Spitzer v. Chaffers*, 14 C. B. (N. S.) 686, to affirm that proposition. But, if the clause of release and covenant not to sue goes beyond that operation, and professes to declare the debt forfeited if the debtor be sued or molested, it is void as against non-assenting creditors. I am of [611] opinion that the present deed is open to that objection. The clause in question is in these terms,—"The said several persons parties hereto of the third part,"—that is, the creditors executing the deed,—“in consideration of the premises, do hereby, for themselves severally and respectively, and for their several and respective heirs, executors, administrators, and partners, covenant and agree with and to the said debtor, his heirs, executors, and administrators, that they the said parties hereto of the third part shall not nor will at any time hereafter sue, arrest, attach, take in execution, or otherwise impede or incumber the said debtor in any manner on account of their said several debts: and that, if any of them should do so, contrary to the intent and meaning of these presents, that then the said debtor, his heirs, executors, and administrators, shall be and are and is hereby declared to be clearly acquitted, exonerated, and for ever discharged of and from all actions, suits, debts, and demands whatsoever of the creditor or creditors by whom they or he shall be so sued, arrested, attached, taken in execution, or otherwise impeded or incumbered, and these presents may be pleaded in bar thereto as effectually as a release under the hands and seals of such creditors respectively for that purpose might or could be.” I cannot read those words without coming to the conclusion that, if any creditor who had executed the deed were to sue the debtor, he would forfeit his debt. That being the meaning of this deed, the defendant is in this dilemma,—if all the non-assenting creditors are brought in by the operation of the statute (the requisite majority having executed), the deed would be in pari jure with that in *Dell v. King*, 2 Hurlst. & Colt. 84, where the clause was that non-assenting as well as assenting creditors were to forfeit their debts if they sued. It is unreasonable that a creditor who proceeds [612] to enforce his rights at law should forfeit his debt because the majority of the creditors choose to execute a release. But I am desirous to construe this deed so as to make it valid rather than void: and I think it is clear from *Loy v. Chursebrough* that a deed may be a valid deed under the 192nd section of

the Bankruptcy Act, 1861, although it contains a clause of release and a clause that any creditor suing or molesting the debtor shall forfeit his debt, provided that clause of forfeiture is clearly limited to those creditors who choose to execute the deed. In that case it was held that the clause of forfeiture was in terms confined to the creditors parties to and who had executed the deed. The deed here is drawn with a marked distinction between creditors who execute the deed and those who do not execute it. It professes to be made between the debtor of the first part, the trustees of the second part, and the several persons whose names and seals were thereunto subscribed and affixed in the schedule thereunder written, being creditors, of the third part; and the release is in terms confined to "the several persons parties thereto of the third part." They may if they choose contract in that form; and the deed may become binding upon all the creditors, all the conditions of the Bankruptcy Act, 1861, being complied with. The terms of this clause are not so clear as they were in *Legg v. Chesbrough*. But it seems to me that the defendant is in this dilemma: if the clause applies to non-executing creditors, as in *Dell v. King*, the deed is void as unreasonable; but, if the other construction be adopted, and the release be held binding on the assenting creditors only, the present plaintiff has not executed it, and then the deed is without a clause of release, and is simply operative in bankruptcy, and is no bar to the action. In either view, therefore, my judgment is for the plaintiff.

[613] BYLES, J. I am of the same opinion. The plea in question sets up a deed whereby the defendant assigns all his property for the benefit of his creditors, but containing a covenant by them not to sue or molest the debtor on account of the several debts, and that, if any creditor party to the deed should do so, the debtor should be exonerated and discharged from all actions, suits, debts, and demands of the creditor by whom he should be so sued, &c., and the deed might be pleaded in bar of the action as effectually as a release might be. That must be an unreasonable covenant as to non-executing creditors, because, though they may have no notice of the existence of the deed, the moment the writ is issued the debt is gone. In *Dell v. King*, 2 Hurlst. & Colt. 84, such a clause was held to be unreasonable. The only distinction between that case and the present is that there the clause of release applied to all the creditors, whereas here it is confined in terms to the creditors executing the deed, and, without the aid of the act of parliament, would not operate as a release by this plaintiff. The act says that the deed, when executed by the requisite number, shall be as valid and effectual and binding on all the creditors of such debtor as if they were parties thereto, and had executed the same. That comes to this that, a man may without notice of the deed lose his debt, which is clearly unreasonable. *Dell v. King* was upheld, as to this point, by the Exchequer Chamber, in *Hilson v. Barrlay*, 3 Hurlst. & Colt. 361.

MONTAGUE SMITH, J. I am of the same opinion. If the release is confined to creditors executing the deed, the defendant cannot take advantage of it in this action; for, if so, according to *Legg v. Chesbrough*, it has no operation as to non-executing creditors. I do not mean to give any opinion upon the construction of [614] this deed, because, in *Legg v. Chesbrough*, the clause of release was confined in terms to creditors actually executing the deed, and here it is a question on the whole deed. To derive any benefit from this release, the defendant must contend that it binds non-executing creditors. That will depend upon whether it is a reasonable clause or not. Upon the authorities, and especially on that of *Dell v. King*, I am of opinion that this is an unreasonable clause. It is not merely a bar of the action, but, if a creditor seeks to enforce a debt, he forfeits it. That clearly is not within the line of reasonable terms in deeds of this kind, and therefore cannot operate on those creditors who have not executed.

Judgment for the plaintiff.

BULLEN AND ANOTHER v. SHARP THE ELDER. April 26th, 1865.

[Reversed in Exchequer Chamber, L. R. 1 C. P. 86.]

S., being about to commence business as an underwriter through the agency of one F., in consideration of the defendant (his father) engaging to hold 5000l. available for him for the purpose of carrying out the arrangement, gave him the following memorandum,—“In consideration of your guaranteeing me to the extent of 5000l.

in my business of an underwriter, until by such business I shall make or acquire from the profits thereof 5000l. after providing for all known losses, I hereby promise and agree to pay to you during your life, in case I shall so long live, an annuity of 500l., being equal to 10l. per cent. per annum on 5000l.; and, further, that if at the end of three years from the date hereof it shall appear that one fourth of the net average annual profits during that period made by me in the said business shall amount to more than 500l., the said annuity shall thenceforth be increased to a yearly sum equal to one fourth of such net average annual profits made by me in the said business during the said three years:" the memorandum concluded with these words,—“moreover, in no case are you to be considered as a partner with me in the said business of an underwriter.”—By a settlement afterwards made on his marriage, S. assigned to the defendant and one D., as trustees, “all and singular the sums of money, earnings, profits, and emoluments which are now in the hands of F., and all such as shall hereafter come into the hands of F. on account or in respect of the said underwriting business.” The deed also contained a power of attorney enabling the trustees to receive the whole proceeds of the business; and the first trust was to pay the defendant 500l. a year, with an additional sum when the profits of the business should have realized a given sum, and a covenant that, when the accumulated profits should have reached 8500l., and continued at that amount without reduction for two years, the trustees should re-assign to S. “the said moneys and *profits* arising from the aforesaid underwriting business.”—Held,—upon a special case, setting out the memorandum and the marriage-settlement, and in which it was agreed that the court should draw “any reasonable inferences of fact,” that the *deed*, at all events, constituted the defendant a partner in the business, and consequently that he was liable on a policy underwritten by S.

This was an action to recover 100l. for a loss on a marine policy of assurance effected by the plaintiffs and signed in the name of William Sharp the younger, [615] a son of the defendant, with whom the defendant was alleged to have been a partner, under the circumstances hereinafter mentioned:—

The cause came on to be tried before Erle, C. J., at the sittings in London after last Michaelmas Term, when a verdict was taken for the plaintiffs, by consent, on all the issues, subject to the opinion of the court on the following case:—

1. In the beginning of 1857, the defendant applied to one Fenn, an underwriter at Lloyd's, to introduce the defendant's son, William Sharp jun. to Lloyd's, with a view to his becoming a member of that body. Fenn shortly afterwards told the defendant that he had been before the committee at Lloyd's, and that they had suggested that the defendant should give a guarantie for the liabilities to be incurred by his son. This the defendant objected to do, but stated that he might not be unwilling to give his guarantie for a limited amount.

2. Fenn thereupon sent the committee of Lloyd's the following letter:—

“March 17th, 1857.

“The committee of management of the affairs of Lloyd's.

“Gentlemen,—I have communicated with Mr. Sharp sen. your requirements as to his son's admittance as a member of Lloyd's; and he tells me that he has such a strong repugnance against guaranties that he is willing to place at my disposal 5000l. (instead of 3000l.). If this meets with your approval, I can further add that he (Mr. S.) assures me that he would never let his son stand in want of further aid, if needed.

“As this introduction is entirely Mr. Sharp senior's own seeking, I feel the less careful about it, and shall gladly fall in with the determination you come to in the matter, only expressing my regret that I should be [616] the cause of giving you so much unnecessary trouble in this case. But, had I known then what I see now, I would have sought such guarantie before laying my application before you.

“Should this not meet with your full concurrence, may I ask to have Mr. Sharp junr.'s name at once withdrawn.

“WILLIAM FENN.”

3. On receipt of this letter, the committee of Lloyd's elected the defendant's son, Mr. Sharp jun. a member of Lloyd's.

4. At the same time the defendant's said son entered into an agreement with Fenn

for him to transact the son's underwriting business for a period of three years, of which the following is a copy :—

“Memorandum of agreement made and entered into the 17th day of March, 1857, between William Sharp, jun., of Upper Clapton, in the county of Middlesex, of the one part, and William Fenn, of Lloyd's, in the city of London, underwriter, of the other part : Whereas, it hath been agreed between the said parties that an underwriting account at Lloyd's Coffee House, London, shall be opened and carried on in the name of the said William Sharp, under the management and superintendence of the said William Fenn, for the time and upon the terms and conditions hereinafter mentioned, that is to say,—

“1st. That, as far as practicable, all risks taken on account of the said William Sharp shall be identical with those taken by the said William Fenn on his own account ; and that the exceptions or single lines shall be taken, as far as practicable, alternately by the said William Sharp and William Fenn, if the said William Sharp shall require it.

“2nd. That the underwriting account shall commence on the 18th of March, 1857, and shall be carried on and the subscription made in the name of the said William Sharp : but the policies, losses, and averages shall and may be adjusted by the said William Fenn on his account.

“3rd. That the said William Sharp shall apply so much of his attention and time to the purposes of the said business as may be essential to him ; and the said William Fenn shall apply such part of his time and attention to the business as may be required for conducting the same : but he is not to be precluded from carrying on the said business as an underwriter in his own name and on his own account.

“4th. That the said underwriting business shall be carried on for the term of three years from the 1st of March, 1857, after which the said business may be determined either by the said William Sharp or William Fenn, on giving three months' notice to the other, or leaving the same at his usual or then last known place of abode in England, upon the expiration of which notice the said business shall cease and determine, and the accounts thereof be settled and wound up.

“5th. That proper books of account, and all securities, letters, and documents relating to the said business shall be kept by the said William Fenn at his counting-house, and proper entries made therein of all such insurances, transactions, and things as are usually written and entered in books of account kept by persons engaged in concerns of a similar nature ; and that each of the parties shall have free access to inspect, cast up, examine, and copy out the same, without any hindrance or denial of or by the other of them.

“6th. That all premiums and other moneys arising or payable in respect of the said business shall be received by the said William Fenn, and paid to the [618] account of the said William Sharp at his bankers' during the said term : and all payments and advances in respect thereof shall be made and paid by him exclusively, the said William Sharp providing the necessary funds for the purpose.

“7th. That the said William Fenn shall during the said term be paid and allowed a salary of 300*l.* per annum ; and that the said salary or sum of 300*l.* shall be paid to the said William Fenn by four equal quarterly payments or instalments in each and every year, on the 30th of May, the 31st of August, the 30th of November, and the 28th of February, in every year,—the first payment to be made on the 30th of May now next ensuing.

“8th. That the said William Fenn engages to give such underwriting business his best care and attention.

“9th. That, after the expiration of this agreement the said William Fenn shall, if required, attend to the winding up of the said account and the adjusting and settling of losses thereunder : but the said salary shall cease at the expiration of the said term of three years, or the determination of the said underwriting account if continued beyond that period.

“10th. That no risk is to be taken by the said William Sharp personally during the continuance of this agreement, without the consent of the said William Fenn.

In witness, &c.

“WILLIAM FENN.

“WILLIAM SHARP, jun.”

5. Under this agreement, the underwriting business of the son, Sharp, jun., was

carried on by Fenn until the agreement was altered in November, 1858, as hereinafter mentioned. Fenn subscribed all policies of insurance for the son in the name of the son.

6. On the 20th of May, 1857, Fenn received the following letter from Lloyd's committee:—

[619] "Lloyd's, 20th of May, 1857.

"Sir,—I am directed by the committee for managing the affairs of Lloyd's to request that you will be good enough to inform them, with reference to your letter of the 17th of March, whether the 5000l. that you therein mentioned would be placed at your disposal by Mr. Sharp, sen. for the benefit of his son's account, has been so appropriated.

"GEO. A. HALSTEAD, Secretary.

"William Fenn, Esq."

7. Mr. Fenn having communicated this letter to the defendant, he wrote the following letter to Fenn:—

"May 21st, 1857.

"My dear Sir,—In order that you may satisfactorily answer the question put to you by the committee at Lloyd's relative to your having at your disposal the 5000l. you represented my son to possess when you proposed him for admission at Lloyd's, I have to inform you that I hold that sum for him, and engage that it shall be freely available for the purpose of carrying out the arrangement he has made with you to conduct for him an underwriting account.

"W. SHARP."

8. On receipt of this, Fenn sent the following answer to the committee of Lloyd's; but such letter was not seen by the defendant, nor was he aware of the contents:—

"To the Committee of Lloyd's.

"May 22nd, 1857.

"Gentlemen,—In reply to yours of the 20th instant, I beg to inform you that I have the 5000l. for the use of Mr. W. Sharp, jun. which for my own interest I took care to secure; and I have further assurance that, if more should be wanted, I shall not be without funds.

"W. FENN."

[620] 9. The underwriting business carried on by Fenn for the son having proved profitable, the son, in November, 1858, with the defendant's concurrence, entered into an agreement with Fenn for extending the business, by increasing the amount of the risk usually taken by the son on policies of insurance.

10. The following is a copy of this agreement:—

"The undersigned do hereby agree this 1st of November, 1858, that, from and after the 1st of November, 1858, and so long as the said William Sharp may require it, the said William Fenn shall write double, or increase the lines, for and on account of the said William Sharp, in all practicable cases; and, in consideration thereof, the said William Sharp shall pay the said William Fenn an additional 50l. per quarter so long as the said William Sharp requires the said William Fenn to write double or increased lines.

"That the said William Fenn and William Sharp agree to extend the agreement of the 17th day of March, 1857, to the 31st of December, 1864, the same remaining in force, except as altered as above.

"WILLIAM FENN.

"WILLIAM SHARP, jun."

11. Shortly after, and in consequence of, this arrangement, the son wrote the following letter to the defendant:—

"To William Sharp, Esq.

"In consideration of your guaranteeing me to the extent of 5000l. in my business of an underwriter until by such business I shall make or acquire from the profits thereof the full and clear sum of 5000l. after providing for all known losses, I hereby promise and agree to pay to you during your life, in case I shall so long live, but not otherwise, an annuity of 500l. being equal to 10 per cent. per annum on the sum of

5000l., this annuity to be paid without any deduction, except [621] on account of the income-tax, by equal half-yearly payments on the 1st of July and the 1st of January in each year, and the first half-yearly payment thereof to be made on the 1st of July next ensuing the date hereof, together with a proportionate part of the said annuity in respect of the time which may elapse between the last pending half-yearly payment of the said annuity and the determination of the same: And, further that, *if at the end of three years from the date hereof, it shall appear that one fourth of the net average annual profits during that period made by me in the said business shall amount to more than 500l., then and in that case the said annuity shall nevertheless be increased to a yearly sum equal to one fourth of such net average annual profits made by me in the said business during the said three years*: the said increased annuity to be paid without deduction, except as aforesaid, by equal half-yearly payments on the days above named, and the first half-yearly payment to be made on the 1st of July, 1862, together with a proportionate part of the said increased annuity in respect of the time which may elapse between the last pending half yearly payment of the said annuity and the determination thereof; and, moreover, *in no case are you to be considered as a partner with me in the said business of an underwriter.*

"W. SHARP, jun.

"Jan. 1, 1859."

12. In July, 1859, a further agreement was made between Sharp jun. and Fenn, of which the following is a copy:—

"Memorandum. It is mutually agreed between the undersigned that the above agreement of the 17th of March, 1857, shall be continued until the 31st of December, 1870, subject to the sooner determination thereof after the 31st of December, 1864, by the said [622] William Sharp the younger giving the said William Fenn six months' notice.

"WILLIAM FENN.

"WILLIAM SHARP, jun.

"London, 2nd July, 1859."

13. Under the above agreements, Fenn carried on the underwriting business for Sharp, jun. until and at the time of the making of the policy on which this action is brought.

14. In August, 1859, the defendant's son, William Sharp, jun. married a Miss Chamney; and on the occasion of his marriage a deed of settlement was made and executed by and between Sharp, jun., Miss Chamney, the defendant, and John Donnison, of which a copy is hereto annexed, and which is to be taken as part of this case.

15. This deed recites the several agreements between Sharp, jun. and Fenn, above set forth, and the defendant's letter to Fenn of May 21st, 1857, and the letter of Sharp, jun. to the defendant of January 1st, 1859, promising the annuity above mentioned. It also recites the intended marriage, and that, in contemplation thereof, it had been agreed that Sharp the younger should assign to the said William Sharp the elder and John Donnison all moneys then in the hands and thereafter to come into the hands of the said William Fenn in respect of the aforesaid underwriting business on behalf and for the benefit of the said William Sharp the younger, and should also transfer to them stock being of the nominal value of 1000l. in the London and North Western railway, and stock being of the nominal value of 500l. in the London and South Western railway, and should likewise assign to them the policy of assurance thereafter mentioned on the life of the said William Sharp the younger for the sum of 3000l., to be held respectively by them upon [623] the trusts and for the intents and purposes thereafter expressed; and that, in pursuance of the said agreement the said William Sharp the younger did previously to the execution of the said deed transfer all the railway stock into the names of the said William the elder and John Donnison in the share register books of the said railway companies respectively, to be held in trust for the said William Sharp the younger until the solemnization of the said intended marriage, and, after the solemnization thereof, upon the trusts and for the intents and purposes thereafter declared and expressed concerning the same. The deed then witnesses that, for the considerations therein mentioned, Sharp, jun. assigned to the defendant and the said John Donnison all and singular the sums of

money, earnings, profits, and emoluments which were then in the hands of the said William Fenn, and all such as should come into the hands of the said William Fenn on account or in respect of the underwriting business, and which according to the terms of the said agreements of the 17th of March, 1857, of the 1st of November, 1858, and of the 2nd of the then present month of July, respectively, or otherwise, were or would or might become payable to the said William Sharp the younger, together with full power and authority to and for the said William Sharp the elder and John Donnison and the survivor of them, and the executors or administrators of such survivor, in the name or names and as the attorneys or attorney of the said William Sharp the younger, to ask, demand, sue for, recover, and receive, and to give effectual receipts and discharges for the said moneys, proceeds, and premises expressed and intended to be thereby assigned, and every or any part thereof: And the said William Sharp the younger did thereby order and direct the said William Fenn and other the agent, de [624]-puty, and attorney for the time being of the said William Sharp the younger in the aforesaid business, to pay the said moneys, profits, and premises unto the said William Sharp the elder and John Donnison, their executors, administrators, and assigns, accordingly, To have and to hold the said moneys, profits, and other the premises thereafter mentioned, and thereby granted and assigned, or expressed and intended so to be, unto the said William Sharp the elder and John Donnison, their executors, administrators, and assigns, In trust, nevertheless, for the said William Sharp the younger until the said intended marriage between him and the said Maria Louisa Perkins Chamney should be solemnized; and, from and after the solemnization thereof, upon the trusts and for the intents and purposes thereafter declared and expressed concerning the same, that is to say, upon trust with and out of the moneys and profits arising from the said underwriting business, in the first place to pay unto the said William Sharp the elder, by half-yearly payments, on the 1st of January and the 1st of July in every year, and the first half-yearly payment to be made on the 1st of January next after the solemnization of the said intended marriage, the annuity or yearly sum agreed or undertaken to be paid by the said William Sharp the younger to the said William Sharp the elder by the said thereinbefore-recited memorandum or writing under the hand of the said William Sharp the younger, dated the 1st of January, 1859; and, subject and without prejudice to the payment of the aforesaid annuity or yearly sum, to the said William Sharp the elder, upon trust, in the next place, with and out of the said moneys, profits, and premises, to pay to the said William Sharp the younger, by equal half-yearly payments, on the days above mentioned, and the first payment thereof to be made on the 1st of January then [625] next after the solemnization of the said intended marriage, an annuity or yearly sum of 500l. free from all deductions: and also upon trust to pay to him, when and as the same became due, the dividends, interest, and annual proceeds of the aforesaid railway shares: and also the resulting income of the surplus moneys, profits, and premises to be accumulated and invested as thereafter directed: and upon further trust to accumulate and invest, in manner thereafter expressed, the residue or surplus after the payments aforesaid of the said moneys, profits, and premises thereinbefore assigned, until the same should amount to or be of the value of 3500l. sterling, and should remain of that amount or value without reduction on account of losses in the aforesaid underwriting business, and for the full term of two years: and, from and after the time when the said accumulations amount to and remain for two years of the amount or value of 3500l., without reduction as aforesaid, then upon trust with and out of the proceeds of the said underwriting business to pay unto the said William Sharp the younger by such half-yearly payments as aforesaid an annuity or yearly sum of 750l. free from all deductions, in addition to the income of the said accumulations, and of the dividends and annual proceeds of the said railway shares, and to accumulate and invest, in manner thereafter expressed, the residue or surplus after the payments thereinbefore mentioned of the profits of the said underwriting business until the same should amount to or be of the value of 8500l. sterling, and should remain of that amount or value, without reduction on account of losses as aforesaid, for the full term of two years: and, from and after the time when the said accumulations should amount to and remain for two years of the amount or value of 8500l. without reduction as aforesaid, then upon trust to re-assign the said moneys and [626] profits arising from the aforesaid underwriting business unto the said William Sharp the younger, his executors, administrators, and assigns, absolutely.

16. The deed contained other provisions more or less material, for which reference was made to the copy (a).

[627] 17. After the marriage, the said deed of settlement was acted on by the defendant and Donnison, the trustees mentioned therein; considerable losses were

(a) The marriage-settlement was as follows:—

This indenture made the 19th day of August, 1859, between William Sharp the younger, of, &c., and of Lloyd's, in the city of London, underwriter, of the first part, Maria Louisa Perkins Chamney, of, &c., spinster, of the second part, and William Sharp the elder, of, &c., and John Donnison, of, &c., of the third part: Whereas, by a memorandum of agreement bearing date the 17th of March, 1857, and made between the said W. Sharp the younger of the one part, and W. Fenn, of Lloyd's aforesaid, underwriter, of the other part, it was agreed between the said parties thereto that an underwriting account at Lloyd's Coffee-House, in the city of London, should be opened and carried on in the name of the said W. Sharp the younger, under the management and superintendence of the said W. Fenn, for the time and upon the terms therein and in part hereinafter mentioned, viz. that, as far as practicable, all risks taken on account of the said W. Sharp the younger should be identical with those taken by the said W. Fenn on his own account, and that the exceptions or single lines should be taken as far as practicable alternately by the said parties: that the underwriting account should commence on the 18th of March, 1857, and be carried on and the subscription made in the name of the said W. Sharp the younger, but the policies, losses, and averages should be adjusted by the said W. Fenn on his account: that the said underwriting business should be carried on for the term of three years from the 1st of March, 1857: that all premiums and other moneys arising or payable in respect of the said business should be received by the said W. Fenn, and paid to the account of the said W. Sharp the younger at his bankers during the said term, and all payments and advances in respect thereof should be made and paid by him exclusively, the said W. Sharp the younger providing the necessary funds for the purpose: that that said W. Fenn should during the said term be paid and allowed a salary of 300*l.* per annum, payable quarterly, as therein mentioned: and that the said W. Fenn should give to such underwriting business his best care and attention: And whereas, on the 21st of May, 1857, the said W. Sharp the elder signed a letter, addressed to the said W. Fenn, informing him that the said W. Sharp the elder held the sum of 5000*l.* for his son the said W. Sharp the younger, and engaging that it should be freely available for the purpose of carrying out the arrangement which the said W. Sharp the younger had made with the said W. Fenn to conduct for the said W. Sharp the younger an underwriting account: And whereas, on the 1st of November, 1858, it was further agreed between the said W. Sharp the younger and the said W. Fenn that, from and after the 1st of November, 1858, and so long as the said W. Sharp the younger should require it, the said W. Fenn should write double, or increase the lines, for and on account the said W. Sharp the younger, in all practicable cases: and that, in consideration thereof, the said W. Sharp the younger should pay the said W. Fenn an additional 50*l.* per quarter, so long as the said W. Sharp the younger should require the said W. Fenn to write double or increased lines: and the said W. Fenn and W. Sharp the younger also agreed to extend the agreement of the 17th of March, 1857, to the 31st of December, 1864, the same remaining in force except as altered above: And whereas by a writing under the hand of the said W. Sharp the younger, bearing date the 1st of January, 1859, and addressed to the said W. Sharp the elder, the said W. Sharp the younger, in consideration of the said W. Sharp the elder guaranteeing him to the extent of 5000*l.* in his business of an underwriter until by such business the said W. Sharp the younger should make or acquire from the profits thereof the full and clear sum of 5000*l.* after providing for all known losses, promised and agreed to pay to the said W. Sharp the elder, during his life, an annuity equal to 10*l.* per cent. on the sum of 5000*l.*, with a proviso that, if at the end of three years from the date thereof it should appear that one quarter of the average profits for that period made by the said W. Sharp the younger in the said business should amount to more than 500*l.*, then and in that case the said annuity should thenceforth be increased to a sum equal to one quarter of the average profits made by the said W. Sharp the younger in the said business during the said three years: And whereas, on the 2nd of July, 1859, it was further agreed between the said W. Sharp the younger and the

made in the underwriting business of Sharp, jun., after his marriage, on policies signed in his name by Fenn [628] under the above agreements; and the defendant, being called upon by Fenn under the defendant's letter of May 21st, 1857, made advances of money to Fenn to a considerable amount to meet the losses so sustained. The

said W. Fenn, that the said agreement of the 17th of March, 1857, should be continued until the 31st of December, 1870, subject to the sooner determination thereof after the 31st of December, 1864, by the said W. Sharp the younger giving the said W. Fenn six months' notice in writing for that purpose: And whereas a marriage has been agreed upon between the said W. Sharp the younger and the said M. L. P. Chamney, and it is intended that the same shall shortly be had and solemnized: And whereas, in contemplation of the said marriage, it has been agreed that the said W. Sharp the younger should assign to the said W. Sharp the elder and John Donnison all moneys now in the hands and hereafter to come into the hands of the said W. Fenn in respect of the aforesaid underwriting business, on behalf and for the benefit of the said W. Sharp the younger, and should also transfer to them stock being of the nominal value of 100l. in the London and North Western railway, and stock being of the nominal value of 500l. in the London and South Western railway, and should likewise assign to them the policy of assurance hereinafter mentioned on the life of the said W. Sharp the younger for the sum of 3000l., to be held respectively by them upon the trusts and for the intents and purposes hereinafter expressed: And whereas, in pursuance of the said agreement, the said W. Sharp the younger hath, previously to the execution of these presents transferred the said stock in the London and North Western railway and the said stock in the London and South Western railway into the names of the said W. Sharp the elder and John Donnison in the share register books of the said railway companies respectively, to be held in trust for the said W. Sharp the younger until the solemnization of the said intended marriage, and after the solemnization thereof upon the trusts and for the intents and purposes hereinafter declared and expressed concerning the same: Now this indenture witnesseth that, in further pursuance on the part of the said W. Sharp the younger of the said hereinbefore-recited agreement, and in consideration of the said intended marriage, and also in consideration of 10s., &c., the said W. Sharp, the younger doth by these presents grant and assign unto the said W. Sharp the elder and John Donnison, their executors, administrators, and assigns, *all and singular the sums of money, earnings, profits, and emoluments which are now in the hands of the said W. Fenn, and all such as shall hereafter come into the hands of the said W. Fenn, or other the agent, deputy, or attorney for the time being of the said W. Sharp the younger to be substituted for the said W. Fenn as hereinafter mentioned, on account or in respect of the said hereinbefore-mentioned underwriting business, and which according to the terms of the hereinbefore-recited agreements of the 17th of March, 1857, of the 1st of November, 1858, and of the 2nd of the present month of July, respectively, or otherwise, are and will or may become payable to the said W. Sharp the younger:* together with full power and authority to and for the said W. Sharp the elder and John Donnison, and the survivor of them, and the executors or administrators of such survivor, in the name or names and as the attorneys or attorney of the said W. Sharp the younger, to ask, demand, sue for, recover, and receive, and to give effectual receipts and discharges for, the said moneys, proceeds, and premises expressed and intended to be hereby assigned, and every or any part thereof: And the said W. Sharp the younger doth hereby order and direct the said W. Fenn and other the agent, deputy, and attorney for the time being of the said W. Sharp the younger in the aforesaid business, to pay the said moneys, profits, and premises unto the said W. Sharp the elder and John Donnison, their executors, administrators, and assigns, accordingly, To have and to hold the said moneys, profits, and other the premises hereinbefore mentioned, and hereby granted and assigned, or expressed and intended so to be, unto the said W. Sharp the elder and John Donnison, their executors, administrators, and assigns, In trust, nevertheless, for the said W. Sharp the younger until the said intended marriage between him and the said M. L. P. Chamney shall be solemnized, and, from and after the solemnization thereof, upon the trusts and for the intents and purposes hereinafter declared and expressed concerning the same, that is to say, Upon trust with and out of the moneys and profits arising from the said underwriting business, In the first place, to pay unto the said W. Sharp the elder, by half-yearly payments, on the 1st of January and the 1st of July in every year (and the

underwriting business was carried on by Fenn as [629] above mentioned in the name of Sharp, jun., until February 19th, 1860, when Sharp, jun stopped payment; and on March 29th, 1860, he was made bankrupt

18. Sharp, jun. did not keep any banking account. [630] Fenn received and paid

first half-yearly payment to be made on the 1st of January next after the solemnization of the said intended marriage) the annuity or yearly sum agreed or undertaken to be paid by the said W. Sharp the younger to the said W. Sharp the elder by the said hereinbefore-recited memorandum or writing under the hand of the said W. Sharp the younger, dated the 1st of January, 1859: and, subject and without prejudice to the payment of the aforesaid annuity or yearly sum to the said W. Sharp the elder, upon trust in the next place, with and out of the said moneys, profits, and premises, to pay to the said W. Sharp the younger, by equal half-yearly payments on the days above mentioned (and the first payment thereof to be made on the 1st of January next after the solemnization of the said intended marriage) an annuity or yearly sum of 500l. free from all deductions: and also upon trust to pay to him, when and as the same become due, the dividends, interest, and annual proceeds of the aforesaid railway shares, and also the resulting income of the surplus moneys, profits, and premises to be accumulated and invested as hereinafter directed: And, upon further trust to accumulate and invest in manner hereinafter expressed the residue or surplus after the payments aforesaid of the said moneys, profits, and premises hereinbefore assigned, until the same shall amount to or be of the value of 8500l. sterling, and shall remain of that amount or value without reduction on account of losses in the aforesaid underwriting business for the full term of two years: and, from and after the time when the said accumulations shall amount to and remain for two years of the amount or value of 8500l. without reduction as aforesaid, then upon trust with and out of the proceeds of the said underwriting business to pay unto the said W. Sharp the younger, by such half-yearly payments as aforesaid, an annuity or yearly sum of 750l. free from all deductions, in addition to the income of the said accumulations and of the dividends and annual proceeds of the said railway shares, and to accumulate and invest in manner hereinafter expressed the residue or surplus after the payments hereinbefore mentioned of the profits of the said underwriting business until the same shall amount to or be of the value of 8500l. sterling, and shall remain of that amount or value without reduction on account of losses as aforesaid for the full term of two years: And, from and after the time when the said accumulations shall amount to and remain for two years of the amount or value of 8500l. without reduction as aforesaid, then upon trust to re-assign the said moneys and profits arising from the aforesaid underwriting business unto the said W. Sharp the younger, his executors, administrators, and assigns, absolutely: And it is hereby agreed and declared between and by the said parties hereto that the accumulations hereinbefore directed to be made of the proceeds of the said underwriting business shall, at the discretion of the said trustees, or of the survivor of them, his executors or administrators, or of other the trustee or trustees of these presents for the time being, but with the consent of the said W. Sharp the younger during his life, be laid out or invested from time to time in some or one of the public stocks or funds of Great Britain, or in the purchase of shares in the capital stock of the Bank of England or of the East India Company, or of all or any of them, or upon any government or real securities in England and Wales, or upon the security of the bond or bonds of any of the British colonies, or of the bond or bonds, debentures or debenture, or preference or guarantee stock or shares of any railway, dock, or canal company or companies of good repute, and paying or understood to pay dividends out of the bona fide profits thereof: And the said W. Sharp the younger doth hereby covenant and agree with the said W. Sharp the elder and John Donnison, their executors, administrators, and assigns, that, in case the said intended marriage shall take effect, and in case at any time thereafter before the accumulations hereinbefore directed to be made shall amount to or be of the value of 8500l., and shall continue of that amount or value without reduction as aforesaid for the space of two years, the said W. Fenn or the person for the time being substituted for and acting in his stead as hereinafter mentioned should die or decline or become incapable to act as the agent, deputy, or attorney of and for the said W. Sharp the younger in the management and carrying on in manner aforesaid of his said underwriting business, then and in every such case the said W. Sharp the younger shall and will immediately thereupon engage and

all moneys for him in respect of the underwriting business and gave him cheques from time to time for such sums as Sharp, jun. drew out of the business. These cheques were paid by Sharp, jun. into the defendant's banking account with [631] Hankey & Co., on whom the defendant allowed him to draw cheques until November, 1859, when the defendant put a stop to his son's drawing cheques.

appoint some other fit and competent person to act in the same capacity as the said W. Fenn now does as agent for or as the deputy or attorney of the said W. Sharp the younger in conducting, managing, and carrying on his said business of underwriting, as also for the purpose of winding up of the accounts between the said W. Sharp the younger and his previous agent, deputy, or attorney in the said business, to the intent that the said business shall be effectually carried on and the profits thereof paid over in manner aforesaid to the said trustees or trustee of these presents for the time being until the accumulations hereinbefore directed to be made shall amount to or be of the value of 8500l. and shall remain of that amount without reduction as hereinbefore mentioned for the space of two years: Provided always, and it is hereby agreed and declared that, notwithstanding the trusts for accumulation and investment hereinbefore contained, it shall be lawful for the said trustees or trustee of these presents for the time being, at any time or times before the said accumulations shall amount to or be of the value of 8500l., and shall continue of that amount without reduction as aforesaid for the space of two years, upon the request in writing of the said W. Sharp the younger, and of the said W. Fenn, or of the agent, deputy, or attorney for the time being to be substituted as aforesaid for him in carrying on the said underwriting business, to raise and pay out of the said railway stock, accumulations, and investments, unto the said W. Fenn, or other agent, deputy, or attorney for the time being substituted for him as aforesaid, any sum or sums of money that may from time to time be required to meet emergencies occurring in the said underwriting business: And this indenture also witnesseth that, in further pursuance of the said hereinbefore-recited agreement, and in consideration of the said intended marriage, it is hereby further agreed and declared between and by the said parties to these presents, that the said W. Sharp the elder and John Donnison, and the survivor of them, and the executors or administrators of such survivor, and other the trustees or trustee of these presents for the time being, shall, after the solemnization of the said intended marriage, stand possessed of and interested in as well the said accumulations hereinbefore directed to be made of the proceeds of the said underwriting business when and so soon as the same shall amount to or be of the value of 8500l., and shall remain of that amount or value without reduction for the period of two years, as hereinbefore mentioned, or, if the said W. Sharp the younger should die before the same accumulations shall reach the said amount or value of 8500l., then of and in the amount actually accumulated at the time of his decease, and of and in the stocks, funds, securities, and investments in or upon which the said accumulations shall or may have been laid out and invested, as also from and immediately after the solemnization of the said intended marriage of and in the aforesaid 1000l. London and North Western railway stock and 500l. London and South Western railway stock, and of and in the interest, dividends, and annual proceeds of the said accumulations, stock, funds, securities, investments, shares, and premises (which are hereinafter called the principal trust premises), upon the trusts and for the intents and purposes, and with, under, and subject to the powers, provisoes, agreements, and declarations hereinafter expressed, declared, and contained concerning the same, that is to say, upon trust in the first place from time to time or at any time or times, whensoever thereunto requested in writing by the said W. Sharp the elder, his executors or administrators, and also by the said W. Sharp the younger, his executors or administrators, to raise by sale or other disposition of a competent part or competent parts of the said principal trust premises, and of the income thereof, any sum or sums of money not exceeding in the whole the sum of 5000l. which may be required for the purpose of paying to and satisfying the said W. Sharp the elder, his executors or administrators, such sum or sums of money as he, his executors or administrators, shall or may have paid or become liable or be called on to pay upon or under the said hereinbefore-recited letter or guarantie of the said W. Sharp the elder dated the 21st of May, 1857, or any other like letter or guarantie to be substituted for or in lieu of the same, and shall pay the said sum or sums of money when so raised as aforesaid unto the said W. Sharp the elder, his executors or administrators, accord-

19. Fenn drew his salary out of the funds of the underwriting business.

[632] 20. The first half-yearly payment of the annuity of 500*l.* a year secured to the defendant by the said marriage-settlement became due to the defendant on the 1st of January, 1860, and was paid to the defendant by Sharp, jun., on the 7th of

ingly; and, subject and without prejudice to the trusts hereinbefore declared, upon trust with and out of the said principal trust premises to pay during the life of the said W. Sharp the younger, when and as the same shall become payable, the annual premiums necessary to be paid in order to keep on foot the policy of assurance herein-after assigned or expressed and intended so to be; and upon further trust to pay the remainder of the said interest, dividends, and annual proceeds during the life of the said W. Sharp the younger unto him the said W. Sharp the younger and his assigns, for his and their own use and benefit; and, from and after his decease, upon trust to pay the said interest, dividends, and annual proceeds unto the said M. L. P. Chamney and her assigns, during her life, for her and their own use and benefit: And, from and after the decease of the said survivor of the said W. Sharp the younger and the said M. L. P. Chamney, then, as well in regard of the said principal trust premises as in regard to the interest, dividends, and annual proceeds thereof, in trust for all and every or such one or more of the issue of whatever degree or degrees of the said intended marriage, at such age or ages, or time or times, with such provisions for maintenance, education, and advancement, and, if more than one, in such parts, shares, or proportions, and for such interest or interests, and subject or without being subject to such restrictions, charges, and limitations over, such charges or limitations over being for the benefit of some or one of the said issue, as the said W. Sharp the younger and M. L. P. Chamney by any deed or deeds, with or without power of revocation and new appointment, to be by them duly executed, shall or may at any time or times jointly direct or appoint; and, in default of such joint direction or appointment, and so far as no such joint direction or appointment may extend, then as the survivor of the said W. Sharp the younger and M. L. P. Chamney after the death of the other of them, by any deed or deeds, with or without power of revocation and new appointment, or by his or her last will and testament in writing, or by any codicil or codicils thereto to be respectively by him or her duly executed, shall or may at any time or times direct or appoint; and, in default of every such direction or appointment as aforesaid, and so far as no such direction or appointment may extend, in trust for all and every the children and child if more than one of the said intended marriage, who, being a son or sons, shall attain the age of twenty-one years, or, being a daughter or daughters, shall attain that age, or marry with the previous consent or subsequent written approbation of her or their parents or parent or guardians or guardian, to be divided among the said children in equal shares or proportions as tenants in common, their respective executors, administrators, and assigns; or, if there should be but one child, then in trust wholly for such one child, his or her executors, administrators, and assigns: Provided always, and it is hereby agreed and declared that no child to whom or to any of whose issue any part or parts of the said principal trust premises may be appointed by virtue of the powers hereinbefore contained, or either of them, shall be entitled to share in the unappointed part or parts thereof, or in other the trust moneys or funds hereinbefore mentioned, without bringing the parts or shares so appointed to him or her, or to all or any of his or her issue, or the value thereof, into hotchpot, and accounting for the same accordingly, unless in and by the same or any other instrument or instruments made in exercise of the powers aforesaid or either of them a contrary intention shall be declared: Provided also, and it is hereby further agreed and declared that, after the decease of the survivor of the said W. Sharp the younger and M. L. P. Chamney, and until the whole of the said principal trust premises shall become vested under the trust or powers hereinbefore contained, it shall be lawful for the said trustees or trustee for the time being to pay and apply at their or his discretion, or otherwise to pay unto the guardian or guardians for the time being of the child or children of the said intended marriage during his, her, or their minority or minorities, all or any part of the interest, dividends, and annual proceeds of the share or respective shares in the said principal trust premises to which such child or children of the said intended marriage shall for the time being be presumptively entitled under the trusts or powers aforesaid, for or towards his, her, or their respective maintenance and education, and, from time to time when and as the said trustees or trustee may think fit, but not

March, 1860, but has since [633] been claimed by the assignees under the son's bankruptcy from the defendant, as an undue preference, and re-paid by him.

21. Sharp the younger, between the date of the said settlement and his bankruptcy, drew various sums of [634] money out of the underwriting business on account of the annuity of 500l. secured to him by the said settlement.

otherwise, to invest and lay out the residue (if any) of the said interest, dividends, and annual proceeds, in any of the investments hereinbefore mentioned, so that the same may accumulate, which accumulations shall go in augmentation of the share or shares in the said principal trust premises whence the same shall have respectively proceeded, yet so nevertheless that all or any part of the residue or surplus unapplied in any one or more year or years, whether the same shall or shall not have been invested, may be applied in manner aforesaid in any future year or years: Provided also, and it is hereby agreed and declared, that it shall be lawful for the said trustees or trustee for the time being, at their or his discretion, after the decease of the survivor of the said W. Sharp the younger and M. L. P. Chamney, or in the life-time of them or the survivor of them, with their, his, or her consent in writing, to raise at once or at several times, and to pay and apply for or towards the preferment or advancement in the world, or otherwise for the benefit of any child or children of the said intended marriage, any sum or sums of money not exceeding in the whole for each such child the value of one moiety of his or her presumptive share under the trusts or powers hereinbefore contained in the aforesaid principal trust premises, the said sum or sums of money to be considered and taken as part of his, her, or their share or respective shares therein, and to be allowed or accounted for accordingly: And it is hereby further declared and agreed that, in case there shall not be any child of the intended marriage who under the trusts or powers aforesaid shall obtain a vested interest in the whole of the said principal trust moneys, then, after the decease of the said M. L. P. Chamney, and such failure of issue as above mentioned, the said trustees or trustee for the time being shall stand possessed of and interested in the said principal trust premises, and the interest, dividends, and annual proceeds thereof, or so much of the same respectively as shall not have been appointed or raised and applied under or by virtue of any of the powers hereinbefore contained, in trust for the said W. Sharp the younger, his executors, administrators, and assigns: Provided always, and it is hereby further agreed and declared between and by the said parties hereto, that it shall be lawful for the said trustees or trustee of these presents for the time being, and they and he are and is hereby authorized and empowered, at any time or times after the solemnization of the said intended marriage, and after the accumulations hereinbefore directed to be made of the proceeds of the said underwriting business shall amount to the sum of 8500l., upon the request in writing of the said W. Sharp the younger, and for meeting emergencies which may arise in the course of the aforesaid underwriting business, but not for any other purpose, to advance and lend out of the said accumulations, and the stocks, funds, or securities in or upon which the same may be invested, to the said W. Sharp the younger, on the security of his bond, or on such other security as the said trustees or trustee may approve of, any sum or sums not exceeding in the whole the sum of 5000l.: and it is hereby further agreed and declared that the said trustees or trustee shall stand possessed of and interested in the sum or sums which may be so advanced and lent to the said W. Sharp the younger as aforesaid, and the interest thereof, and the security or securities for the same, upon and for the same trusts, intents, and purposes as are hereinbefore expressed concerning the said principal trust premises hereby settled, and the interests, dividends, and annual proceeds thereof: Provided also, and it is hereby further agreed and declared between and by the said parties hereto, that it shall be lawful for the said trustees or trustee of these presents for the time being, but during the lives and life of the said W. Sharp the younger and M. L. P. Chamney, and of the survivor of them, with their, his, or her consent in writing, to sell and dispose of, call in, and receive the said railway shares hereinbefore mentioned, as also all or any part or parts of the principal trust moneys, stocks, funds, and securities subject for the time being to the trusts hereby declared, and to invest or lay out the moneys to be produced by any such sale or other dispositions, or so to be called in and received as aforesaid, in any of the investments hereinbefore particularized, and so from time to time when and as often as occasion may require or as it

22. On the 22nd of December, 1859, the plaintiffs effected a marine policy of assurance at Lloyd's, in the [635] usual way, for the sum of 2700l. on the ship "Shepherdess," for twelve calendar months, in any trade, and from and to any port or ports, commencing sailing from Whampoa, at 8 guineas per cent. premium. This policy was subscribed by several underwriters for [636] various sums, and, amongst

may be deemed expedient: Nevertheless, it is hereby further declared that all such new stocks or funds, securities, and investments as above mentioned, and the principal moneys invested therein or thereby secured, and the interest, dividends, and annual proceeds thereof respectively, shall be held and applied upon, for, and to the same trusts, intents, and purposes, and with, under, and subject to the same powers, provisos, agreements, and declarations as are hereinbefore declared, expressed, and contained, of or concerning the said principal trust premises hereby settled, and the interest, dividends, and annual proceeds thereof: Provided also, and it is hereby further agreed and declared, that it shall be lawful for the said trustees or trustee of these presents for the time being, at any time or times during the lives of the said W. Sharp the younger and M. L. P. Chamney, and the life of the survivor of them, with their, his, or her consent in writing, to call in, receive, sell, transfer, and dispose of all or any part or parts of the said principal trust premises hereby settled, and to lay out the moneys to be so called in, received, or to be produced by any such sale or other disposition as aforesaid, in the purchase of any freehold or copyhold or customary messuages, lands, or tenements in England or Wales, but not in Ireland, held for an estate of inheritance in fee-simple or of the nature thereof, or of any leasehold messuages, lands, or tenements in England or Wales, but not in Ireland, held for a life or lives, or for years, customarily renewable, or for any term or terms of years certain whereof not less than sixty shall be to come and unexpired at the time of such purchase or purchases being made, or in the purchase of messuages, lands, or tenements situate as aforesaid of all or any of the aforesaid tenures, the said messuages, lands, or tenements to be conveyed, surrendered, or assigned respectively to the said trustees or trustee for the time being, their or his heirs, executors, administrators, and assigns, according to the nature of the estates or interests therein, and to be held by them or him upon trust during the lives of the said W. Sharp the younger and M. L. P. Chamney, and the life of the survivor of them, with such their, his, or her consent as aforesaid: and, after the decease of the survivor of them, then at the discretion of the said trustees or trustee for the time being to sell and dispose of the said messuages, lands, or tenements which shall have been so purchased as above mentioned, at such time or times, in such manner, and for such price or prices in money, as shall or may be deemed expedient or reasonable; and, as to the moneys arising from or by such sale or sales, upon trust to invest and apply the same (after payment of the expenses attending the said sale or sales) in such manner and to such intents and purposes as the money laid out in the purchase of the messuages, lands, or tenements so sold would have been invested and have been applicable in case such purchase or purchases had not been made: and also upon trust in the mean while until such messuages, lands, or tenements shall be re-sold, to apply the rents and profits thereof in the manner and to the purposes hereinbefore declared with regard to the interest, dividends, and annual produce of the principal trust premises laid out in such purchase or purchases as aforesaid,—it being the intent of the said several persons parties to these presents that all messuages, lands, and tenements which shall or may be purchased under the authority of this present power shall be considered as money, and be subject to such and the same trusts, powers, provisos, and declarations as the money laid out in the purchase thereof would have been subject to if the same had not been so invested and applied: Provided also, and it is hereby further agreed and declared, that it shall be lawful for the said trustee or trustees of these presents for the time being (but during the lives of the said W. Sharp the younger and M. L. P. Chamney, and the life of the survivor of them, with their, his, or her consent in writing) to demise or lease all or any part of the messuages, lands, or tenements which shall or may be purchased in virtue of the power lastly hereinbefore contained, in the meantime and until the same shall be re-sold pursuant to the trust for that purpose also above expressed, to any person or persons for any term or number of years not exceeding twenty-one years in possession, and not by way of future interest, so that there be reserved in every such demise or lease the best or most improved yearly rent that can be reasonably

others, by a clerk in the name of Sharp, jun., before he stopped payment, for 100l. A loss afterwards occurred upon this policy to the plaintiffs by the perils insured against, to the amount of 100l. per cent.: and it was agreed that the under-[637]-writers of the said policy are liable to the plaintiffs thereon to that amount.

23. The plaintiffs were wholly ignorant of the aforesaid arrangements and dealings

obtained for the tenements to be thereby demised, and so that the lessee or lessees be not made punishable for waste by any words to be therein contained: And this indenture further witnesseth that, in further pursuance of the said hereinbefore-recited agreement, and for the considerations hereinbefore expressed, the said W. Sharp the younger doth by these presents grant, bargain, sell, and assign unto the said W. Sharp the elder and John Donnison, their executors, administrators, and assigns, all that policy or instrument of assurance under the hands of two of the trustees of the London Life Association for Assurance on Lives, bearing date the 24th of June, 1859, and numbered 10617, second series, and also the principal sum of 3000l. thereby assured to be paid out of the funds of the said association unto the executors, administrators, or assigns of the said W. Sharp the younger within three calendar months after satisfactory proof shall have been made according to the rules and practice of the said association of the death of the said W. Sharp the younger, and all such other sums of money (if any) which by way of bonus or otherwise shall or may become payable or be recoverable under or by virtue of the said policy, and all the right, title, interest, property, benefit, claim, and demand whatsoever, both at law and in equity, of the said W. Sharp the younger into, upon, or out of the same policy, money, and premises, together with full power and authority to and for the said W. Sharp the elder and John Donnison, and the survivor of them, and the executors and administrators of such survivor, and their or his assigns, in the names and as the attorneys or attorney of the executors or administrators of the said W. Sharp the younger, or otherwise howsoever, to ask, demand, sue for, recover, receive, and take, and to give effectual receipts and discharges for, the said principal sum of 3000l. and other the moneys to become payable or recoverable by virtue of or under the said policy of assurance, or any of them, or any part or parts thereof, to have and to hold the said policy of assurance, moneys, and other the premises lastly hereinbefore mentioned, and hereby granted and assigned, or expressed and intended so to be, unto the said W. Sharp the elder and John Donnison, their executors, administrators, and assigns, absolutely, nevertheless, in trust for the said W. Sharp the younger, his executors, administrators, and assigns, until the said intended marriage between him and the said M. L. P. Chamney shall be solemnized, and, from and after the solemnization thereof, upon the trusts and for the intents and purposes hereinafter expressed or referred to concerning the same (that is to say), in case the said M. L. P. Chamney should die in the lifetime of the said W. Sharp the younger, without leaving any child of the said intended marriage her surviving, and without having had any child who under the trusts hereinafter declared by way of reference shall have obtained or shall afterwards obtain a vested interest in the moneys to be recoverable under or by virtue of the said policy of assurance, in trust to assign or transfer the said policy, moneys, and premises unto the said W. Sharp the younger, his executors, administrators, and assigns, for his and their own absolute use and benefit; but, in case the said M. L. P. Chamney, or any child of the said intended marriage, should survive the said W. Sharp the younger, or if any such child should previously to the decease of the said W. Sharp the younger have obtained a vested interest in the moneys to become payable or recoverable under or by virtue of the policy of assurance, then and in any such case, upon trust when and so soon as the said principal sum of 3000l. assured by the said policy shall become payable, upon trust to apply for and obtain payment of the said 3000l., and all other moneys (if any) which may be payable or be recoverable by virtue of or under the said policy; and, after deducting the expenses (if any) incurred in obtaining the payment thereof, in trust to lay out and invest the moneys so obtained and received (but, in the life-time of the said M. L. P. Chamney, with her consent in writing,) in or upon any of the stocks, funds, securities, or other investments hereinbefore mentioned; and it is hereby further agreed and declared that the said trustees or trustee of these presents for the time being shall stand possessed of and interested in all and singular the said trust moneys, stocks, funds, securities, and principal trust premises last mentioned, and of and in the interest, dividends,

between the defendant, his son, Fenn, and the committee of Lloyd's, and also of the said marriage-settlement.

[638] 24. In the month of September, 1861, the plaintiffs proved their claim under the son's bankruptcy. At the time of such proof, neither of the plaintiffs was aware of the aforesaid arrangements and dealings.

and annual proceeds thereof, upon and for such and the same trust, and with, under, and subject to such and the same powers, provisoes, agreements, and declarations as are hereinbefore declared, expressed, and contained of and concerning the principal trust moneys, stocks, funds, securities, railway shares, and premises first hereinbefore mentioned and hereby settled, and the interest, dividends, and annual proceeds thereof, or such of the said trusts, powers, provisoes, agreements, and declarations as shall at the time of the decease of the said W. Sharp the younger be subsisting, undetermined, and capable of taking effect, and of being performed and exercised respectively: Provided also, and it is hereby further agreed and declared, that the receipt and receipts in writing of the trustees or trustee for the time being acting in the execution of the trusts or powers hereinbefore contained, shall be good and sufficient as a discharge or discharges for all or any sum or sums of money payable or to be paid to them or him under or by virtue of these presents, or upon or for any of the trusts or purposes herein expressed, and that the person or persons to or for whom the same shall be given shall not be obliged to see to the application or be answerable for the misapplication of the moneys therein respectively expressed to be received, or any part thereof respectively: Provided also, and it is hereby further agreed and declared between and by the said parties to these presents that, in case the said trustees hereinbefore named, or any of them, or any future trustee or trustees to be appointed as hereinafter mentioned, should die or go to reside abroad, or be desirous of being discharged from, or refuse or become incapable to act in, the execution of the trusts and powers hereby created, before the said trusts and powers shall be fully executed and performed, then and so often as the same shall happen it shall be lawful for the said W. Sharp the younger and M. L. P. Chamney, or the survivor of them, during their, his, or her lives or life, and, after the decease of the survivor of them, for the surviving or continuing trustees or trustee for the time being, or the executors or administrators of the last surviving or of any deceased trustee, or for the retiring trustees if all the trustees for the time being retire together, or for the last acting trustee, on his retiring, by any deed or deeds, to be by them, him, or her respectively duly executed, to nominate, substitute, or appoint any other fit person or persons to be a trustee or trustees in the place or stead of the trustee or trustees so dying, or going or gone to reside abroad, or desiring to be discharged, or refusing or becoming incapable to act as aforesaid; and that, when and so often as any new trustee or trustees shall be appointed as above mentioned, all the said trust premises subject for the time being to the trusts hereby declared, shall be thereupon assigned or transferred and assured in such manner and so that the same may be legally and effectually vested in the continuing former trustees or trustee of these presents and such new trustee or trustees jointly, or, if there be no such continuing former trustee, then in such new trustees solely, upon and for the several trusts, intents, and purposes, and with and subject to the several powers, provisoes, agreements, and declarations hereinbefore declared or expressed and contained of or concerning the said trust premises, or such of them as shall be then subsisting or capable of taking effect or of being exercised; and that such new trustee or trustees as above mentioned either before or after any assignment or transfer of the said trust premises shall have, and may exercise and concur in exercising, all the same powers and authorities and as fully and effectually as if he or they had been originally appointed a trustee or trustees of these presents, in the room of the trustee or trustees in whose place he or they respectively shall or may be substituted: Provided also, and it is hereby further agreed and declared that the said trustees hereinbefore named, and all future trustees to be appointed as aforesaid, their respective heirs, executors, and administrators, shall be chargeable only for such moneys as they shall respectively actually receive by virtue of the trusts hereby in them reposed, notwithstanding their joining in any receipt for the sake of conformity; and that each of them shall be answerable for his own acts and wilful defaults only, and in no case for involuntary losses, and in particular shall not be answerable or accountable for any moneys which in pursuance of or under

25. The plaintiffs contended that the defendant, by [639] the effect of the instruments and facts above mentioned, became a partner or a principal in the underwriting business carried on in his son's name, as above mentioned, and, as such, a party to the said policy, and liable to pay to the plaintiffs the loss sustained on [640] the said policy in respect of the sum of 100l. underwritten in the son's name as aforesaid. The defendant contended the contrary. It was agreed that the court should draw any reasonable inferences of fact.

26. The question for the opinion of the court was, [641] whether the defendant was or was not liable on the said policy, as a partner with his said son.

27. If the court should be of opinion that the defendant was liable, then it was agreed that judgment should be entered for the plaintiffs for the sum of 100l. [642] If the court should be of the contrary opinion, then it was agreed that the verdict and judgment should be entered for the defendant on the issues joined on the second and sixth pleas.

[643] J. Brown, Q. C. (with whom was Bovill, Q. C.), for the plaintiffs (a). The defendant, it is submitted, was a [644] partner with his son. The effect of making the profits of the business the subject of the marriage settlement was to make the trustee a partner, even if he were a bare trustee. The memorandum of the 1st of January, 1859, in itself would constitute a partnership: but, [645] when we come to the marriage-settlement, the thing assumes a very definite shape; all the profits already accrued or thereafter to accrue from the underwriting business were assigned to the defendant and Domison as trustees. In *Wightman v. Townroe*, 1 M. & Selw. 412, where executors of a deceased partner continued his share of the partnership property in trade for the benefit of his infant daughter, it was held that they were liable upon a bill drawn for the accommodation of the partnership, and paid in discharge of a partnership debt, although their names were not added to the firm, but the trade was carried on by the other partners under [646] the same firm as before, and the executors, when they divided the profits and loss of the trade, carried the same to the account of the infant, and took no part of the profits themselves. Le Blanc, J., says: "It seems to me that the executors, by embarking the property in trade in the first instance, contracted a responsibility in a court of law, which their subsequent application of the profits to purposes not of personal benefit, cannot afterwards vary." A similar decision was come to in *Ex parte Garland*, 10 Ves. 110. It is a clear principle in the law of partnership, that one who contracts for a share of profits is liable to contribute to losses. The rule has been so laid down in a long series of cases. In *Ex parte Wilson*, *In re Colbeck*, Buck, B. C. 48, it was held that, if a retiring partner assign all his share in the concern to two continuing partners, upon trust to pay him an annuity for his life, subject to an abatement or enlargement with the fluctuation of the profits of the trade, that will not with reference to creditors determine the partnership. In *Ex parte Hamper*, 17 Ves. 403, 404, Lord Eldon says: "The cases have gone

the trusts, powers, or authorities hereinbefore contained, shall or may be paid or advanced by the said trustees or trustee for the time being to the said W. Fenn, or other the agent, deputy, or attorney for the time being of the said W. Sharp the younger in his said business of underwriting, or to the said W. Sharp the younger himself, for the purposes of the said business, nor for the loss or avoidance of the said policy of assurance hereinbefore assigned or expressed and intended so to be, or of the moneys thereby assured, by reason of the non-payment of any of the annual premiums to be paid for keeping the same on foot: and that the said present and future trustees, their respective heirs, executors, and administrators, shall and may, out of the moneys which shall come to their respective hands by virtue of these presents, retain to and reimburse themselves respectively all such reasonable costs and expenses as they shall or may respectively incur in or about the execution of the trusts hereby in them reposed. In witness," &c.

(a) The points marked for argument on the part of the plaintiffs were as follows:—

"1. That the facts shew that the defendant was a partner as to third persons in the underwriting business carried on in his son's name:

"2. That the defendant was liable to the plaintiffs on the policy in question subscribed in the son's name, as a partner with him; and that the plaintiffs are entitled to recover the amount insured from the defendant."

farther to this nicety, upon a distinction so thin that I cannot state it as established upon due consideration that, if a trader agrees to pay another person for his labour in the concern a sum of money, even in proportion to the profits, equal to a certain share, that will not make him a partner: but, *if he has a specific interest in the profits themselves, as profits, he is a partner.*" Again at p. 412, he further says: "It is clearly settled, though I regret it, that, if a man stipulates that, as the reward of his labour, he shall have, not a specific interest in the business, but a given sum of money, even in proportion to a given quantum of the profits, that will not make him a partner: but, if he agrees for a part of the profits, as such, giving him a right to an ac-[647]-count, though having no property in the capital, he is as to third persons a partner: and in a question with third persons no stipulation can protect him from loss."

Lush, Q. C. (Mellish, Q. C., and Sir G. Honyman were with him), for the defendant (a). It is sought to fix the defendant as a partner in the business carried on by his son, by a reference to the agreement of 1st of January, 1859, and the marriage-settlement taken together. The agreement was to pay the defendant 500*l.* a year for three years, in consideration of his guaranteeing in case of losses to the extent of 5000*l.*, and that, if at the end of the three years the business should be found to have produced a profit of more than 2000*l.* a year, the annuity was to be increased. That was not an agreement for a share of the profits of the business. [Montague Smith, J. It would have been much the same if the annuity had been measured by the amount of profits of another man's business.] Precisely so. Then, does the marriage-settlement make the father a partner? It is said that not only does it make the father, but also the co-trustee, a partner. The business, however, is not transferred to them: but only the railway stock, moneys in hand, and all the moneys, earnings, profits, and emoluments which should thereafter come to the hands of Fenn [648] on account or in respect of the underwriting business. The trustees had no power to interfere with the business. [Montague Smith, J. Would not the father be entitled in equity to an account of the profits?] It is submitted not. By the agreement of the 17th of March, 1857, the business was to be entirely under the control and management of Fenn. If the agreement of the 1st of January, 1859, did not make the father a partner, the settlement clearly did not. There is nothing in any of the trusts to impose upon the trustees any such liability as is sought to be inferred from the deed. In *Hickman v. Carr*, 18 C. B. 617, A. and B., who carried on the business of iron-masters in co-partnership, by a deed purporting to be made between A. and B. of the first part, five persons named as trustees of the second part, and the several persons whose names were contained in a schedule as creditors for the sums therein mentioned, and who should execute the deed, of the third part,—reciting that the said A. and B. were indebted to the several persons parties thereto of the third part, and that they had agreed to assign all their estate and effects for the benefit of such creditors, —assigned the works and all their property and effects to trustees, upon trust, amongst other things, *to carry on the business* under the name of "The Stanton Iron Company," and *out of the profits* to pay interest on mortgages, &c., and to "*pay and discharge the net income of the business remaining after answering the purposes aforesaid, unto and among all and singular the creditors of A. and B., in rateable proportions according to the amount of their respective debts.*" And this court held that, under this deed, the creditors executing it became liable *as partners* for debts contracted by the trustees in carrying on the trade. On appeal to the Exchequer Chamber, that court was equally divided in opinion,—Coleridge, J., Erle, J., and Crompton, J., agreeing with the court below: Martin B., Bramwell, B., and Watson, B., thinking the decision of this court wrong: see 3 C. B. (N. S.) 523. The House of Lords, however, held that the deed did not

(a) The points marked for argument on the part of the defendant were as follows:—

"1. That, upon the facts and documents set out in the special case, the defendant is not liable as an underwriter on the policy:

"2. That the facts do not shew that the defendant was a partner with his son in business, so as to make him liable for the loss:

"3. That it appears by the case that the plaintiffs were not aware of the facts alleged to constitute a partnership, and therefore are not entitled to rely on any ostensible partnership."

constitute the creditors partners, so as to become liable for debts contracted by the trustees in carrying on the business: see *Wheatcroft and Cox v. Hickman*, 9 C. B. (N. S.) 47, 8 House of Lords Cases, 268. The liability of a partner in respect of contracts made by the firm is there put upon the true ground, viz. that of *agency*. Lord Cranworth there says (9 C. B., N. S. 90): "The liability of one partner for the acts of his co-partner is in truth the liability of a principal for the acts of his agent. Where two or more persons are engaged as partners in an ordinary trade, each of them has an implied authority from the others to bind them all by contracts entered into according to the usual course of business in that trade. Every partner in trade is, for the ordinary purposes of the trade, the agent of his co-partners; and all are therefore liable for the ordinary trade contracts of the others. Partners may stipulate among themselves that some of them only shall enter into particular contracts, or enter into any contracts, or that, as to certain of their contracts, none shall be liable except those by whom they are actually made: but with such private arrangements third persons dealing with the firm, without notice, have no concern. The public have a right to assume that every partner has authority from his co-partner to bind the whole firm in contracts made according to the ordinary usages of trade." Again, at p. 95, His Lordship says: "I can find no case in which a person has been made liable as a dormant or sleeping partner, in which the trade might not fairly be said to have been carried on for him, together with those ostensibly conducting it, and when therefore he would stand in the [650] position of principal towards the ostensible members of the firm as his agents. This was certainly the case in *Waugh v. Carter*, 2 H. Bl. 235. Each firm was carrying on business on account, not only of itself, but also of the other firm: this, therefore, made each firm the agent of the other. The case of *Bond v. Pittard*, 3 M. & W. 357, could admit of no doubt. The question was, whether G. F. Watts and P. H. Watts could sue jointly for business transacted by them as attorneys. They had agreed to become partners on a stipulation that P. H. Watts should always receive 300l. yearly out of the first profits as his share, and should not be liable for any losses. It was argued that this latter stipulation prevented them from being partners: but the court held the contrary. Each of them worked for the common benefit of both: and each of them therefore acted as agent for the other. The produce of the labour of each was to be brought into a common fund, to be afterwards shared according to certain arrangements between themselves. The case was really free from doubt. A similar principle explains and justifies the decision of the court of Common Pleas in *Barry v. Nesham*, 3 C. B. 641. The question was whether the defendant was liable for goods furnished to one Lowthin in the way of his business as the printer and publisher of a newspaper. It is clear that Lowthin was conducting the business for the common benefit of both, subject to the private arrangements as to the shares they should separately be entitled to. Lowthin was therefore clearly the agent of Nesham." Tried by that test, what is there here to shew that the underwriting business was being carried on for the benefit of this defendant? [Byles, J. We are to draw any reasonable inferences of fact. If we think that the substance of the arrangement makes the defendant a partner, we are bound so to decide. Erle, C. J., re-[651]-ferred to *Courtenay v. Wagstaff*, 16 C. B. (N. S.) 110. Montague Smith, J. It appears that all the moneys received in the business were paid into the father's banking-account.] The accounts being all kept by Fenn, the son did not require himself to keep a banking account for the purpose of this business. The business began in 1857: it was not until the 1st of January, 1859, that the defendant took the agreement to receive 500l. a year. If such an arrangement as this enures as a partnership, no security can be taken for the repayment of advances out of the profits of a business. [Erle, C. J. The difficulty is, that this is a bargain to receive the proceeds of future contracts.] The true question is, as in *Wheatcroft v. Hickman*, 9 C. B. (N. S.) 47, 8 House of Lords Cases, 268, whether the business carried on is the business of the person who is sought to be charged, and the person carrying it on is doing so as his agent. None of the cases cited on the other side have any application. In *Wightman v. Towroe*, 1 M. & Selw. 412, the executors had taken to and were carrying on the business for the benefit of an infant. Lord Justice Knight Bruce so explains that case in *Labouchere v. Tupper*, 11 Moore's P. C. 198, 221, where he says,—“The executor of a trader carrying on the trade after his death, though doing so avowedly in the character of executor, is nevertheless personally liable for all the debts contracted in the trade after his death, whether he is entitled or not entitled to be wholly or to any extent indemnified by the testator's

personal estate, and whether it is sufficient or insufficient for the purpose: nor does the propriety of his conduct, as between himself and those beneficially interested in the testator's personal estate, give the creditors of the trade, becoming so after the death, the rights of creditors of the testator. The latest authorities on the point are, we conceive, to this effect, [652] and appear to us preponderant and correct. A sufficient number of these authorities, including *Ex parte Garland*, 10 Ves. 110, *Ex parte Richardson*, 3 Madd. 138, and *Wightman v. Tower*, 1 M. & Selw. 412, were cited at the bar during the argument. *Kilshaw v. Jukes*, 32 Law J., Q. B. 216, is also a cogent authority to shew that no partnership was created here. There, A., an ironmonger, having supplied ironmongery to the amount of 189l. to B. and C., who were builders, agreed to join them in the purchase of some land for building, on the conditions that B. and C. should build the houses, A. supplying the ironmongery required, and that on the completion and sale of the houses A. should be paid the 189l. and the price of the ironmongery, and no more, and that, if no profit was realized, A. should be a loser: an agreement was accordingly entered into by all three with the land-owner for the purchase of a piece of land, and the three bound themselves to complete buildings upon it according to certain plans, the vendor agreeing to make advances to the three to enable them to complete the buildings, and the three being jointly bound to pay the purchase-money, and the conveyance when all was paid to be to the three or as they should direct. B. and C. having ordered timber of the plaintiff, it was supplied on their credit (the plaintiff being ignorant of A.'s having any interest in the building), and it was used on the building. The court held (Wightman, J., dissenting) that A. was not jointly interested with B. and C. in such a way as to make him a partner and liable for the timber.

Brown was not called upon to reply.

ERLE, C. J. I am of opinion that our judgment in this case ought to be for the plaintiffs. My judgment [653] turns upon the operation of the deed of the 19th of August, 1859, the marriage-settlement. That, I think, made the defendant liable as a partner, as giving him an interest in the business which was to be carried on. It is very material to consider what was the nature of the business. There was no place of business; and no stock in trade; but only a contract between William Sharp the younger and Fenn, by which it was agreed that the underwriting business should be carried on by them under the guarantie of the father (the now defendant) to the extent of 5000l. if losses to that amount should be called for; and, if no losses were incurred, the proceeds were to be paid over by Fenn (by whom the business was to be carried on and the accounts kept) to Sharp the younger. That was the business which was the subject of the settlement. In consideration of his guarantie, the defendant was to receive 500l. a year out of the profits. By the settlement, Sharp the younger assigned to the defendant and Donnison, their executors, &c., "all and singular the sums of money, earnings, profits, and emoluments which are now in the hands of the said W. Fenn, and all such as shall hereafter come into the hands of the said W. Fenn or other the agent, deputy, or attorney for the time being of the said William Sharp the younger to be substituted for the said W. Fenn as hereinafter mentioned, on account or in respect of the said hereinbefore-mentioned underwriting business, and which according to the terms of the said hereinbefore-recited agreements of the 17th of March, 1857, of the 1st of November, 1858, and of the 2nd of the present month of July respectively, or otherwise, are and will or may become payable to the said William Sharp the younger." The result of that assignment, with the accompanying power of attorney, was to hand over to the defendant and Donnison substantially the entirety of the business. Everything that [654] could come from the business became the property of the defendant and Donnison, in trust, as to 500l. thereof, to pay the defendant's annuity. Assuming that the yearly earnings of the business were 500l. only, and losses should be incurred, the result would be that every shilling of the proceeds would be handed over to the defendant, and nothing would remain whereout to pay losses. The deed is to be construed with reference to the business to which it related. It was no doubt intended to be a real transaction. The mistake which the defendant made was, that he calculated upon the business being profitable: not taking into account the possibility of losses occurring and of the concern thus becoming a losing one. An arrangement by which all the proceeds of a business are to be handed over to a third person certainly looks suspicious on the face of it. No fraud is suggested here: but still the whole gross proceeds of the business passed by the deed to the

trustees until the 500l. a year was paid to the defendant. The result seems to me to be, that the defendant became responsible as a principal. I do not place so much reliance upon the antecedent agreement as upon the deed. If this had been the case of an ordinary trading concern, and the whole stock had been transferred, it would have been beyond argument. Here the whole proceeds of the business pass, including the profits, *eo nomine*. That distinguishes this case from those where an annuity has been agreed to be paid in proportion to the profits of a business. The ground upon which the decision of the House of Lords in *Wheatcroft v. Hickman* proceeded seems to me to be a sound and rational one. It was admitted there that for debts contracted by the trustees they would be liable. Here the claim is against one of the trustees to whom all the proceeds of the business,—a very peculiar one,—are in terms conveyed. Upon the whole, I feel bound to come to the [655] conclusion that the defendant has by the contract he has entered into made himself liable for the debts of the concern.

BYLES, J. I am of the same opinion. It is not necessary to consider here whether or not a mortgagee of the profits of a business becomes a partner. We are impowered and bound to draw inferences of fact: and the question is, whether upon the facts stated in this special case we do not see an obvious intention to evade the law of partnership,—as, no doubt, a man may do without any reflection upon his character or honour. That that intention was present to the mind of this defendant, is clear from two or three passages. One is in the memorandum of agreement of the 1st of January, 1859,—a very carefully worded passage: “If at the end of three years from the date hereof, it shall appear that one fourth of the net average annual profits during that period made by me in the said business shall amount to more than 500l., then and in that case the said annuity shall thenceforth be increased to a yearly sum equal to one fourth of such net average annual profits made by me in the said business during the said three years.” The person who drew that document was evidently desirous to guard against a partnership; for, the concluding sentence of the memorandum is as follows,—“Moreover, in no case are you to be considered as a partner with me in the said business of an underwriter.” All notion of a participation in *profits* is carefully avoided. When we come to the marriage-settlement, we find an express assignment to the trustees of “all and singular the sums of money, earnings, *profits*, and emoluments which are now in the hands of Fenn, and all such as shall hereafter come into the hands of Fenn, on account or in respect of the said underwriting business.” Here is an assignment of profits by name. Then, when the accumulated pro-[656]-fits shall have reached 8500l., and continued at that amount without reduction for two years, the trustees are to re-assign to Sharp the younger “the said moneys and *profits* arising from the aforesaid underwriting business.” When the whole deed is looked at, it amounts in substance to this, that the first 500l. of the yearly profits of the concern are to go into the pocket of the defendant,—being 10 per cent. on a sum not *advanced*, but merely guaranteed. I must confess that, if I were sitting as a jurymen, I should have no hesitation in coming to the conclusion that the real substance of the bargain was for a share of the profits, and nothing else.

MONTAGUE SMITH, J. I am of the same opinion. If the case had rested on the agreement of the 1st of January, 1859, I should not have thought that any partnership was created. That is a mere agreement or promise to pay the defendant 500l. a year, and a further sum in the event of the profits of the business reaching a given amount. But the marriage-settlement gives the defendant a right to receive the whole “earnings, profits, and emoluments” of the business,—at once and absolutely to take the whole of the net profits of the business, *eo nomine*. It gave him all the rights of a partner, including a right to an account. If he were not a partner, the effect would be, that the whole fund applicable to the payment of losses would be entirely taken away. If an agreement to receive half the profits of a concern makes a man a partner, how is he less a partner if he stipulates to receive the whole? By this deed the defendant is to receive the profits of the business as profits, and he thereby deprives the creditors of the fund out of which losses, if any, were to be paid. All the usual tests of a partnership are satisfied.

Judgment for the plaintiffs.

[657] FRANCES MATTHEY, Administratrix of Frederick Matthey, Deceased r.
WISEMAN AND ANOTHER. May 16th, 1865.

[S. C. 34 L. J. C. P. 216; 12 L. T. 846; 11 Jur. N. S. 603; 13 W. R. 914. Referred to, *London Corporation v. Coz*, 1867, L. R. 2 H. L. 258; *Cooke v. Gill*, 1873, L. R. 8 C. P. 113.]

1. The custom of foreign attachment in the city of London does not warrant proceedings against one who at the time of their commencement was dead.—2. Held, therefore, that a judgment and execution and payment by the garnishees in a suit so commenced in the Mayor's court cannot be set up by them as an answer to a claim against them by the personal representative of the deceased, for a debt due to him in his life-time, notwithstanding that the letters of administration were granted before execution had, and that (as was suggested) by the custom she might have appeared in the Mayor's court and dissolved the attachment —3. *Westoby v. Day*, 2 Ellis & B. 605, distinguished.

This was an action by the plaintiff, administratrix of Frederick Matthey, deceased, for money payable to Frederick Matthey, the intestate, in his life-time, for money received by the defendants for the use of the said Frederick Matthey, and for money found due from the defendants to the said Frederick Matthey on accounts stated between them, and for money payable by the defendants to the plaintiff as administratrix, for money received by them for the use of the plaintiff as administratrix: Claim, 3000l.

The defendants pleaded,—thirdly, that the plaintiff, as such administratrix as aforesaid, ought not further to maintain her action against the defendants, because they said, that the city of London now is, and immemorially has been an antient city, and that there is, and immemorially has been, a custom therein, that if any person affirms or hath affirmed a plaint in debt in the court of Her present Majesty or her predecessors, Kings or Queens of England, held or to be held before the mayor and aldermen of the said city for the time being, in the chamber of the Guildhall of the said city, within the said city, according to the custom of the said city, and upon such plaint it be or hath been commanded by the court to any of the serjeants-at-mace and ministers of the said court to summon such person named defendant in such plaint to appear in the same court to answer the plaintiff in such plaint; and if it is or has been certified and returned by such serjeant-at-mace and minister of the court that the defendant in such plaint has or had nothing within the said city, or the liberties thereof, whereby he can or [658] could be summoned, nor is nor was to be found within the city, and such defendant at that court, being solemnly called, makes or has made default, and in the same court it is or has been alleged by the plaintiff in the plaint that any other person owes or has owed to any such defendant any sum of money amounting to the debt in such plaint specified, or any part thereof, then, at the petition of such plaintiff made to the same court for process according to the custom of the said city, that is to say, that such person so owing or having owed such debt as aforesaid, being found within the jurisdiction of the said court, may or might be warned by the said serjeant-at-mace or minister of the said court not to part with such debt or sum of money so being in his hands and custody, without licence of the said court, but the same in his hands and custody keep so that the said defendant might be attached thereby, that he might appear in the same court to answer the said plaintiff in the plea in such plaint specified,—it is and has been commanded by the court to one of the serjeants-at-mace and a minister of the court, to attach such defendant in such plaint by such sum of money, so being in the hands or custody of such other person, according to the said custom, so that such defendant might appear at the then next court to be holden before the said mayor and aldermen, in the chamber of the Guildhall, to answer the plaintiff in the plea in such plaint specified; and then, if such serjeant-at-mace and minister of the court return and certify to such court such defendant to be attached accordingly to the said custom, by such sum of money, so being in the hands or custody of such other person, to be defended and kept so that such defendant in such plaint named might appear at the same or the then next court holden, or to be holden, to answer such plaintiff in the plea in such plaint speci-[659]-fied;

and if the defendant at that and three other courts then next severally holden or to be holden before the mayor and aldermen of the said city, in the chamber of the Guildhall of the said city, being solemnly called, does not appear, but makes default, and such four defaults according to the custom of the said city are recorded against such defendant at such four courts after such attachment made; and if such plaintiff in such plaint named, at every such four courts, in his own person or by his attorney appear and offer himself against such defendant in the plea in such plaint specified, according to the custom of the said city, then, at the last of the said four courts, or at any court holden or to be holden after such four defaults recorded, at the petition of such plaintiff in such plaint named made to the court, it is and has been used for the court to command such or any other serjeant-at-mace and minister of the court to warn such other person, so being found within the said city, according to the custom of the said city, to be and appear at any court afterwards to be holden before the mayor and aldermen of the said city, to shew if anything he has or knows to say for himself why such plaintiff in such plaint ought not to have execution of such sum so attached as aforesaid; and if at such court such serjeant-at-mace return and certify such other person in whose hands such sum of money is or has been attached to be warned, according to such custom, to be and appear in the same court to shew such cause, and if such person so warned, being solemnly called at such court, do not appear or has not appeared, but makes or has made default, then it is, and from time immemorial it has been, used and accustomed for such court to award such plaintiff to have execution of such sum so attached, to satisfy such plaintiff the debt in such plaint specified, or so much thereof as such sum so [660] attached extends or has extended to satisfy, by sufficient pledges to be found and given by such plaintiff in such plaint named in the same court, according to such custom, to restore to such defendant such sum of money so attached, if such defendant within a year and a day thence next ensuing come or has come into the court so holden, and disproves or avoids, or has disproved or avoided, such debt in such plaint mentioned, according to the custom of the said city; and that, after such pledges found and execution had of such sum so in the hands and custody of such other person attached and defended by the plaintiff in such plaint named, such other person in whose hands or custody such sum is or has been attached is or has been discharged against such defendant of the sum so attached and had in execution, and such defendant in such plaint named is or has been discharged against the same plaintiff of so much of his debt in such plaint demanded by such plaintiff, so long as such judgment and execution remains in force and effect, not revoked or disproved by such defendant; and, if such sum of money so attached and defended and had in execution amount not nor has amounted in the whole to the sum of the debt in and by the said plaint demanded by such plaintiff against such defendant, then such plaintiff, by the custom of the said court, is, and from time immemorial has been, used and accustomed to have process against such defendant, according to such custom, for the residue of his debt by him in such plaint demanded: Averment, that the said custom, and all other customs of the said city obtained and used in the said city during all the time aforesaid, were by authority of a parliament holden in the seventh year of the reign of His Majesty Richard the Second, late King of England, ratified and confirmed to the then mayor and commonalty of the said city, and their sue-[661]-cessors: That C. Kelson, V. B. Tritton, E. P. Alderson, P. G. Chapman, and E. T. Hankey, trading under the style or firm of Kelson, Tritton, & Co., and hereinafter called Messrs. Kelson, Tritton, & Co., before the commencement of this action of the plaintiff in this suit against the defendant in this suit, to wit, on the 3rd of March, 1863, in their own proper persons came into the court of our Sovereign Lady the Queen there, before the mayor and aldermen of the said city of London, in the chamber of the Guildhall of and within the said city, according to custom, such chamber then and still being in and parcel of the said Guildhall, and then and there affirmed a certain plaint against Frederick Matthey, now deceased, in a plea of debt upon demand of 2183l. 17s. 9d. of lawful money of Great Britain; and the same Messrs. Kelson, Tritton, & Co., then in the same court, according to such custom, found pledges to prosecute such suit, to wit, John Doe and Richard Roe, and then and there appointed in their stead J. M. Pearson, their attorney against the said Frederick Matthey in the plea of the said plaint, according to such custom, and it was granted to them, &c.: whereupon, at the petition of the said Messrs. Kelson, Tritton, & Co. then and there made to such court by their said

attorney, and by virtue of such plaint, it was then and there commanded by the said court to C. Fitch, then being one of the serjeants-at-mace of such court, that he, according to such custom, should summon by good summoners the said Frederick Matthey to appear at the same court so holden before the mayor and aldermen of the said city, in the chamber of the Guildhall of the said city, to answer the said Messrs. Kelson, Tritton, & Co. in the plea in such plaint specified, and that the said C. Fitch should return and certify what he should do by virtue of the said precept: and afterwards at the same court, the [662] said C. Fitch, according to such custom, returned and certified to the same court that the said Frederick Matthey had nothing within the said city, or the liberties thereof, whereby he could be summoned, nor was he to be found within the same: and thereupon the said Frederick Matthey was then and there at the same court solemnly called, and did not appear, but made default; and thereupon afterwards, and before the commencement of this action, to wit, on the day and year last mentioned, at the same court, it was alleged by the said Messrs. Kelson, Tritton, & Co., by their said attorney, that the said James Wiseman and William Wilson, the now defendants, owed to the said Frederick Matthey 2183l. 17s. 9d. in moneys numbered, as the proper moneys of the said Frederick Matthey, and then detained the same in their hands and custody: That they the now defendants, at the time when it was by the said Messrs. Kelson, Tritton, & Co., by their said attorney, so alleged as last aforesaid, were and were found within the said city, and within the jurisdiction of the same court: and thereupon the said Messrs. Kelson, Tritton, & Co., by their attorney, then and there prayed process, according to such custom, to attach the said Frederick Matthey by the said 2183l. 17s. 9d. so being in the hands and custody of the now defendants, so that the said Frederick Matthey might appear at the next such court to be held before the mayor and aldermen of the said city, in the chamber of the Guildhall of and in the said city, to answer the said Messrs. Kelson, Tritton, & Co. in the plea in such plaint specified: whereupon, at their said petition, it was then and there commanded by such court, before the commencement of this action, to the said serjeant-at-mace and minister of the said court, that he, according to such custom, should attach the said Frederick Matthey by the said 2183l. 17s. 9d. so being in the [663] hands and custody of the now defendants as aforesaid, and the same in their hands and custody defend and keep, according to such custom, so that the said Frederick Matthey might appear at the then next such court to be holden before the said mayor and aldermen of the said city, in the Guildhall of the said city, to wit, on the 4th of March then next, according to such custom, to answer the said Messrs. Kelson, Tritton, & Co. in the plea in the said plaint specified: and that the said serjeant-at-mace and minister of the said court should then return and certify to such court what he should do by virtue of that precept: and the same day was given to the said Messrs. Kelson, Tritton, & Co.: That afterwards, and before the commencement of this suit, to wit, on the day and year last aforesaid, they the now defendants, being then found within the said city, and within the jurisdiction of the said court, were then and there duly warned, according to the said custom, by the said serjeant-at-mace and minister of the said court, not to part with the said sum of 2183l. 17s. 9d. without the licence of the said court, but the same in their hands and custody safely to keep so that the said Frederick Matthey might be attached thereby that he might appear at the said then next court to answer the said Messrs. Kelson, Tritton, & Co. in the said plea in the said plaint specified: and thereby the said serjeant-at-mace duly attached the said Frederick Matthey by the said sum of 2183l. 17s. 9d.: and that afterwards, to wit, at the said then next court holden before the said mayor and aldermen of the said city, in the said chamber of the Guildhall of the said city, on the said 4th of March in the year last aforesaid, the said Messrs. Kelson, Tritton, & Co., by their said attorney, appeared, and the said serjeant-at-mace returned and certified to the same court that he by virtue of the said precept [664] had thereupon, to wit, on the 3rd of March in the year last aforesaid, between the hours of 12 and 1 of the clock in the afternoon, attached the said Frederick Matthey by the said 2183l. 17s. 9d., so being in the hands and custody of the now defendants, and the same had defended and kept in their hands and custody, according to such custom, so that the said Frederick Matthey might appear at the said court so holden on the said 4th of March in the year last aforesaid, to answer the said Messrs. Kelson, Tritton, & Co. in the said plea in their said plaint specified: and thereupon the said Frederick Matthey, at the same court, was solemnly called, but

did not appear, but then made a first default, which said first default at the same court was recorded according to such custom; and thereupon, according to such custom, a further day was then given by the same court to the said Frederick Matthey to appear at the then next such court to be holden before the mayor and aldermen of the said city, in the chamber of the Guildhall of the said city, on the 5th day of March in the year last aforesaid, to answer the said Messrs. Kelson, Tritton, & Co. in the plea in their said plaint specified; and the same day was by the said court given to the said Messrs. Kelson, Tritton, & Co., according to such custom; at which said next such court, holden on the day and year last mentioned, the said Messrs. Kelson, Tritton, & Co., by their attorney, appeared and offered themselves against the said Frederick Matthey in the plea in the said plaint specified, according to such custom; and thereupon at the same court the said Frederick Matthey was again solemnly called, but did not appear, and then made a second default, which was recorded at the same court, according to such custom: and thereupon, according to such custom, a further day was then given by the said court to the said Frederick Matthey to appear at [665] the then next such court, to be holden before the mayor and aldermen of the said city on the 6th of March in the year last aforesaid, to answer the said Messrs. Kelson, Tritton, & Co. in the plea in their said plaint specified; and the same day was by the same court given to the said Messrs. Kelson, Tritton, & Co., according to such custom: at which said next such court, holden on the day and year last aforesaid, the said Messrs. Kelson, Tritton, & Co., by their said attorney, appeared and offered themselves against the said Frederick Matthey in the plea in their said plaint specified, according to such custom: and thereupon, at the same court, the said Frederick Matthey was again solemnly called, and did not appear, but then made a third default, which was recorded at the same court, according to such custom; and thereupon, according to such custom, a further day was then given by the same court to the said Frederick Matthey to appear at the then next such court, before the mayor and aldermen of the said city of London, to be holden in the chamber of the Guildhall of the said city on the 7th of March in the year last aforesaid, to answer the said Messrs. Kelson, Tritton, & Co. in the plea in their said plaint specified; and the same day was by the same court given to the said Messrs. Kelson, Tritton, & Co., according to such custom; at which said next such court holden on the day and year last mentioned, the said Messrs. Kelson, Tritton, & Co., by their attorney, appeared and offered themselves against the said Frederick Matthey in the plea in their said plaint specified, according to such custom; and thereupon, at the same court, the said Frederick Matthey was again solemnly called, and did not appear, but then made a fourth default, which was recorded in the same court, according to such custom: And thereupon, afterwards, and after the said four defaults had been recorded as [666] aforesaid by the same court against the said Frederick Matthey in the plea aforesaid, according to such custom, the said Messrs. Kelson, Tritton, & Co., by their attorney, then at the same court prayed process according to such custom, to warn the now defendants, the garnishees, to be and appear in the same court to be holden on Tuesday the 24th of November in the year last aforesaid, to shew cause why the said Messrs. Kelson, Tritton, & Co. should not have execution of the said 2183l. 17s. 9d. so attached in their said hands and custody; whereupon, at such said court so holden as aforesaid, at the said petition of the said Messrs. Kelson, Tritton, & Co. made in such court, it was commanded by the same court to the said serjeant-at-mace that he, according to such custom, should warn and make known to the now defendants, being the garnishees, to be and appear in such court to be so as aforesaid holden on the said 24th of November in the year last aforesaid, to shew cause why the said Messrs. Kelson, Tritton, & Co. should not have execution of the said 2183l. 17s. 9d. so attached in their hands and custody, and that the said serjeant-at-mace should then return and certify to the same court what he should do by virtue of such precept; and the same day was given by the same court to the said Messrs. Kelson, Tritton, & Co. to be there, according to such custom: That afterwards, to wit, on the day and year last aforesaid, they the now defendants were in the said city duly warned by the said serjeant-at-mace to be and appear at such court to be so as aforesaid holden on the said 24th day of November then instant to shew cause why the said Messrs. Kelson, Tritton, & Co. should not have execution of the said 2183l. 17s. 9d.; at which said court holden on the said 24th day of November last aforesaid, the said Messrs. Kelson, Tritton, & Co., by their said attorney, appeared, and the [667] said serjeant

at-mace then returned and certified to the same court that he by virtue of such precept to him directed, and according to such custom, had warned and made known to the now defendants, the garnishees, to be and appear at the same court to shew such cause: and thereupon, at the same court, the now defendants, the garnishees in such attachment, were solemnly called according to such custom, and did not appear, but made default: and thereupon, according to such custom, it was considered by the same court that the said Messrs. Kelson, Tritton, & Co. should have execution of the said 2183l. 17s. 9d. in moneys numbered so attached, and that they should retain and hold the same in full satisfaction of the like sum of 2183l. 17s. 9d., being the amount of the debt in the said plaint mentioned, by sufficient pledges to be found and given by the said Messrs. Kelson, Tritton, & Co. in the same court, according to such custom, to restore to the said Frederick Matthey the said 2183l. 17s. 9d. so attached, if the said Frederick Matthey within a year and a day thence next ensuing should come into the said court and disprove and avoid the same debt in the said plaint mentioned: whereupon the said Messrs. Kelson, Tritton, & Co. afterwards, to wit, on the day and year last aforesaid, at the same court, according to such custom, found sufficient pledges, to wit, F. H. Janson and Alfred Wilson, to restore to the said Frederick Matthey the said 2183l. 17s. 9d. so attached, if the said Frederick Matthey, within a year and a day thence next ensuing, should come into the same court, holden as aforesaid, and disprove or avoid the debt in the said plaint mentioned, according to such custom: and thereupon the said Messrs. Kelson, Tritton, & Co. afterwards, to wit, on the day and year last aforesaid, for the purpose of obtaining execution of the said sum of 2183l. 17s. 9d. [668] so attached as aforesaid, sued out of the same court, according to the custom of the said court, a certain precept directed by the said court to the said C. Fitch, being one of the serjeants-at-mace of the said court: whereupon he was commanded by the said court that he should take the now defendants if they were to be found within the liberties of London, and them should safely keep so that he might have their bodies there in court without delay, to satisfy the said Messrs. Kelson, Tritton, & Co. 2183l. 17s. 9d. attached in their hands at the suit of the said Messrs. Kelson, Tritton, & Co., as the proper moneys of the said Frederick Matthey, by due process of attachment and judgment of the court there recovered against them the said defendants, according to the tenor and effect of the said judgment thereof given: and which said precept was afterwards, and within the jurisdiction of the said court, to wit, on the day and year aforesaid, delivered to the said serjeant-at-mace, to be executed in due form of law: And thereupon the now defendants, afterwards, and after the commencement of this action, and whilst the said precept was in the hands of the said serjeant-at-mace for the purpose of being executed, to wit, on the day and year last aforesaid, being then within the city of London and the jurisdiction of the said court, were then and there forced and obliged, and then and there necessarily did for the purpose of satisfying the said judgment, pay to the said Messrs. Kelson, Tritton, & Co. the said sum of 2183l. 17s. 9d., according to the exigency of the said precept, and thereby the said Messrs. Kelson, Tritton, & Co. then and there, according to the custom of the said court, had execution of the said debt of 2183l. 17s. 9d. against the now defendants, the said garnishees, according to the tenor of such judgment in that behalf given; and thereby the said execution was then executed, as by the record [669] and proceedings thereof remaining in the chamber of the Guildhall of the city of London aforesaid, more fully appears: That the said 2183l. 17s. 9d. so attached, and of which the said Messrs. Kelson, Tritton, & Co. had execution by virtue of such judgment, accrued due from the now defendants to the said Frederick Matthey, and the said Frederick Matthey's cause of action in respect thereof, and the cause of action of the now plaintiff as administratrix of the said Frederick Matthey in respect thereof, arose within the city of London and the jurisdiction of the said court, and not elsewhere: and that the said 2183l. 17s. 9d. were so attached before and paid after the commencement of this suit: and that the said execution was duly executed in the said city according to the custom of the said city: and that the said judgment and execution are still in force, and not in the least by the plaintiff otherwise disproved or avoided: and that the said sum of 2183l. 17s. 9d. claimed by the plaintiff as such administratrix of the said Frederick Matthey deceased in this action is the very same and identical sum of 2183l. 17s. 9d. so attached and taken in execution by the said Messrs. Kelson, Tritton, & Co. by virtue of the judgment aforesaid: wherefore the defendants prayed judgment if the now plaintiff, as

such administratrix as aforesaid, ought further to maintain her said action against them.

To this plea the plaintiff replied that, before the time of the affirming of the said plaint, the said Frederick Matthey died, and he was then dead.

The defendants rejoined, that the defendant Frederick Matthey at the time of his death was indebted to Messrs. Kelson, Tritton, & Co. in 2183l. 17s. 9d. for money lent by the said Messrs. Kelson, Tritton, & Co. for the use of the said Frederick Matthey in his life-time and at his request, and for money found to be [670] due from the said Frederick Matthey in his life-time upon accounts stated between the said Messrs. Kelson, Tritton, & Co. and the said Frederick Matthey; and that, at the time of the affirming of the said plaint in the said Mayor's court as in the third plea mentioned, neither the plaintiff nor any other person had administered to the estate and effects of the said Frederick Matthey deceased; and that the said Messrs. Kelson, Tritton, & Co. were entitled to recover against the estate of the said Frederick Matthey deceased the said sum of 2183l. 17s. 9d., and that they the said Messrs. Kelson, Tritton, & Co. affirmed the said plaint in the said Mayor's court as in the third plea mentioned, according to the custom of the said city of London, and, before execution was had of the said sum as in the third plea mentioned, the plaintiff took out letters of administration to the estate and effects of the said Frederick Matthey deceased, and had notice of the premises; and thereupon the plaintiff, as such administratrix as aforesaid, afterwards, and before execution was had of the said sum as aforesaid, might, according to the practice of the said Mayor's court, and the custom of the said city of London, have caused an appearance to be entered to the said plaint of the said Messrs. Kelson, Tritton, and Co., and might have defended the same, or she might, according to the practice of the said Mayor's court and the custom of the said city of London, have dissolved the said attachment as in the third plea mentioned, and defended the said plaint so affirmed by the said Messrs. Kelson, Tritton, & Co. against the said Frederick Matthey deceased; and that all proceedings were had in the matter of the said plaint and the said attachment as in the third plea mentioned, according to the practice of the said Mayor's court, and the custom of the said city of London, and in pursuance thereof.

[671] The plaintiff demurred to this rejoinder, the ground of demurrer stated in the margin being, "that the plea does not shew that the proceedings in the Mayor's court have been in accordance with the custom alleged in the plea, and that the custom does not shew any right of affirming a plaint against a dead man." Joinder.

Hannen, in support of the demurrer (a)¹. The third plea sets out the proceedings in the Mayor's court, and alleges that after the commencement of this action Messrs. Kelson, Tritton, & Co., the plaintiffs in that suit, had execution of the debt against the now defendants, as garnishees, and that they paid the debt now sought to be recovered. The plaintiff replies that, at the time of affirming the plaint in the Mayor's court, Frederick Matthey, the person against whom those proceedings were instituted, was dead. The rejoinder in substance alleges that, at the time of affirming the plaint in the Mayor's court, no administration had been taken out to the estate of Frederick Matthey, but that, before execution had and executed in the Mayor's court, the plaintiff administered, and that she might then, according to the practice of that court, have appeared and dissolved the attachment. The question, therefore, to be determined upon this demurrer is, whether by the custom of the city of London proceedings by way of foreign attachment can be had against a man who has ceased to exist, and, if so, [672] whether such a custom can be sustained. In Pulling's Laws and Customs of London, p. 189, the practice is thus, and it is believed correctly, stated:—"The custom of foreign attachment in London was certified into court in an old case (a)² to be, 'that, if a plaint be affirmed in London before, &c., against any

(a)¹ The points marked for argument on the part of the plaintiff were as follows:—

"1. That the custom alleged is not a custom to affirm a plaint against a dead person:

"2. That, if the custom be so alleged, it is a bad one:

"3. That the rejoinder is a departure from the plea, and does not warrant a plaint against Frederick Matthey after his death."

(a)² Per Sterkey, Recorder, 22 E. 4, fo. 30 b., pl. 11; Roll. Abr. 554; and also in *Robertson v. Norroy, King-at-Arms*, Dyer, 83 a.; and see Coke's Entries, 139.

person, and it be returned nihil, if the plaintiff will surmise that another person within the city is a debtor to the defendant in any sum, he shall have garnishment against him, to warn him to come in and answer whether he be indebted in the manner alleged by the other: and, if he comes, and does not deny the debt, it shall be attached in his hands: and, after four defaults recorded on the part of the defendant, such person shall find new surety to the plaintiff for the said debt: and judgment shall be that the plaintiff shall have judgment against him, and that he shall be quit against the other after execution sued out by the plaintiff.' As the original object of this process was to *compel the defendant's appearance* and to give bail to the action, the attachment is at an end immediately that is done. In practice, however, the real defendant is not actually served with any process or notice at all, but, as a necessary foundation for the attachment, the plaintiff makes an affidavit of the debt; the names of the parties with a memorandum of the attachment are then entered in a book, called the action-book, preserved in the office of the court, and an attachment-paper is prepared by the plaintiff's attorney, and notice thereof served upon the person in possession of the property, who is thenceforward called the garnishee or person warned. The notice is that all the goods, moneys, and effects of the defendant then in the garnishee's possession, or which may thereafter come to his possession, or the debt or debts due from him to the defendant, are attached to answer the plaintiff's demand: and that he (the garnishee) is not to part with such goods, or pay over such debts, without the licence of the court. No precept or process is ever issued against the defendant, nor any actual default made, nor are there any returns of nihil or defaults or otherwise actually made to any process, although there are entries thereof on the record, and the omission of such entries would be fatal. The serjeant-at-mace serves the attachment on the garnishee, and makes an entry thereof in the action-book; and thenceforward the proceedings are against the garnishee, who either appears and disputes the attachment (a)¹ or suffers the property to be taken by default." But there is no pretence for saying that this ceremony, sufficiently absurd in the case of a living person, may be gone through where the person who is supposed to be summoned and to have notice is *dead*. It would be an outrage against the first principles of justice. The party must either be summoned or have notice, otherwise the proceedings will be invalid: *Andrews v. Clarke*, Carth. 25, Comb. 109, 1 Show. 11; *Fisher v. Lane*, 3 Wils. 297. In the last-mentioned case, the Chief Justice observes,— "Customs of particular cities may deviate from the course of the common law, but a custom contrary to the first principles of justice can never be good: so this custom, *not to summon or give notice* to a defendant in a suit commenced against him, is *contrary to the first principles of justice*, and (in my [674] opinion, as at present advised,) cannot be good." And, in giving judgment, the court say: "The now plaintiff, Mrs. Fisher, residing in the city of London, is sued in London by process whereof she has *no notice*, and does not appear, whereupon the officer attaches the money of John Fisher, the intestate, in the hands of the now defendants, Lane and others, that is to say, attaches Mrs. Fisher by the debt owing to her by a third person, i.e. the officer distrains her to appear. If she appears, there is an end of the foreign attachment: it is like the process in the courts at Westminster, by way of distraining issues to compel an appearance. It is not necessary to repeat particularly the evidence of this judgment in the foreign attachment, which consisted only of minutes taken from a book kept for that purpose; and those minutes, which an officer read from a paper in his hand, were the only evidence of the judgment: and, if this be all, the judgment is erroneous; it is said to be for the default of Mrs. Fisher's appearance: *she made no default*, for it appears *she never was summoned or had notice*, which is contrary to the principles of justice." How could these proceedings compel the appearance of a dead man?

H. James (with whom was Gates), *contra* (a)². There being a debt due to Matthey

(a)¹ That is, by disputing his own liability to the attachment, as, by a denial of any debt owing from himself, or of the defendant's title to the property attached, or by setting up a lien: *Giles v. Nathan*, 5 Taunt. 558, *Nathan v. Giles*, 1 Marsh. 226.

(a)² The points marked for argument on the part of the defendants were as follows:—

"1. That the rejoinder shews that the proceedings in the Mayor's court were in accordance with the custom of the city of London, and that such custom is reasonable and good:

"2. That the plaintiff's replication to the defendant's third plea is bad, on the ground that it raises an immaterial issue."

from a person being within the jurisdiction, the proceedings in the Mayor's court were fully warranted by the custom, which is so well known and so firmly established that it would be [675] idle to cite authorities in support of it. The plaintiffs in the Mayor's court, having no notice that Matthey was dead, proceed in the usual course, and get judgment and execution against the garnishees, who, having no means of contesting the propriety of the proceedings, are compelled to pay the amount. A judgment of a court of record, —which this is, though an inferior one,—is clearly a good protection to the defendants under such circumstances. It is admitted upon the record that the now plaintiff had notice of the attachment and of all the proceedings: and she might have come in and dissolved the attachment by giving bail. The defendants, on the other hand, had no notice of the death, and no means of defeating the attachment. There are numerous authorities to shew that, where money has been paid under a judgment of the Mayor's court, valid upon the face of it, such payment is a discharge of the debt, even though it should turn out that the Mayor's court had no jurisdiction to try the matter: see *Harrington v. Macmorris*, 5 Taunt. 228, 1 Marsh. 33; *Banks v. Self*, 5 Taunt. 234, n. Almost all the cases on the subject are collected in *Westoby v. Day*, 2 Ellis & B. 605. There, in an action of debt by Westoby against Day, the latter pleaded that the debt had been attached in his hands, as garnishee, in a plaint of debt in the Mayor's court by one Caldwell against Westoby. The plaintiff replied that the alleged debt sued for in the Mayor's court did not arise or accrue within the jurisdiction of that court, nor had that court had at any time jurisdiction thereof: and the replication was held bad, on demurrer. Lord Campbell, in delivering the judgment of the court, there says: "This replication allows that the plea replied to is good within the custom of foreign attachment in the city of London, and raises the question whether the garnishee, after a regular judgment and [676] execution against him, having paid the debt, may be compelled to pay it a second time on proof in this suit that the debt did not arise within the jurisdiction of the Mayor's court. The affirmative would often work great hardship and injustice to the garnishee, who may be entirely ignorant of the origin of the debt sued for, who has no means of contesting the debt except by appearing and putting in bail to the original action, and who may be wholly unable to prove that the debt arose out of the jurisdiction of the Mayor's court, although the fact be so. The plaintiff below, to render his proceedings effectual against the garnishee, is not even bound to prove the existence of the debt alleged to be due to him from the defendant below, nor to allege that it arose within the jurisdiction of the inferior court. In the recent case of *De Haber v. The Queen of Portugal*, 17 Q. B. 171, we expressed an opinion that 'the process of foreign attachment can only be duly resorted to when the cause of action arose within the jurisdiction of the court from which it issues.' But we said: 'The garnishee is safe by paying under the judgment of the court:' adding,—'The objection that the cause of action did not arise within the jurisdiction of the court, if properly taken, must prevail.' But, in the absence of fraud, the objection, as against the garnishee, comes too late after he has paid the debt to the plaintiff below under a regular judgment." All the reasoning there applies to the present case. [Montague Smith, J. Might you not have moved for a prohibition?] We had no means of knowing whether or not Matthey was really dead. We were bound to give credit to the proceedings of a competent court.

Hannen, in reply. In *Westoby v. Day*, the proceedings were valid on the face of them, and were commenced and carried on against a real person. [Erle, C. J. [677] Might not the garnishees have pleaded that they did not owe the money, because the man was dead? James stated that the only plea admissible is *nil habet*.] The reason why the garnishee is not entitled to intervene is given in 2 Bell's Commentaries on the Law of Scotland (where the proceeding is well known), edit. 1826, p. 66: "It is the business of the original creditor alone to object to the claim of the arrestee; and, if he do not appear and object, the arrestee has no right or interest to take up the plea."

Cur. adv. vult.

MONTAGUE SMITH, J., delivered the judgment of the court:—

In the case of an action brought by the administratrix of Frederick Matthey, the defendants pleaded to the farther maintenance of the action, that the debt sued for had been attached in the Lord Mayor's court in a suit instituted by Kelson and others against the intestate. The plea sets out the proceedings in the Lord Mayor's court, and alleges that, after the commencement of this action, Kelson & Co. had execution

of the debt against the defendants, and that they, as garnishees, paid it. To this plea the plaintiff replied that, at the time of affirming the plaint in the Mayor's court, Frederick Matthey was dead. The defendants by their rejoinder in substance allege that, when the plaint was brought in the Mayor's court, no one had administered to the estate of Matthey, but that, before execution had, the plaintiff administered, and might by the custom have appeared in the Mayor's court and dissolved the attachment. To this rejoinder the plaintiff demurred; and we think that she is entitled to judgment upon this demurrer.

It is admitted on the pleadings that all the proceedings in the Lord Mayor's court took place after the [678] death of the nominal defendant in that suit. It could not be contended with any shew of reason that the custom alleged in the plea justified the prosecution of a suit against a dead man, as if he were living; or that a custom to that effect, if alleged, would be good. Although it has been held that actual notice of the suit in the Mayor's court need not be given to the defendant, certain proceedings must be taken, which, by intendment, are considered equivalent to notice, and which are essential to the validity of the attachment. These proceedings, the purpose of which is to compel the appearance of the defendant, are all averred in the plea to have been duly had and taken. But it appears to us they were all null and vain, when there was no defendant to be affected by them.

The principal contention of the defendants was, that the judgment of the Mayor's court was conclusive, and that, the garnishees having paid the debt under the attachment, the judgment quoad them could not be impeached.

We think this contention is not well founded. No doubt, the Lord Mayor's court is a court of record: but it is an inferior court, and its jurisdiction may be questioned. The case of *Westoby v. Day*, 2 E. & B. 695, decided that, in an action against garnishees to recover a debt paid by them under process of foreign attachment in the Lord Mayor's court, it could not be averred by the plaintiff (the defendant in the Mayor's court) that the debt did not arise within the jurisdiction of that court.

But in that case the plaintiff Westoby (the defendant in the Mayor's court) might have appeared and raised the objection in the Mayor's court by a plea to the jurisdiction; and, not having done so, it was held that *he*, when suing in the superior court the garnishees who had paid the debt under the attachment, could not as against them impeach the judgment.

[679] The present case seems to us to be distinguishable from *Westoby v. Day*, on the broad ground that, in this case, there was no defendant in the Mayor's court who could appear or plead. The suit was commenced and prosecuted against a non-existing defendant; and the judgment cannot, as it seems to us, be conclusive, when there was nobody, as defendant, to conclude. The garnishees (the now defendants) might no doubt, when they had notice of the attachment, have appeared in the Mayor's court, and, if Matthey's death were then known to them, might probably have pleaded to the jurisdiction. But they took no step, and allowed the proceedings to go on to judgment and execution.

It is not necessary for us now to decide whether the present defendants, as between Kelson & Co., the plaintiffs in the Mayor's court, and themselves, are estopped from disputing the attachment. But we are of opinion that the present plaintiff, who was no party to the suit, is not estopped, as against them, from shewing the nullity of the proceedings.

It was further contended by the counsel for the plaintiff, that the debt now sued for was not attached at all, inasmuch as the debt assumed to be attached was a debt due from the defendants to Matthey, whereas, at the time of the attachment, Matthey being dead, there was no such debt.

Our decision being in the plaintiffs' favour on the larger question, it is not necessary for us to say whether this objection should also prevail. It was held in *Westoby v. Day* that the plaintiff (the defendant in the Mayor's court) was not estopped by the judgment from shewing that the debt there attached was not attachable by reason of the beneficial interest being vested in another.

The rejoinder is founded on an alleged custom that [680] the plaintiff, after she became administratrix, might have appeared to the suit in the Lord Mayor's court, and dissolved the attachment. We think that such a custom is unreasonable and void, if it is to be understood to mean that the non-appearance of the administratrix is to give life to a suit which was a nullity from its inception: and, if the custom does not

mean this, we do not see how the fact that the plaintiff did not intervene, can affect the position of the parties.

We think, therefore, that the defendants, who made no effort to avoid the attachment, or to prevent the execution of it, and who did not pay the debt until after this action had been brought against them by the administratrix, cannot avail themselves of that payment; and our judgment is given for the plaintiff.

Judgment for the plaintiff.

JAMES DAY, *Appellant*; MERCER HAMPSON SIMPSON, THE YOUNGER, *Respondent*.
May 3rd, 1865.

[S. C. 34 L. J. M. C. 149; 12 L. T. 386; 11 Jur. N. S. 487; 13 W. R. 748.]

The following was held to be a dramatic entertainment or "stage-play," within the prohibition of the 6 & 7 Vict. c. 68:—On the rising of the curtain, there was a representation of a storm at sea and of a man swimming, not a living person, but in theatrical phrase a "double." When the storm subsided, a drop-scene was disclosed, with a lake in the back-ground. A character then appeared upon the stage, in the costume of a Greek prince, who spoke some lines relative to the shipwreck from which he had just escaped. He was then joined by another person, dressed as an attendant, and a short dialogue ensued. These two were the only persons who appeared bodily on the stage; and they were twice on the stage together. There were several other characters,—a king, a princess, &c., and a chorus; and the dialogue between them was a composed set drama, with a regular plot of love, courtship, and matrimony. With the exception of the two persons above mentioned (the dialogue between whom was wholly subordinate to the plot of the piece), none of the characters were at any time bodily upon the stage: they had their places in a chamber below it, where they acted their parts, and addressed each other in the words allotted to them: but by a combination of lenses and mirrors their figures were reflected upon a mirror at the back of the stage, so as to present to the spectators the appearance of persons actually upon the stage. There was dancing, music, and singing, but no change of scenery or dress during the performance.

The following case was stated by the stipendiary magistrate for the borough of Birmingham, for the opinion of this court:—

[681] By statute 6 & 7 Vict. c. 68, s. 2, it is enacted that it shall not be lawful for any person to have or keep any house or other place of public resort for the public performance of *stage-plays*, without authority by virtue of letters-patent from Her Majesty, her heirs, &c., or without license from the Lord Chamberlain of Her Majesty's household for the time being, or from the justices of the peace, as thereafter provided (s. 5): And every person who shall offend against this enactment shall be liable to forfeit such sum as shall be awarded by the court in which, or the justices by whom, he shall be convicted, not exceeding 20*l.* for every day on which such house or place shall have been kept open by him for the purpose aforesaid, without legal authority.

By s. 11 of the same statute, every person who for hire shall act or present, or cause, permit, or suffer to be acted or presented, any part in any stage-play in any place not being a patent theatre, or duly licensed as a theatre, shall forfeit such sum as shall be awarded by the court in which, or the justices by whom, he shall be convicted, not exceeding 10*l.* for every day on which he shall so offend.

By s. 16, it is enacted that, in every case in which any money or other reward shall be taken or charged directly or indirectly, or in which the purchase of any article is made a condition for the admission of any person into any theatre to see any stage-play; and also in every case in which any stage-play shall be acted or presented in any house, room, or place in which distilled or fermented exciseable liquor shall be sold, every actor shall be deemed to be acting for hire.

And, lastly, by s. 23 it is enacted that, in this act, the word "stage-play" shall be taken to include any *tragedy, comedy, farce, opera, burletta, interlude, melo-*[682]
drama, pantomime, or other entertainment of the stage, or any part thereof.

On the 15th of December, 1864, James Day (herein called the appellant), licensed victualler, appeared before the stipendiary magistrate for the borough of Birmingham on two informations at the instance of Mercer Hampson Simpson, the younger (herein

called the respondent), being the proprietor of a licensed theatre in the same borough, framed respectively upon the 2nd and 11th sections of the above statute; the first charging that, on the 24th of November last, he did unlawfully keep a certain house and place of public resort in the said borough for the public performance of stage-plays, without authority in that behalf by virtue of any letters-patent, or a licence from Her Majesty's justices of the peace, &c., and did unlawfully continue so keeping open the same for four successive days thereafter contrary to the act of 6 & 7 Vict. c. 68, which hath for the said offence imposed a forfeiture of any sum not exceeding 20l. for each of the said days on which the said house and place was so kept open for the purpose aforesaid.

The second information charged that the said appellant did unlawfully for hire cause and permit and suffer to be acted and presented certain parts in certain stage-plays called, &c., &c., in a certain place, to wit, a house, the said place not being a patent theatre or duly licensed as a theatre, and continue the same for four successive days, contrary to the act, &c., which hath for the offence aforesaid imposed a forfeiture of any sum not exceeding 10l. for each of the said days.

It was proved that the appellant is the occupier of a concert hall licensed under the 73rd section of the Birmingham Improvement Act, 1861 (24 & 25 Vict. c. cccv.), as a place kept and used for public dancing, music, and other public entertainments of the like [683] kind; that he was a licensed victualler; that the concert hall consisted of a large room, the floor being covered with seats and small tables for refreshment, consisting, among other things, of distilled and fermented exciseable liquors; that there was a gallery round three sides of the hall, fitted up with similar seats and tables; that the fourth side or further end of the hall presented the appearance of a regular theatre, with a stage raised above the floor of the hall, a proscenium, a curtain, a float for foot lights, wings, and drop-scene; and that every person entering the hall paid 6d., in exchange for which he received a check entitling him to refreshments of the value of 3d. and a seat in any part of the hall during the whole evening.

It was proved also that, when the public were admitted, the curtain of the stage was down, but that it was subsequently raised, and the following performance then took place on and about the stage:—

On the rising of the curtain, there was a representation of a storm at sea and of a man swimming. This was not a living person, but, in theatrical phraseology, a "double" of the prince hereafter named. When the storm subsided, a drop-scene was disclosed, with a clear lake in the back-ground.

A character then appeared upon the stage, in the costume of a Greek prince, who spoke some lines relative to the shipwreck from which he had just escaped. He was then joined by another person, dressed as an attendant; and a conversation was held between them. The latter was described by the witnesses as a "low comedian." These two were the only persons who during the course of the evening appeared bodily on the stage. They were twice on the stage together; and the dialogue between them on each occasion was short and comparatively unimportant.

[684] There were several other characters,—a king, a princess, &c., and a chorus, and the dialogue between them was a composed set drama, with a regular plot of love, courtship, and matrimony. The peculiarity of the representation, and that which, according to the contention of the appellant, distinguished it from an ordinary "stage-play" or "entertainment of the stage," was the following:—

With the exception of the two persons above mentioned (the dialogue between whom was wholly subordinate to the plot of the piece), none of the characters were at any time bodily upon the stage. They had their places in a chamber below it, where they acted their parts, and addressed each other in the words allotted to them; but, by a complication or combination of lenses and mirrors, their figures were reflected upon a mirror at the back of the stage so ingeniously and effectually that to the spectators the appearance was that of persons actually upon the stage. There was a good deal of dancing and music and singing; and there was no change of dress or scenery during the performance.

It was admitted that the place was not a patent theatre, and that the appellant had no license from the Lord Chamberlain or the justices, except as above mentioned.

It was contended on his behalf that he was not liable to be convicted of an offence under the above-mentioned section of the 6 & 7 Vict. c. 68, because,—first, he was licensed under s. 73 of the Birmingham Improvement Act, 1861, to keep a room or

place for public dancing, music, and other public entertainments of the like kind; that the performance above set forth came under the description of a public entertainment of the like kind with those specified: and that the latter statute, being of a later date than the 6 & 7 [685] Vict., must be taken *pro tanto* to operate as an exclusion of the borough of Birmingham from the provisions of that statute.

The magistrate was of opinion that the entertainment was essentially different from those to which the appellant's license extended and that the defence on that ground was without weight.

It was then contended, secondly, that it was not an "entertainment of the stage," inasmuch as only one of the characters who sustained the plot of the piece was bodily upon the stage, the second being an unimportant subordinate; and that the others were merely represented upon a mirror at the back of the stage, by optical illusion.

The magistrate was of opinion that, in order to constitute an "entertainment of the stage" (it having been proved there was a regular plot and dialogue), it was not at all essential that all the characters should be bodily upon the stage: and he considered the offence proved, and convicted the appellant in a nominal penalty upon each information.

The question for the opinion of the court was, whether the determination of the magistrate was right or not.

Hayes, Serjt., for the appellant. The question turns upon the construction of the 6 & 7 Vict. c. 68, the 2nd section of which prohibits the keeping of any house or other place of public resort for the public performance of stage-plays, without letters-patent or license. The interpretation clause, s. 23, enacts that the word "stage-play" shall be taken to include every tragedy, comedy, farce, burletta, interlude, melodrama, pantomime, or other entertainment of the stage, or any part thereof. These are substantially the words contained in the 7th section of the 10 G. 2, c. 28. That statute came under [686] the consideration of the court of Queen's Bench in two cases. The first was *Gallini v. Laborie*, 5 T. R. 242, where it was held that no action could be maintained for the breach of an agreement "to dance at the King's Theatre in the Haymarket, or at such other place as the plaintiff should appoint," it appearing that no licence for that theatre was granted by the Lord Chamberlain, as required by the 10 G. 2, c. 28, and that the plaintiff did not request the defendant to dance at any other place which was licensed. It was there contended that the statute did not extend to dancing. But Lord Kenyon said,—“I think the statute of 10 G. 2 does extend to this and every other species of stage entertainment. The words are general; and the intent of the legislature manifestly was to put all places of public diversion under the control of the magistracy. The subsequent statute of the 25 G. 2, c. 36, puts all sorts of places opened for public diversion under the direction and appointment of the magistrates at large, and is applicable to other entertainments than those of the stage. Under the former act, no *entertainment of the stage*, of which dancing is one, can be exhibited without the Lord Chamberlain's licence; and, none having been obtained in this case, the plaintiff cannot call upon the defendant for the breach of an agreement which, without such licence, it was unlawful for him to execute.” His lordship, however, in the next case of *The King v. Handly*, 6 T. R. 286, recalls that opinion. It was there held that *tumbling* is not an entertainment of the stage within the meaning of the 10 G. 2, c. 28. Lord Kenyon says: “The decision in the case alluded to, of *Gallini v. Laborie*, was perfectly right, because that case clearly came within the statute 25 G. 2, c. 36. But, if I expressed myself, as has been now represented, that the statute 10 G. 2, c. 28, extended to every species of [687] stage-entertainment, I think I was mistaken. In that case it was not necessary to consider that act so particularly as it is in the present case; and, our immediate attention being now called to it, I do not think that *tumbling* is an entertainment of the stage within the meaning of that act of parliament: it might equally be said that *fencing* on a public stage is. This is a penal act of parliament, and we cannot extend it to entertainments that did not exist when the statute was made.” This place was licensed under the 73rd section of the Birmingham Improvement Act, 1861, 24 & 25 Vict. c. cxi.,—which is almost in terms a re-enactment of the 25 G. 2, c. 36, s. 2,—for “public dancing, music, and other public entertainments of a like kind.” Does the entertainment here exhibited come within the prohibition of the 6 & 7 Vict. c. 68? It is not a tragedy, comedy, farce, burletta, interlude, melodrama, or pantomime. It is an entertainment altogether of a novel kind, and could not have been within the

contemplation of the legislature at the time of the passing of the act,—an act which, as Lord Kenyon observes, is of a highly penal character. Ghosts have not unfrequently been introduced into dramatic entertainments,—in *Hamlet* and *Julius Cæsar*, for instance. But there they were, so to say, only subordinate personages. This is the first time that shadows have been made the substance of the entertainment. It is a mere exhibition of an optical illusion. [Montague Smith, J. You have a set drama here.] Would the popular entertainment of “Punch” be within the prohibition, if exhibited on a stage, with side-scenes and foot-lights? What difference can there be in this respect between puppets and shadows? Would a lecture delivered on a stage with scenery and foot-lights be a dramatic entertainment? [Bytes, J. Are poses plastiques within the statute?] Clearly not: the object there is merely to exhibit a picture.

[688] Field, Q. C., for the respondent. It is submitted that the entertainment in question falls clearly within the prohibition of the statute, and that the magistrate was right in convicting the appellant. The earliest enactment to be found upon the subject of stage-plays is contained in the 3 Jac. 1, c. 21, which “for the preventing and avoiding of the great abuse of the Holy name of God in stage-plays, interludes, May-games, shews, and such like,” enacts that, “if at any time or times after the end of that session of parliament, any person or persons do or shall in any stage-play, interlude, shew, May-game, or pageant, jestingly or profanely speak or use the Holy name of God, or of Christ Jesus, or of the Holy Ghost, or of the Trinity, which are not to be spoken but with fear and reverence, [he] shall forfeit for every such offence by him committed 10l.” Then came the 12 Ann. stat. 2, c. 23, which enacted “that all fencers, bearwards, common players of interludes, &c., shall be deemed rogues and vagabonds.” Then followed the 10 G. 2, c. 28, the 1st section of which, reciting the statute of Anne, enacted that “every person who shall for hire, gain, or reward, act, represent, or perform, or cause to be acted, represented, or performed, any interlude, tragedy, comedy, opera, play, farce, or other entertainment of the stage, or any part or parts thereof, in case such person shall not have any legal settlement in the place where the same shall be acted, represented, or performed, without authority by letters-patent from His Majesty, his heirs, successors, or predecessors, or without licence from the Lord Chamberlain of His Majesty’s household for the time being, shall be deemed to be a rogue and a vagabond within the intent and meaning of the said recited act, and shall be liable and subject to all such penalties and punishments, and by such methods of conviction, as are inflicted on or appointed by the said act [689] for the punishment of rogues and vagabonds who shall be found wandering, begging, and misordering themselves, within the meaning of the said recited act.” And the 2nd section imposed a penalty of 50l. on any person who, having or not having a legal settlement as aforesaid, should without such licence as aforesaid, act, represent, or perform, or cause to be acted, represented, or performed, for hire, gain, or reward, “any interlude, tragedy, comedy, opera, play, farce, or other entertainment of the stage, or any part or parts thereof.” It was under that statute that the question in *Gallini v. Lalor*, 5 T. R. 242, arose. The engagement there was, to dance in “ballets,” which have every incident of a stage-play, except language. There is no ground for quarrelling with the judgment in that case: and the subsequent case of *The King v. Hamby*, 6 T. R. 286, does not interfere with it. The Dramatic Copyright Act, 3 & 4 W. 4, c. 15, secures the sole liberty of representation to the author of any “tragedy, comedy, play, opera, farce, or any other dramatic piece or entertainment.” Under that statute, an introduction to a pantomime,—that is, the only *written* part of the entertainment,—was held in *Lee v. Simpson*, 3 C. B. 871, to be within the statutory protection. The doctrine was carried a little further in *Russell v. Smith*, 12 Q. B. 217, where it was held that a song which related to the burning of a ship at sea, and the escape of those on board, described their feelings in vehement language, and sometimes expressed them in the supposed words of the suffering parties, was “dramatic,” and therefore within the meaning of the statute, though sung only by one person, sitting at a piano, giving effect to the verses by his delivery, but not assisted by scenery or appropriate dress. “The absence,” said Lord Denman, “of scenes and appropriate dresses and a regular theatre has been urged for the defendant. [690] But we should take away a part of the protection conferred on authors if we held that there could be no public representation without these accompaniments” (a). It is impossible to

(a) And see *Russell v. Briant*, 8 C. B. 836.

say whether this was a tragedy, a comedy, or a farce; the dialogue not being set out in the case. But there is a stage, a curtain, a proscenium, foot-lights, and all the accessories of a stage-play. Two performers at least appeared upon the stage; and it can make no difference in the legal character of the performance that all the performers were not there bodily. Suppose the reflections, or shadows, as they are called, were not seen upon the stage at all, the entertainment would not be the less within the prohibition of the statute. That this sort of spectacle was unknown at the time of the passing of the 6 & 7 Vict. c. 68, clearly makes no difference: that was settled by *Gambart v. Ball*, 14 C. B. (N. S.) 306. In the case of *Pepper's Ghost*, there was no dialogue,—nothing to make the exhibition at all analogous to a dramatic entertainment or stage-play. Even Marionettes may become stage-plays, if accompanied by a regular dialogue carried on by unseen living actors.

Hayes, Serjt., in reply. The Dramatic Copyright Act has nothing whatever to do with this question. The entertainment in the case of *Russell v. Smith*, 12 Q. B. 217, was a musical entertainment dramatized, and might well be held to be within the meaning of the act. The thing complained of in *Gambart v. Ball*, 14 C. B. (N. S.) 306, the multiplication of copies of a picture by photography, was the very thing the statutes for the protection of artists and engravers was levelled at, though the mechanical means were new. This statute clearly would not apply to dramatic readings. A dramatic performance or entertainment necessarily involves the appearing and acting of living persons on the stage. It cannot be too much urged that this is a highly penal statute, and that the question is one of grave importance.

ERLE, C. J. I come to the conclusion that the conviction in this case should be confirmed. I am very desirous of not laying down anything calculated to prevent the exhibition of ingeniously contrived spectacles for the amusement of the public. But the law requires that every person who keeps a house or other place of public resort for the exhibition of stage-plays or other entertainments of the stage, shall be licensed in the manner pointed out by the 6 & 7 Vict. c. 68, s. 2. I think the entertainment described in this case is within that statute: and, if the appellant wishes to continue this exhibition, which seems to have been conducted with all the accessories of the stage,—a curtain, foot-lights, a drop-scene and wings, living actors on the stage at the commencement, dialogue, dancing, music, and singing, all seen and heard by the audience, he must arm himself with the authority which the law has provided for that purpose. Upon the description given of this entertainment, I am unable to discover that the magistrate has arrived at an erroneous conclusion.

BYLES, J. I am of the same opinion. Nothing can be larger than the words of the 6 & 7 Vict. c. 68. The 2nd section prohibits the keeping any house or other place of public resort for the public performance of "stage-plays," without authority by virtue of letters-patent from Her Majesty, &c., or without licence from the Lord Chamberlain for the time being, or from the justices of the peace. And the interpretation clause, [692] s. 23, defines "stage-play" to mean and include "any tragedy, comedy, farce, opera, burletta, interlude, melodrama, pantomime;" and then follow these still more comprehensive words, "or other entertainment of the stage, or any part thereof." I observe two words in this act which were not in the former act of 10 G. 2, c. 28, viz. "burletta" and "pantomime," which may well have been introduced still further to enlarge the meaning of "stage-play." It seems to me that there are here three distinct infringements of the statute. There was a representation of a storm at sea, with a "double" swimming, and then a character appeared upon the stage, in the costume of a Greek prince. It seems to me that these, at all events, formed part of an entertainment of the stage. Then there is the introduction of dialogue between persons not seen by the audience, with the usual theatrical accessories of music and singing and dancing. My Brother Hayes asked whether a public lecture delivered on a stage, with scenery and foot-lights, would be a dramatic entertainment or stage-play within the act. I am by no means clear that it would not. I do not say that the reflection of figures on mirrors on a stage, without the accessories of actors, dialogue, scenery, lights, and music, would constitute an infringement of the statute: but I am clearly of opinion that an entertainment such as that described in this case is within the prohibition of the statute.

KEATING, J. I entirely concur in the opinion expressed by my Lord and my Brother Byles, and have nothing to add.

MONTAGUE SMITH, J. I am of the same opinion. The entertainment in question

is thus described in the case :—On the rising of the curtain, there was a re-[693]-presentation of a storm at sea and of a man swimming, not a living person, but in theatrical phrase a “double.” When the storm subsided, a drop-scene was disclosed, with a lake in the back-ground. A character then appeared upon the stage, in the costume of a Greek prince, who spoke some lines relative to the shipwreck from which he had just escaped. He was then joined by another person, dressed as an attendant, and a short dialogue ensued. These two were the only persons who appeared bodily upon the stage: and they were twice on the stage together. There were several other characters, a king, a princess, &c., and a chorus; and the dialogue between them was a composed set drama, with a regular plot of love, courtship, and matrimony. With the exception of the two persons above mentioned (the dialogue between whom was wholly subordinate to the plot of the piece), none of the characters were at any time bodily upon the stage: they had their places in a chamber below it, where they acted their parts, and addressed each other in the words allotted to them: but by a combination of lenses and mirrors their figures were reflected upon a mirror at the back of the stage, so as to present to the spectators the appearance of persons actually upon the stage. There was dancing, music, and singing, but no change of scenery or dress during the performance. The exhibition thus described seems to me to have had all the characteristics of an entertainment of the stage. My Brother Hayes says that this is a highly penal statute, and that the consequences of holding this to be an entertainment of the stage will be very serious. It may be so. But all we can do is to construe legislation as we find it. Upon the facts found by the magistrate here, I think it is impossible for us to affirm that he came to a wrong conclusion.

Conviction affirmed.

[694] PHILLIPS AND ANOTHER v. J. C. IM THURN. May 3rd, 1865.

[S. C. 12 L. T. 457; 11 Jur. N. S. 489; 13 W. R. 750. For subsequent proceedings see L. R. 1 C. P. 463. Referred to, *Fagliano v. Bank of England*, 1889, 23 Q. B. D. 260.]

The acceptor *supra* protest of a bill of exchange, for the honor of the drawer, is, like the drawer himself, estopped from denying that the bill is a valid bill; and, consequently, it is not competent to him to set up as a defence to an action against him by an indorsee, that the payee is a fictitious person, and that he was ignorant of that fact at the time he accepted the bill.

This was an action against the acceptor for honor of a bill of exchange. The declaration and pleas are set out ante, p. 404.

To the sixth plea,—that, when the bill of exchange in the first count mentioned was made, there was no such person as Carlos Raffo, the supposed payee named in the said bill, but the said name of Carlos Raffo was and is merely fictitious, whereof the defendant at the time of his acceptance of the said bill had no notice or knowledge,—the plaintiffs demurred; the ground of demurrer stated in the margin being, “that the defendant is by his said acceptance estopped from saying that there was no such person as Carlos Raffo, the person named in the said bill.”

Hannen, in support of the demurrer. The acceptor for honor is liable for the engagement of the drawer, in whose place he by his intervention puts himself. It must be assumed that the drawer was aware that the payee was a fictitious person. The effect of such a transaction, as against an ordinary acceptor, was considered in *Gibson v. Minet*, 1 H. Bl. 569. Upon the authority of that case and the note to *Bennett v. Farnell*, 1 Campb. 130, 133, it is laid down in Byles on Bills, 8th edit. 73, that, “if the acceptor, at the time of acceptance *knew* the payee to be a fictitious person, he shall not take advantage of his own fraud; but a *bonâ fide* holder may recover against him on the bill, and declare on it as payable to bearer, or may recover on the money counts.” The note in Campbell is as follows,—“Almost all the modern cases upon this question arose out of the bankruptcy of Livesay & Co. [695] and Gibson & Co., who negotiated bills with fictitious names upon them, to the amount of nearly a million sterling a year. The first case was *Tatlock v. Harris*, 3 T. R. 174, in which the court of King’s Bench held that the *bonâ fide* holder for a valuable con-

sideration of a bill drawn payable to a fictitious person, and indorsed in that name by the drawer, might recover the amount of it in an action against the acceptor for money paid or money had and received, upon the idea there was an appropriation of so much money to be paid to the person who should become the holder of the bill. In *Tre v. Lewis*, 3 T. R. 182, decided the same day, the court held there was no occasion to prove that the defendant had received any value for the bill, as the mere circumstance of his acceptance was sufficient evidence of this: and three of the judges thought the plaintiff might recover on a count which stated that the bill was drawn payable to bearer. *Minet v. Gibson*, 3 T. R. 481, put this point directly in issue, and the unanimous opinion of the court was that, where the circumstance of the payee being a fictitious person is known to the acceptor, the bill is in effect payable to bearer. Soon after, the court of Common Pleas laid down the same doctrine in *Collis v. Emmott*, 1 H. Bl. 313. This decision was acquiesced in; but *Gibson v. Minet* was carried up to the House of Lords (1 H. Bl. 569). The opinion of the judges being then taken, Eyre, C. B. (p. 598), and Heath, J. (p. 619), were for reversing the judgment of the court below, and Lord Thurlow, C., coincided with them (p. 625): but, the other judges thinking otherwise, judgment was affirmed (2 Bro. P. C. 48). The last case upon the subject reported is *Gibson v. Hunter*, 2 H. Bl. 187, 288, which came before the House of Peers upon a demurrer to evidence, and in which it was held that, in an action on a bill of this sort against the acceptor, to [696] shew that he was aware of the payee being fictitious, evidence is admissible of the circumstances under which he had accepted other bills payable to fictitious persons. Vide *Tuff's case*, Leach, Cro. Law, 206." All the reasoning which is applicable to the acceptor must be applicable à fortiori to the drawer. Does the fact of the acceptance here being for the honor of the drawer make any difference? The obligation into which an acceptor for honor enters is that he will, on the drawee's default, pay the bill on behalf of the drawer,—his intention being solely to protect the interests and the honor of the drawer. Why, then, should he be at liberty to set up a defence which the drawer himself could not set up? The law which governs this subject is most clearly laid down in Story on Bills, §§ 123-125. "The acceptance of a bill supra protest for non-acceptance," says that learned author, "imports an obligation on the part of the acceptor that, if the bill is not paid by the drawee upon due presentment at its maturity, and it is then duly protested for non-payment, and due notice thereof is given to the acceptor supra protest, he will pay the same. Such presentment, protest, and notice, are therefore indispensable requisites to make the liability of such an acceptor absolute (a)¹. An acceptance supra protest enures for the benefit of all the parties on the bill subsequent to the person for whose honor it is accepted. Thus, if the acceptance be for the honor of the drawer, it enures to the benefit of the payee and all subsequent indorsees and holders under him. If accepted for the honor of the first, second, or third indorser, it enures for the benefit of all subsequent indorsers or holders [697] under them accordingly, but not for the benefit of antecedent indorsers or holders. If accepted for the honor of the bill, that is, of all the parties on the bill (as it may be), then, of course, it enures to the benefit of all the parties except the drawer. If accepted for the honor of the drawee, then it enures, or at least it may enure, for the benefit of the drawer as well as of the payee and subsequent holders, if the drawer was entitled to have the bill accepted by the drawee. On the other hand, the acceptor supra protest, upon giving proper notice thereof, and a due payment of the bill, has his own rights and recourse over against the person or persons for whose honor he accepted the same, and against all other parties to the bill who are liable to the same person or persons (a)². But he has no recourse over against any other parties

(a)¹ Citing Bayley on Bills, 5th edit. 176-179; Chitty on Bills, 8th edit., 375, 382; *Hoare v. Cazenove*, 16 East, 391; *Williams v. Germaine*, 7 B. & C. 468, 1 M. & R. 394; 3 Kent. Comm., 4th edit. 87; *Mutford v. Walcot*, 1 Ld. Raym. 574.

(a)² Citing Bayley on Bills, 5th edit. 179, 180; Chitty on Bills, 8th edit. 382, 383; Beawes, Lex Merc. by Chitty, vol. 1, 569; 3 Kent's Comm. 4th edit. 87; *König v. Bayard*, 1 Peters, R. 250; *Mertens v. Wymington*, 1 Esp. N. P. C. 113. In *Mertens v. Wymington*, Lord Kenyon said that an acceptor supra protest "is to be considered as an indorsee paying a full value for the bill, and as such entitled to all the remedies to which an indorsee would be entitled, that is, to sue all the parties to the bill." This is too loosely and generally said; for, the acceptor has no remedy against the

to the bill. Hence, if he accepts for the honor of the drawer, he has no remedy against the payee or any subsequent indorser: nor, if he accepts for the honor of the payee, will he have any against the subsequent indorsers. If he accepts for the honor of the bill generally (that is, of all the parties thereto), he has a remedy against all of them except the holder at the time of the acceptance. It follows also from what has been said, that [698] an acceptance for the honor of the drawer only will, or at least may under particular circumstances, entitle the acceptor to the same remedy against the drawee which the drawer himself would have (*a*)¹. Similar principles are recognized in the foreign commercial law, as to the rights and remedies growing out of acceptances *supra* protest. In the French law it is called an Intervention on the part of the stranger who accepts for the honor of any of the antecedent parties: and he thus performs the functions, and contracts the engagements, and acquires the rights, of the negotiorum gestor of the Civil law. Heineccius affirms the like doctrine,—Heinec. de Camb. c. 6, § 9, p. 54. Id. c. 2, § 10. Id. c. 3, § 10. Qui in honorem trassantis litteras cambiales ad se non directas acceptavit, perinde, ac ipse trassatus tenetur. Hinc integrum est presentanti, adversus eum, si constituto die non solverit, actione cambiali experiri. Contra ea et hic præstita solutione, agit adversus trassantem ad recuperandam summam solutam, una eum provisione, damnis, et impensis. Quum in finem hæc acceptatio non aliter fieri solet, quam *sopra* protesto. The rights of the acceptor *supra* protest, upon his intervention, stand upon the general maxim, Qui alterius jure utitur eodem jure uti debet. He stands subrogated to the rights of the holder." Upon general principles, and upon the reason and justice of the thing, it is submitted, it does not lie in the mouth of one who by his intervention has set the bill afloat, and has induced another person to part with money for it, to say that which the person for whom he intervenes could not have said.

Lush, Q. C. (with whom was Sir G. Honyman), con-[699]tra (*a*)². It may be conceded that the *drawer* would be precluded from setting up as a defence to a claim against him upon the bill, that the payee was a fictitious person. But the acceptor for honour is not so estopped. The acceptance by the drawee admits only the capacity of the drawer to draw the bill: and the acceptor for the honour of the drawer stands in no different position than the drawee would have stood in had he accepted the bill. In truth he is an acceptor without value. The only authority upon the subject seems to be that of Story on Bills, §§ 261, 262. "The obligations," he says, "resulting from a general acceptance have been already considered in another place. They are, on the part of the acceptor, to pay the bill upon presentment, at its maturity, or at any time afterwards, according to its tenor, to the holder. The obligations of an acceptor for honour, or *supra* protest, are not (as has been already stated) exactly coincident with the former: for, whereas the obligations of a general acceptance are absolute, those of an acceptance for honour or *supra* protest are conditional, to wit, that the acceptor will pay the bill, if duly presented to the original drawee for payment at the time of its maturity, and he refuses payment, and due protest is made thereof, and due notice is given to him of the [700] dishonour. All these acts must be punctually done, or the acceptor will be discharged. Pothier affirms the like doctrine as the law of France: Pothier du Change, n. 113: and Heineccius (de Camb. c. 6, § 9) states it, without any distinction between the cases where the bill is to be protested for non-acceptance and where it is protested for non-payment. There is another collateral consideration resulting from an acceptance, which ought to be mentioned in this place. It is that the acceptance, whether general, or for honour

holder from whom he received it, nor against any indorsee upon the bill whose name is subsequent to that of the person for whom he accepts.

(*a*)¹ Citing *Ex parte Wackerbath*, 5 Ves. 574, and *Ex parte Lambert*, 13 Ves. 179.

(*a*)² The points marked for argument on the part of the defendant were as follows:—

"1. That the sixth plea is good, because, the bill being made payable to the order of a fictitious person, no such order can possibly have been made, and the supposed indorsement by such person must be a fiction and nullity, and can give no title to any person to sue upon the bill as an indorsee thereof:

"2. That the defendant, not having had any notice at the time of his acceptance that the bill was drawn payable to a fictitious person, or his order, is not estopped from pleading the matters contained in the said sixth plea as a bar to the action."

or supra protest, after sight of the bill, admits the genuineness of the signature of the drawer; and, consequently, in favour of a bona fide holder for value, without notice, if the signature of the drawer turns out to be a forgery, the acceptance will nevertheless be binding, and entitle such holder to recover thereon according to its tenor. *But there is no such implied admission, on the part of the acceptor, of the genuineness of the signature of the payee or of any other indorser;* and, consequently, the holder, in order to recover against the acceptor upon the bill, must establish by proofs the genuineness of their signatures, in order to make title thereto, although he need not prove the genuineness of that of the drawer. In like manner, an acceptance admits the ability of the party to draw, and, if drawn by an agent in the name of his principal, it also admits that he has full authority to draw the bill. But it does not admit the authority of the agent to indorse the same bill, even though it is made payable to the order of his principal, and is indorsed by the same agent in the name of the principal." There can be no reason why an acceptance for honour should admit more than an ordinary acceptance admits.

HAMEN, in reply. If, as Story admits, the acceptor [701] for honour has his remedy over against the drawer, why should not his liability be co-extensive with that of the drawer of the bill?

ERLE, C. J. I am of opinion that our judgment in this case should be for the plaintiff. The action is brought by the holder of a bill accepted by the defendant supra protest for the honour of the drawer, acceptance having been refused by the drawee. At the maturity of the bill all things were done which were necessary to fix the defendant with liability as an acceptor for honour: and the defence relied on is that the bill was drawn payable to a fictitious payee, of which fact the defendant had no notice at the time of his acceptance of the bill. I take it to be clear that, if the defendant had not intervened, and the action had been brought by the holder of the bill against the drawer, the drawer would have been by law compelled to admit that the bill was a valid bill payable to bearer, or, in other words, that he would have been estopped from denying the indorsement of the payee. It seems to me that there is good reason for saying that that which the drawer would be estopped from denying the acceptor for honour should also be estopped from denying. I think he is equally bound to admit that the bill is a valid bill. The acceptor supra protest paying the bill has all the rights against the drawer that an ordinary holder would have. I find no authority which contravenes this view; and it seems to me that it receives confirmation from the passages cited from Story on Bills.

BYLES, J. I am of the same opinion. The defendant, as acceptor supra protest, is subrogated to the drawer. He has all the rights and all the liabilities of the drawer, and is, I think, equally precluded [702] from denying that the bill is a valid bill payable to bearer.

KEATING, J. I am entirely of the same opinion.

MONTAGUE SMITH, J. I am of the same opinion. The acceptor supra protest has his remedy against the drawer, and is as much estopped as the drawer is from saying that the bill is not a valid negotiable instrument. I do not think Story had this precise case in his mind: but still I think the present defendant substantially stands in the same predicament as did the acceptor in the case there put. The acceptor for honour must be considered as the drawer for this purpose.

Judgment for the plaintiff.

THE REV. H. J. DAY, Clerk, v. PEACOCK, Clerk to the Burial Board of Barnsley, in the county of York. THE REV. C. F. COBA, Clerk, v. SAME. THE REV. W. J. BINDER, Clerk, v. SAME. May 3rd, 1865.

[S. C. 34 L. J. C. P. 225; 12 L. T. 571; 11 Jur. N. S. 428; 13 W. R. 717.]

1. The incumbent of a *district church* to which a burial-ground had been appropriated before the passing of the 16 & 17 Vict. c. 85, and which district had been carved out of a township having separate overseers, and maintaining its own poor, is by the 32nd section of that act entitled to all the fees he formerly enjoyed in respect of burials in his district, for burial services performed by him in a new burial-ground provided by the burial board of a parish or township since that act.—
2. And, where an ecclesiastical district having a burial-ground has been divided

into two districts, but no burial-ground has been allotted to the second district, the incumbent of the first created district is entitled to the fees for the burial of inhabitants of both districts.

These actions were brought by the respective plaintiffs therein against the burial board for the township of Barnsley, in the county of York, for the recovery of [703] fees claimed to be payable by the defendants to the plaintiffs respectively, for burials, and the erecting or placing of monuments, grave-stones, tablets, and monumental inscriptions in the burial-ground provided by the defendants for the township of Barnsley under the provisions of the statutes relating to the burial of the dead: and by the consent of the parties, and under a judge's order, according to the Common Law Procedure Act, 1852, the following case was stated for the opinion of the court, without pleadings:—

1. The township of Barnsley, in the county of York, forms a part of the parish of Silkstone. It has separate overseers of the poor, and separately maintains its own poor.

2. Up to the time of the making of the order in council of the 8th of August, 1831, hereinafter mentioned, the said township formed one parochial chapelry, which had existed from time immemorial. The church of St. Mary's was the parochial chapel of the said chapelry, and within the said township was an antient burial-ground, in which from time immemorial the remains of the inhabitants of the said chapelry had been and were of right entitled to be buried: and for burials in this burial-ground, and for the erection of monuments therein and in the said church of St. Mary, fees had always been paid to the incumbent for the time being of the said chapelry.

3. In or about the year 1823, an additional church, called St. George's church, was built within the said chapelry by Her Majesty's commissioners for building new churches, under provisions of 58 G. 3, c. 45, and 59 G. 3, c. 134; and on or about the 16th of June, 1824, a burial-ground within the said township was under the provisions of the same statutes purchased and appropriated by the said commissioners as and for a burial-ground for the said church of St. George. [704] This church and burial-ground were afterwards duly consecrated.

4. By an order in council, bearing date the 8th of August, 1831, a district was divided from the said chapelry, and assigned to the said church of St. George, under the provisions of the statutes above referred to, and of the statute of 7 & 8 G. 4, c. 72. A copy of this order in council accompanied the case.

5. The district so assigned to the said church of St. George has since the said order in council been called St. George's district. The residue of the said township has since the same order in council been called St. Mary's district. In this latter district are situate the said church of St. Mary and the said antient burial-ground belonging to the said chapelry. This antient burial-ground was enlarged about forty years ago, and from the time of its being so enlarged until the formation of St. George's district as aforesaid, was the burial-ground of the said chapelry, and since the formation of St. George's district as aforesaid has been the burial-ground of the said district of St. Mary; and for burials and the erection of monuments therein, fees have always been paid to the incumbent for the time being of St. Mary's.

6. Since the formation of St. George's district as aforesaid, the burial-ground so appropriated as and for the burial-ground of St. George's church as aforesaid, has been the burial-ground of the said district of St. George's; and for burials and the erection of monuments therein, fees have always been paid to the incumbent for the time being of St. George's district.

7. By an order in council, bearing date the 23rd of May, 1844, a district called St. John's district was divided from St. George's district under the provisions of the statutes above referred to. A copy of this order in council accompanied the case. From the [705] making of this order until the year 1858, divine service for St. John's district was performed in a school-room in that district; and in 1858 a church called St. John's church was built in and for the same district, in which church divine service has since been performed.

8. The district so assigned to St. John's church has since the said last-mentioned order in council been called St. John's district. The residue of St. George's district has since the same order in council been called St. George's district.

9. There has never been any burial-ground assigned to or belonging to St. John's district; but the remains of persons dying within the limits of this district have been accustomed to be buried in the burial-ground of St. George's district, of which St. John's district formerly formed part; and for such burials in the said burial-ground of St. George's district, fees have always been paid since the formation of St. George's district as aforesaid, to the incumbent for the time being of St. George's district.

10. By an order in council bearing date the 2nd of February, 1857, made under the provisions of 16 & 17 Vict. c. 134, it was ordered (amongst other things) that (with certain exceptions therein mentioned) burials should after periods in that behalf appointed be discontinued in the said burial grounds of St. Mary's and St. George's districts. A copy of this order in council accompanied the case.

11. Upon the last-mentioned order in council being made, it became necessary to provide a new burial-ground for the said township of Barnsley; and, the vestry of the said township having refused to provide such burial-ground, the local board of health for the said township became on or about the 3rd of February, 1858, under the provisions of the 4th section of the [706] 20 & 21 Vict. c. 81, the burial board for the said township.

12. The said burial board afterwards, under the provisions of the various statutes relating to the burial of the dead, duly provided a burial-ground for the said township.

13. The burial-ground so provided by the said burial board (except the portion thereof not intended to be consecrated, and upon which portion a chapel is erected and built,) was with a chapel erected thereon, on or about the 6th of November, 1861, duly consecrated; from which time it became the burial-ground for the said several ecclesiastical districts of the said township, within the meaning and according to the provisions of the said last-mentioned statutes.

14. The plaintiff the Rev. Henry Josiah Day is the incumbent of the said district of St. Mary, and claims to be entitled to perform the duties and have the same rights and authorities for the performance of religious service in the burial in the burial-ground so provided by the said burial board, of the remains of parishioners or inhabitants of the said district of St. Mary, and also to be entitled to receive the same fees in respect of such burials which he had previously enjoyed and received for burials in the said burial-ground of St. Mary's district, as if such burial-ground so provided by the said burial board were the burial ground of St. Mary's district. He also claims to be entitled to fees for such monuments, grave-stones, tablets, and monumental inscriptions erected or placed in the consecrated part of the burial-ground so provided by the said burial board as aforesaid, or in the chapel erected thereon, as may be so erected or placed over the remains or in memory of parishioners or inhabitants of the said district of St. Mary, in lieu of the fees or sums which he would have been entitled to for the erecting [707] or placing of such monuments, grave-stones, tablets, and monumental inscriptions in the said burial-ground of St. Mary's district, or in the said church of Saint Mary.

15. The plaintiff the Rev. Clement Francis Cobb is the incumbent of the said district of St. George's, and claims to be entitled to perform the duties and have the same rights and authorities for the performance of religious service in the burial in the burial-ground so provided by the said burial board, of the remains of parishioners or inhabitants of the said district of St. George, and also to be entitled to receive the same fees in respect of such burials which he had previously enjoyed and received for burials in the said burial-ground of St. George's district, as if such burial-ground so provided by the said burial board were the burial-ground of St. George's district. He also claims to be entitled to fees for such monuments, grave-stones, tablets, and monumental inscriptions erected or placed in the consecrated part of the burial-ground so provided by the said burial board as aforesaid, and in the chapel erected thereon, as may be so erected or placed over the remains or in memory of parishioners or inhabitants of the said district of St. George, in lieu of the fees or sums which he would have been entitled to for the erecting or placing of such monuments, grave-stones, tablets, and monumental inscriptions in the said burial-ground of St. George's district, or in the said church of St. George.

16. The plaintiff the Rev. William John Binder is the incumbent of the said district of St. John, and claims to be entitled to perform the duties and have the same rights and authorities for the performance of religious service in the burial in the

burial-ground so provided by the said burial board, of the remains of parishioners or inhabitants of the said district of St. [708] John, and also to be entitled to receive the same fees in respect of such burial which he would have been entitled to enjoy and receive for burials in a burial-ground provided for the said district of St. John, as if the burial-ground so provided by the said burial-board were the burial-ground of St. John's district. He also claims to be entitled to fees for such monuments, grave-stones, tablets, and monumental inscriptions erected or placed in the consecrated part of the burial-ground so provided by the said burial board as aforesaid, and in the chapel erected thereon, as may be so erected or placed over the remains or in memory of parishioners or inhabitants of the said district of St. John, in lieu of the fees or sums which he would have been entitled to for the erecting or placing of such monuments, grave-stones, tablets, and monumental inscriptions in a burial-ground provided for St. John's district, or in the said church of St. John.

17. If the court should be of opinion that neither the said Clement Francis Cobb as the incumbent of St. George's district, nor the said William John Binder as the incumbent of St. John's district, has any right or title to fees as in the 15th and 16th paragraphs of this case is respectively mentioned, then the said Henry Josiah Day, as the incumbent of St. Mary's district, claims to have the same rights and to be entitled to the same fees in respect of parishioners or inhabitants of the whole of the said township which before the said order in council of the 8th of August, 1831, formed one parochial chapelry as hereinbefore mentioned, as he claims in respect of parishioners or inhabitants of the said district of St. Mary, as in the 14th paragraph of this case is stated.

18. If the court should be of opinion that the said Clement Francis Cobb, as incumbent of the said district of St. George, has the rights and is entitled to the [709] fees claimed by him as and in the 15th paragraph of this case is stated, but that the said William John Binder, as the incumbent of the said district of St. John, has no right or title to fees as in the 16th paragraph of this case mentioned, then the said Clement Francis Cobb, as incumbent of the said district of St. George, claims to have the same rights and to be entitled to the same fees in respect of parishioners or inhabitants of the whole of the district of St. George as it existed before the said district of St. John was formed out of it, as he claims in respect of parishioners or inhabitants of the said district of St. George as now existing, as in the 15th paragraph of this case is stated.

19. The said burial board, who are the defendants in the said several actions, deny that the plaintiffs or any of them have or has the rights, or are or is entitled to the fees, as above claimed by them respectively.

20. The questions for the opinion of the court are, whether the plaintiffs, or any and which of them, have or has any, and if any what rights, or are or is entitled to any, and if any what fees, as above claimed by them respectively.

21. Judgment was to be entered for 1s. damages and costs of suit (including one third of the costs of this special case and the argument thereof) in each of the said actions in which the court should decide in favour of the plaintiff in such action: and judgment was to be entered for the defendants, with costs of suit (including one third of the costs of this special case and the argument thereof), in each of the said actions in which the court should decide in favour of the defendants in such action.

Lush, Q. C. (with whom was Kemplay), for the plain-[710]-tiffs (a). The question

(a) The points marked for argument on the part of the plaintiffs were as follows:—

"1. That, from and after the consecration of the burial-ground provided by the burial board (except the portion thereof not intended to be consecrated), the said burial-ground became the burial ground of the township of Barnsley; and the Rev. Henry Josiah Day, as the incumbent or minister of St. Mary's district, being an ecclesiastical district in the said township for which the said burial-ground was provided, became entitled to perform the duties and have the same rights and authorities for the performance of religious services in the burial in the consecrated portion of such burial-ground of the remains of parishioners or inhabitants of St. Mary's district, and also to receive the same fees in respect of such burials, as he had previously enjoyed and received for burials in the burial-ground of St. Mary's district, as if the burial-ground provided by the burial board were the burial-ground of St. Mary's district.

"2. That, from and after such consecration as aforesaid, he the said Rev. Henry

in these cases turns upon the construction of certain clauses in the Burial Act, 15 & 16 Vict. c. 85 (extended to the provinces by the 16 & 17 Vict. c. 134). The circumstances under which the question arises are these:—The township of Barns-[711]ley maintains its own poor, and has separate overseers, though it is part of the parish of Silkstone. Down to August, 1831, it formed one parochial chapelry, called St. Mary's, having an antient burial-ground. On the 8th of August, 1831, an order in [712] council was made, assigning a district to the church of St. George; and to this district of St. George's a burial-ground was attached. In 1844, a district called St. John's was carved out of St. George's district; and in 1858 a church called St. John's church was built. To St. John's district no burial-ground was provided; and the inhabitants of that district were interred in the burial-ground of St. George's. Under these circumstances, it can scarcely be contended that the incumbent of St. John's can sustain any claim for burial fees, &c. The argument must therefore be confined to the cases of the Rev. Mr. Day and the Rev. Mr. Cobb. When the burial board was established under the 20 & 21 Vict. c. 81, s. 4, neither of these districts of St. Mary or St. George was a place maintaining its own poor: the division was a mere ecclesiastical one. The scope and object of the 15 & 16 Vict.

Josiah Day became entitled to fees for such monuments, grave-stones, tablets, and monumental inscriptions, erected or placed in the consecrated portion of the burial-ground provided by the board, or in the chapel erected thereon, as might be erected or placed over the remains or in memory of parishioners or inhabitants of St. Mary's district in lieu of the fees or sums which he would have been entitled to for the erecting or placing of such monuments, grave-stones, tablets, or monumental inscriptions in the burial-ground or chapel of St. Mary's district:

"3. That, under the circumstances stated in the special case, the Rev. Henry Josiah Day is in respect of the consecrated portion of the burial-ground provided by the burial board an incumbent or minister within the meaning of ss. 32 and 33 of the 15 & 16 Vict. c. 85, so far as regards the burial in the consecrated portion of the burial-ground provided by the burial board, of the remains of parishioners or inhabitants of St. Mary's district, and the erecting or placing in such consecrated portion of the said burial-ground, or the chapel thereof, of monuments, grave-stones, tablets, or monumental inscriptions over the remains or in memory of such parishioners or inhabitants:

"4. The Rev. C. F. Cobb and the Rev. W. J. Binder will rely on the same points in respect of St. George's district and St. John's district respectively, as are intended to be relied on by the Rev. H. J. Day in respect of St. Mary's district as above stated, —with this difference, that the Rev. W. J. Binder will contend that the fact of there never having been any burial-ground in and for St. John's district, does not affect the rights and authorities claimed by him in respect of the burial ground provided by the burial board; and that he is in the same position as regards such rights and authorities as if there had been a burial-ground in and for St. John's district before and at the time of the consecration of the consecrated portion of the burial-ground provided by the burial board:

"5. In the event of the court being of opinion that neither the Rev. C. F. Cobb, as the incumbent of St. George's district, nor the Rev. W. J. Binder, as the incumbent of St. John's district, has the rights and authorities claimed by them respectively, then the Rev. H. J. Day, as the incumbent of St. Mary's district will contend that he has the same rights and is entitled to the same fees in respect of parishioners or inhabitants of the whole of the said township which before the order in council of 8th of August, 1831, formed one parochial chapelry, as he claims in respect of parishioners or inhabitants of St. Mary's district:

"6. In the event of the court being of opinion that the Rev. C. F. Cobb, as the incumbent of St. George's district, has the rights and is entitled to the fees claimed by him in respect of St. George's district, but that the Rev. W. J. Binder, as the incumbent of St. John's district, has not the rights nor is entitled to the fees claimed by him in respect of St. John's district, then the Rev. C. F. Cobb, as the incumbent of St. George's district, will contend that he has the same rights and is entitled to the same fees in respect of parishioners or inhabitants of the whole of St. George's district as it existed before the said district of St. John was formed out of it, as he claims in respect of the parishioners or inhabitants of St. George's district, as now existing.

c. 85, was to put an end to the interment of the dead in crowded places. The 2nd section enacts that, "in case it appear to Her Majesty in council, &c., that for the protection of the public health burials in any part or parts of the metropolis, or in any burial-grounds or places of burial in the metropolis, should be wholly discontinued, or should be discontinued subject to any exception or qualification, it shall be lawful for Her Majesty to order that after a time mentioned in the order burials in such part or parts of the metropolis in such burial-grounds or places of burial shall be discontinued [713] wholly, or subject to any exceptions or qualifications mentioned in such order," &c. The 10th section enacts that, "upon the requisition in writing of ten or more rate-payers in any parish in the metropolis in which the place or places of burial shall appear to such rate-payers insufficient or dangerous to health (and whether any order in council in relation to any burial-ground in such parish has or has not been made), the churchwardens or other persons to whom it belongs to convene meetings of the vestry of such parish, shall convene a meeting of the vestry for the special purpose of determining whether a burial-ground shall be provided under this act for the parish, &c. : and, if it be resolved by the vestry that a burial-ground shall be provided under this act for the parish, a copy of such resolution, extracted from the minutes of the vestry, and signed by the chairman, shall be sent to one of Her Majesty's principal secretaries of state." By s. 11, in case the vestry agree to provide a burial-ground, a board is to be appointed. The 32nd section enacts that, "from and after the consecration as aforesaid (s. 30) of any burial-ground provided by this act (except any portion thereof intended not to be so consecrated), or where all or any part of such burial-ground, by reason of the same having been already consecrated, shall not require to be consecrated, then from and after such time as the bishop of the diocese shall appoint, such burial-ground shall be deemed the burial-ground of the parish for which the same is provided : and, where the same is provided for two or more parishes, such burial-ground shall be in law as if such parishes were one parish, and as if such burial-ground were the burial-ground of such one parish : and every incumbent or minister of the parish or of each of the parishes (as the case may be) for which such burial-ground is provided, shall, by himself and [714] his curate, or such duly-qualified persons as such incumbent or minister may authorize, perform the duties and have the same rights and authorities for the performance of religious service in the burial in such burial-ground, or in the consecrated portion thereof, of the remains of parishioners or inhabitants of the parish of which he is such incumbent or minister, and shall be entitled to receive the same fees in respect of such burials which he has previously enjoyed and received ;" "and the parishioners and inhabitants of such parish, or of each of such parishes, shall have the same rights of sepulture in such burial-ground as they respectively would have had in the burial ground or burial grounds in and for their respective parish." The 36th section provides that, "where fees or any portions of fees payable on interments, or for any monument, grave-stone, tablet, or monumental inscription in the burial-ground of any parish for which a burial-ground is provided alone or jointly with any other parish or parishes under this act, are by law or custom payable to the churchwardens of any parish, or to trustees or other persons, for or towards the payment of any annuity or stipend to the incumbent or minister, or any other parochial purpose, or the discharge of any other debt or liability, such fees or portion of fees shall be payable in the burial-ground to be provided as aforesaid for such parish under this act, and shall be received by the burial-board, and paid to the parties entitled to receive the same ; and when fees or payments have been received on interments, or for any monument, grave-stone, tablet, or monumental inscription in the burial-ground of any such parish, by any such churchwardens, or by trustees or other persons, for the purpose of discharging any periodical payment or other liability, it shall be lawful for the burial-board, upon the request of such churchwardens, [715] trustees, or persons, to pay from time to time out of the fees and moneys received by them on account of such parish, such amount as may be necessary for discharging such periodical payment or liability." By the interpretation-clause, s. 52, it is declared that the word "parish" shall mean "every place having separate overseers of the poor, and separately maintaining its own poor ;" and that "incumbent" or "minister" shall, "in respect of any fee made payable to an incumbent or minister under this act, mean, the clergyman who would have been entitled to the fee, had the body been buried in the churchyard or burial-ground of the parish from which it came, or in the burial-ground of the ecclesiastical district, in case such district has a burial-ground at the passing of

this act; and, if any difference shall arise between two or more persons severally claiming to be the incumbent or minister under this provision, such difference shall be determined by the bishop of the diocese." The intention to preserve the rights of incumbents, not only in parishes, but also in ecclesiastical districts, is obvious throughout the act.

Manisty, Q. C. (with whom was J. B. Maule), for the defendant (*a*). The right of Mr. Day and Mr. Cobb is [716] purely a statutory right. Unless it be given to them

(*a*) The points marked for argument on the part of the defendant were as follow:—

"1. That the plaintiff the Rev. H. J. Day is not the incumbent or minister of a parish or place that has separate overseers of the poor, and separately maintains its own poor, and for which the burial-ground of the burial board of the township of Barnsley has been provided:

"2. That the said Rev. H. J. Day would not have been entitled to any fee for the burial in any churchyard or burial-ground of a parish or place having separate overseers of the poor, and separately maintaining its own poor, of the body of any inhabitant or parishioner of the district of St. Mary's, in the township of Barnsley, if such body had not been buried in the said burial-ground provided by the said Barnsley burial board for the said district:

"3. That the said burial-ground of the Barnsley burial board has been provided under the powers contained in the Burial Acts, but has not been thereby provided for any parish or place within the meaning of the said Burial Acts, having any incumbent or minister thereof:

"4. That the said Rev. H. J. Day, as the incumbent of St. Mary's district, in the township of Barnsley, has not any title in law under the said Burial Acts to perform the duties or to have the same rights or authorities for the performance of religious service in the burial in the said burial-ground of the Barnsley burial board, of the remains of parishioners or inhabitants of the said district of St. Mary, nor is he entitled to receive the same fees in respect of such burials which he previously enjoyed or received, inasmuch as the said district of St. Mary's is not a parish or place within the meaning of the 15 & 16 Vict. c. 85, s. 32:

"5. That the Rev. C. F. Cobb is not the incumbent or minister of a parish or place that has separate overseers of the poor and separately maintains its own poor, for which the said burial-ground of the Barnsley burial board has been provided:

"6. That the said Rev. C. F. Cobb, as the incumbent of the district of St. George's, in the township of Barnsley, would not have been entitled to any fee for the burial in any church-yard or burial-ground of a parish or place having separate overseers of the poor and separately maintaining its own poor, of the body of any inhabitant or parishioner of the said district of St. George's, if such body had not been buried in the said burial-ground provided by the said Barnsley burial board for the said district:

"7. That the said Rev. C. F. Cobb, as such incumbent, has not any title under the said Burial Acts to perform the duties, and have the same rights and authorities for the performance of religious service in the burial in the said burial-ground of the Barnsley burial board, of the remains of parishioners or inhabitants of the said district of St. George, nor is he entitled to receive the same fees in respect of such burials which he previously enjoyed or received, inasmuch as the said district of St. George is not a parish or place within the meaning of the 15 & 16 Vict. c. 85, s. 32:

"8. That the Rev. W. J. Binder is not the incumbent or minister of a parish or place that has separate overseers of the poor and separately maintains its own poor, and for which the burial-ground of the township of Barnsley has been provided:

"9. That the said Rev. W. J. Binder, as the incumbent of the district of St. John's, in the said township of Barnsley, would not have been entitled to any fee for the burial in any churchyard or burial-ground of a parish or place having separate overseers of the poor and separately maintaining its own poor, of the body of any inhabitant or parishioner of the said district of St. John's, if such body had not been buried in the said burial ground provided by the said Barnsley burial board for the said district:

"10. That the said Rev. W. J. Binder, as such incumbent, has not any title under the said Burial Acts to perform the duties and have the same rights and authorities for the performance of religious service in the burial in the said burial-ground, of the Barnsley burial board, of the remains of parishioners or inhabitants of the said district of St. John's, nor is he entitled to receive the same fees in respect of such burials,

by the 15 & 16 Vict. c. 85, they can have no right at all. Each of them was the incumbent of a district church with a burial-ground attached to it, and each was before the passing of the statute entitled to the [717] fees for burials therein. But for the statute, that was the beginning and the end of their right. The question depends on the 32nd and 52nd sections of the act. The former enacts that the newly consecrated burial-ground shall thenceforth "be deemed the burial-ground [718] of *the parish* for which the same is provided," and that, "where the same is provided for *two or more parishes*, such burial-ground shall be in law as if such parishes were one parish, and as if such burial-ground were the burial-ground of such one parish." Here, the burial-ground is provided for *one* parish, viz. Barnsley. The three ecclesiastical districts are in no sense "parishes." If the argument for the appellants were tenable, it would equally give a right to the fees to the incumbent of St. John's district, which had no burial-ground. [Byles, J. The language of the interpretation-clause is clear, — "*Incumbent and minister* shall, in respect of any fee made payable to an incumbent or minister under this act, mean the clergyman who would have been entitled to the fee had the body been buried in the churchyard or burial-ground of the parish from which it came, or in the burial-ground of the ecclesiastical district in case such district has a burial-ground at the passing of this act."] The appellants are not bound to perform the duties in respect of which they seek to recover these fees. The burial board provide a chaplain for the purpose, and pay him. [Lush. There is no clause in any of the acts empowering the board to appoint a chaplain.] The 38th and 39th sections give such authority (a).

[719] Lush was not called upon to reply.

ERLE, C. J. It appears to me that the incumbent of St. Mary's is entitled to the fees for the burial of every inhabitant of his district, and that the incumbent of the district of St. George is entitled to the fees for the burial of every corpse coming from that district or from the district of St. John, where they respectively perform the service. The township of Barnsley was a parochial district, having its own overseers, and maintaining its own poor, and therefore a "parish" within the meaning of the 15 & 16 Vict. c. 85. There had originally been one church (St. Mary's) and one burial-ground for the township. Afterwards a district church, called St. George's, was built, and a district with a burial-ground attached to it. Subsequently, a district

which he previously enjoyed or received, inasmuch as the said district of St. John's is not a parish or place within the meaning of the 15 & 16 Vict. c. 85, s. 32.

"11. That no one of the said plaintiffs, as the incumbent of his respective district, is separately, nor are any of the said plaintiffs jointly, entitled as such incumbents to the fees for the right of erecting, or for erecting, any monument, grave-stone, tablet, or monumental inscription, in the said burial-ground provided for the several districts, or in the chapel erected thereon, which may be erected or placed over the remains or in memory of any of the parishioners or inhabitants of any of the said several districts under the provisions of the said Burial Act:

"12. That the said Rev. W. J. Binder is not minister or incumbent of any parish, place, or ecclesiastical district, which at the time of the passing of the 15 & 16 Vict. c. 85, had any burial-ground belonging to it, as such parish, place, or ecclesiastical district."

(a) The 38th section enacts that "the general management, regulation, and control of the burial-grounds provided under this act, shall, subject to the provisions of this act, and the regulations to be made thereunder, be vested in and exercised by the respective burial boards providing the same: provided that any question which shall arise touching the fitness of any monumental inscription placed in any part of the consecrated portions of such grounds shall be determined by the bishop of the diocese."

And the 39th enacts that, "where a burial-ground is provided under this act for the common use of two or more parishes, in case any question arise among the incumbents of such parishes as to the performance of the burial-service by a chaplain to be paid by means of contributions from such incumbents, or deductions from fees or sums payable to them, or otherwise touching the performance of service in the consecrated part of such ground, the bishop of the diocese shall from time to time confirm any arrangement which a majority, or, in case of equal numbers, one half of the incumbents shall approve, and such arrangement so confirmed shall be binding upon all the parties concerned."

called St. John's was carved out of St. George's district : and, though there were then three places of worship within the township, there were but two burial-grounds, viz. those of St. Mary and St. George, [720] and the burials of the inhabitants of St. John's district took place in the ground allotted to St. George's. In 1858, the board of health for the township of Barnsley, under the provisions of the 20 & 21 Vict. c. 81, established a new burial-ground : and the question for us is, who is to receive the fees for the performance of the burial-service there,—it being a burial-ground for the entire township of Barnsley. This depends upon the construction of the 32nd section of the 15 & 16 Vict. c. 85, coupled with the interpretation-clause, s. 52. It seems to me that the 32nd section is capable of the construction which has been contended for on behalf of the incumbents Day and Cobb. That section enacts that, "from and after the consecration of any burial-ground provided under this act, such burial-ground shall be deemed the burial-ground of the parish for which the same is provided : and, where the same is provided for two or more parishes, such burial-ground shall be in law as if such parishes were one parish, and as if such burial-ground were the burial-ground of such one parish ; and every incumbent or minister of the parish, or of each of the parishes (as the case may be) for which such burial-ground is provided, shall, by himself and his curate, &c. perform the duties and have the same rights and authorities for the performance of religious service in the burial in such burial-ground of the remains of parishioners or inhabitants of the parish of which he is such incumbent or minister, and shall be entitled to receive the same fees in respect of such burials, which he has previously enjoyed and received." It appears to me that the incumbent of each district having a burial-ground is entitled to the fees. Mr. Manisty insists that the words "every incumbent or minister of the parish," mean, the incumbent or minister of the whole parish, and that, as neither the incumbent of St. Mary's nor [721] the incumbent of St. George's is the incumbent of the parish of Barnsley, but each the incumbent of his own particular district only, therefore there is no one answering the description of "incumbent of the parish," so as to be entitled to demand these fees. But I take it that the incumbents of the district churches to which burial-grounds are attached are in some sense within the words, and certainly are within the meaning of the legislature ; and that they are to perform the same duties, and to have the same rights and authorities, and entitled to the same fees in respect of burials which they had previously enjoyed. I think the statute clearly gives them a right to receive the same fees, and (though it is not necessary to decide that question here) imposes upon them the same duties, to which they were entitled and which they were bound to perform before in their respective districts. If they were bound to perform the service formerly, they are bound now : and, if they perform the service, they are entitled to receive the fees as heretofore. The language of s. 52 is clear to shew that incumbent means and includes the clergyman of an ecclesiastical district having a separate burial-ground,—who would have been entitled to receive the fee if the body had been buried in the ground belonging to his district. If the fee is given to the incumbent of the ecclesiastical district, it seems to me that the duty in respect of which it was payable was intended to be performed by the same incumbent.

BYLES, J. I am of the same opinion. No one reading the statute can for a moment doubt that the ruling desire of the legislature was that the clergyman should not be deprived of any of the emoluments he was before entitled to, and that the public should have the same last service performed over them as heretofore. [722] If necessary, I think we are entitled, if not bound, to do some violence to the language of the act, in order that that paramount intention should be carried into effect. But I do not think it is necessary to do any violence to the language here. The incumbents of these district churches were bound to perform certain duties and entitled to receive certain emoluments. Their performance of the former cannot be dispensed with, nor can they be deprived of their right to the latter, without clear and express words. The utmost that *could* be needed here is the substitution of the word "in" for "of" in the twelfth line of s. 32. But even that I do not think necessary. When you speak of "a bishop of the province of Canterbury," you mean a bishop who is benefited in that province. The literal construction, therefore, of this statute is quite as consistent with our decision as any other.

The rest of the court concurring,

Judgment for the plaintiffs Day and Cobb.

CHARLES LEE, *Appellant* : SAMUEL RILEY, *Respondent*. May 5th, 1865.

[S. C. 34 L. J. C. P. 212 ; 12 L. T. 388 ; 11 Jur. N. S. 527 ; 13 W. R. 751. Followed, *Ellis v. Loftus Iron Company*, 1874, L. R. 10 C. P. 12. Discussed, *Child v. Hearn*, 1874, L. R. 9 Ex. 176 ; *Smith v. Cook*, 1875, 1 Q. B. D. 83.]

Through defect of fences which it was the defendant's duty to repair, his mare strayed in the night-time from his close into an adjoining field, and so into a field of the plaintiff's in which was a horse. From some unexplained cause, the animals quarrelled, and the result was that the plaintiff's horse received a kick from the defendant's mare, which broke his leg, and he was necessarily killed :—Held, that the defendant was responsible for his mare's trespass, and that the damage was not too remote.

A plaint was entered in the county court of Yorkshire holden at Halifax, by the plaintiff (the now respondent) on the 10th of November, 1864, whereby he sought to recover the sum of 22l. The particulars attached to the summons served upon the defendant (the [723] now appellant) claimed 22l. as "the price of a black horse."

The action was brought to recover the sum of 22l., the value of a horse belonging to the plaintiff, which had had its leg broken in the night-time. The horse had been left safe and sound in the plaintiff's field on the evening of the 25th of October last, and was found the following morning standing there on three legs, the fourth having been broken, as was alleged, by the kick of a horse of the defendant's.

The plaint was tried before a jury : and it appeared in evidence that the plaintiff and defendant occupied two adjoining farms, and that an occupation-road extended from a highway through the defendant's farm, of which it formed part, into the plaintiff's farm, where it formed part of the plaintiff's farm, and terminated some two or three fields' length within the farm ; that there was a gate across the occupation-road at the point where the two farms adjoined, which belonged to the defendant to repair, and had been erected by the occupier of his farm immediately preceding him, some seven or eight years ago : and that, being broken in two pieces, the plaintiff had given notice to the defendant to repair it about three weeks before the occurrence which gave rise to the action, and had apprised him that it was his duty to repair it. It appeared further, that the defendant's horses, and particularly a large grey mare of his, had on several occasions passed through this gateway along the plaintiff's portion of the occupation-road, and thence through a small gateway opening from the occupation-road into a meadow field of the plaintiff called the Rye Bank, and thence through a hedge into another field of the plaintiff called the Pasture, being the field in which the plaintiff's horse had been left sound and well on the evening of the day in question ; that the last-men-[724]-tioned gateway was a small one (1½ yards wide) for the plaintiff's cows to enter the close called the Rye Bank, from the occupation-road ; and that there was a gate reared against the opening, and stones placed against it on the field side, to support it : but that, if a horse pushed his breast against it, the gate would fall down : and it was in evidence that the defendant's horses (including the grey mare) had on several previous occasions pushed the gate down, and entered the plaintiff's land through the gap. It further appeared that, on the night before the horse was found lamed, this gate had been fastened by one of the plaintiff's sons : further, that the hedge separating the two fields of the plaintiff (the Rye Bank and the Pasture) had been of sufficient strength during all the summer previous to prevent the plaintiff's cattle from passing out of one field into the other. This gate was found thrown down, and recent foot-marks of a horse were observed on the morning of the 26th of October on each side of it, and traced across the close called Rye Bank, and through the hedge into the field called the Pasture : and, in the latter field, close to where the plaintiff's horse was found standing on three legs, strong marks of horses "scuffling" were observed, and patches of black and of grey hair were found at the same spot, corresponding with the colour of the plaintiff's horse, which was black, and with that of the defendant's grey mare.

The plaintiff's horse was discovered standing on three legs, as before mentioned, at about 8 o'clock on the morning of the 26th of October : and, on being examined by a veterinary surgeon, it was found that the off hind-leg was broken, a compound fracture, and that a piece of the bone had been taken out. The horse was obliged to be killed ;

and, on a post-mortem examination, the bone exhibited an appearance of [725] having been struck, and a piece of it knocked out by a violent blow.

Such shoes as the defendant's grey mare had on, it was in evidence, might have caused it. The ordinary shoe of a horse would not have caused the injury; nor could the plaintiff's horse have caused the injury to itself.

About 12 o'clock the same day, the plaintiff's sons, accompanied by the veterinary surgeon, went to the defendant's stable, and there found his servant fomenting the off hind-leg of the defendant's grey mare with hot water. There were "abrasions," principally inside the thigh, down the leg, towards the hock. Hair was found knocked off in several places; and the colour of the mare corresponded with that of the patches of grey hair found in the field.

The defendant's mare was a large powerful animal of $17\frac{1}{2}$ hands high; and its shoes had attached to them large strong "caulkins," formed by the shoes being turned down at the heels. The plaintiff's horse was about 15 hands high.

There was no evidence of the defendant's mare being a vicious one.

No evidence was given on the part of the defendant, except as to the value of the plaintiff's horse.

A letter was put in, dated the 28th of October, 1864, from the plaintiff's attorneys to the defendant, charging the death of his horse to have been occasioned by a kick from the defendant's mare, and claiming compensation; to which no answer had been returned.

On the close of the plaintiff's case, the attorney for the defendant submitted that there was no evidence to go to the jury, and invited the judge's attention to the case of *Cox v. Burbidge*, 13 C. B. (N. S.) 430.

The judge decided there was evidence for the jury, and that it was not necessary for the plaintiff to prove [726] that the grey mare of the defendant was a vicious animal; that there was a distinction betwixt the two cases; that it might not be in the ordinary course of nature for a horse to kick a child, but that it was so for one horse to kick another, particularly a strange one, when they met in a field. And, on summing up to the jury he told them that the case depended mainly on circumstantial evidence; that there was no direct evidence bringing the plaintiff's horse in contact with the defendant's, and shewing that the defendant's mare caused the injury; but that he thought there was sufficient evidence for them to take the case into consideration, and in the exercise of their judgment to consider whether sufficient grounds of complaint had been made out by the plaintiff; that the plaintiff was bound to furnish them with reasonable evidence from which they might presume that the defendant's mare was the cause of the accident: that that was one question; but, in order to make the defendant liable, supposing that his mare had done the mischief, it must be shewn that the defendant's mare was wrongfully on the plaintiff's land; and that, if the defendant was bound to repair the gates, it was also his duty to keep his cattle from trespassing upon other persons' land. He then directed the attention of the jury to the fact that no evidence or explanation had been offered on the part of the defendant as to where the grey mare was on the night in question, or what she was doing; that he certainly expected that some evidence would have been adduced on this point; that it might be reasonably expected that some evidence would be given which would answer the presumption that the defendant's mare did the mischief; that where she was that night, and why the defendant's man was found fomenting the grey mare's legs, were circumstances which might reasonably have some weight in [727] the matter. He further told them that the three points for consideration were,—first of all, and mainly, did they think the circumstances given in evidence were sufficient to satisfy them that the defendant's mare caused the death of the plaintiff's horse? If so, then came the next question, whether the defendant was liable. His mare would become a trespasser as soon as it passed the gate leading to the plaintiff's portion of the occupation-road. The main difficulty was, whether there was sufficient evidence to lead them to a conclusion that it was the defendant's mare that did the mischief. It was entirely a matter for their consideration. It did not require that the evidence should be as strong and exact as would be required to convict a man charged with murder; but still that it should be such reasonable evidence as men of ordinary capacity would act upon as between man and man. The question had arisen whether the defendant was liable, supposing that plaintiff did not give evidence of notice to the defendant that his mare was a violent animal. He was

of opinion, he said, that had nothing to do with the present question. He added that, if the defendant's mare got into the plaintiff's field, whether the plaintiff's horse began to kick first or not did not affect the question, if the defendant's mare was a trespasser. And that it was for the jury to consider,—first, whether the death of the plaintiff's horse was caused by the defendant's mare,—secondly, whether the defendant's mare was trespassing,—and then the amount of damages.

The jury found a verdict for the plaintiff, damages 14l.

The defendant gave notice of appeal on the following grounds :—

"1. That there was no evidence to support the claim of the plaintiff:

[728] "2. That the judge was wrong when at the end of the plaintiff's case he determined that it was not necessary for the plaintiff to prove that the grey mare of the defendant was a vicious animal:

"3. That the judge was wrong when at the end of the plaintiff's case he determined that there was evidence for the jury in support of the case, if the plaintiff proved that the grey mare of the defendant had committed a trespass by entering the fields of the plaintiff, and had whilst committing that trespass kicked the horse of the plaintiff:

"4. That the judge misdirected the jury, and particularly when he observed that no evidence or explanation had been offered on the part of the defendant as to where the grey mare was on the night in question, or what she was doing, and that he certainly expected that some evidence would have been adduced on this point, and that it was reasonable to expect that the jury should have some evidence which would answer the presumption that the defendant's mare did the mischief: and further, when he said that, whether the defendant's mare was a violent animal or not, he was of opinion that had nothing to do with the question, nor if the defendant's mare got into the plaintiff's fields, whether the plaintiff's horse began to kick first or not."

J. B. Maule, for the appellant (*a*). There was no evidence to warrant the jury in finding that the defendant's mare did the damage complained of, or that the [729] defen-

(*a*) The points marked for argument on the part of the appellant were as follows :—

"1. That the plaintiff below adduced no evidence of any cause of action against the defendant below (the now appellant) at the hearing of the plaint:

"2. That the road mentioned in the case as passing from the appellant's to the respondent's farm, was a public road, and not an occupation-road, as alleged:

"3. That there was no evidence given to support the statement that the gate across the said road at the point where the same road passes from the appellant's farm on to the respondent's farm was one belonging to the appellant to repair:

"4. That the verdict was against evidence in this, that the fence mentioned in the case as dividing the respondent's closes therein respectively called Rye Bank and the Pasture, was proved to be, and is stated to have been, of sufficient strength during all the summer previous to the time of the alleged cause of action, to prevent the respondent's and therefore also the appellant's cattle from passing into the 'Pasture' in which the respondent's horse is said to have been found with his leg broken:

"5. That there was no evidence by what means the respondent's horse had broken his leg; and no proof was given of the appellant's mare ever having been in or near the respondent's 'Pasture Close' when the leg of the respondent's horse is said to have been there broken:

"6. That the respondent gave no evidence, even upon the assumption that the appellant's mare had strayed into the 'Pasture Close,' that the appellant knew that his mare was, or that his mare actually was, of a vicious nature and given to kicking, or had any tendency to acts of that kind, and to acts which are not in the ordinary course of the nature of a horse or mare to do:

"7. That the judge, in summing up the plaintiff's case to the jury, erroneously told them that no evidence on the last head was required to support the plaintiff's cause of action:

"8. That the judge was in error in telling the jury that some evidence should have been given by the appellant, and an explanation offered by him at the trial, as to where the appellant's mare was on the night in question, or what she was doing, to answer the presumption that his mare did the alleged mischief:

"9. That the judge ought not to have left to the jury the question whether there

dant was legally liable, inasmuch as it was not proved that the mare was to his knowledge vicious or accustomed to kick other horses. This subject was very much discussed in the recent case of *Cox v. Burlidge*, 13 C. B. (N. S.) 430. There, the defendant's [730] horse, being on a highway, kicked the plaintiff, a child who was playing there: there was no evidence to shew how the horse came on the spot, or what induced him to kick the child, or that he was accustomed to kick: and it was held that there was no evidence from which a jury would be justified in inferring that the defendant had been guilty of actionable negligence. Erle, C. J., there says: "To entitle the plaintiff to recover, there must be some affirmative proof of negligence in the defendant in respect of a duty owing to the plaintiff. But, even if there was any negligence on the part of the owner of the horse, I do not see how that is at all connected with the damage of which the plaintiff complains. It appears that the horse was on the highway, and that, without anything to account [731] for it, he struck out, and injured the plaintiff. I take the well-known distinction to apply here, that the owner of an animal is answerable for any damage done by it, provided it be of such a nature as is likely to arise from such an animal, and the owner knows it. Thus, in the case of a dog, if he bites a man or worries sheep, and his owner knows that he is accustomed to bite men or to worry sheep, the owner is responsible; but the party injured has no remedy unless the scienter can be proved." And Williams, J., says: "We must assume that the injury to the plaintiff was caused by the horse having viciously kicked him, as a horse of ordinary temper would not have done. Taking that to be so, I am of opinion that the plaintiff cannot maintain the action, because he has not shewn that the defendant knew that the horse was subject to that infirmity of temper. That brings the case within the ordinary rule, by which it is established that the owner is not liable unless it can be shewn that he was aware of the irritable temper and vice of the animal." Willes, J., takes a somewhat wider range; but he winds up with saying,—"The important circumstance in this case is, that the act is not in accordance with the ordinary instinct of the animal, which was not known to be of a mischievous disposition." There was no evidence here that the defendant's mare was in the habit of kicking. Every one who knows anything about horses, knows that kicking is the exception. [Keating, J., referred to *Read v. Edwards*, 17 C. B. (N. S.) 245, where it was held that an action lies against the owner of a dog, who, knowing the animal to have a propensity for chasing and destroying game, permits it to be at large, and the dog in consequence "breaks and enters" the plaintiff's wood, and chases and destroys young pheasants which are being reared there under domestic hens.] There the scienter was proved.

[732] Horace Smith, contra (a). In *Cox v. Burlidge*, the plaintiff failed to shew the breach by the defendant of any legal duty. Here, however, there was abundant evidence of breach of duty in the defendant, in permitting his fences to be out of

was sufficient evidence to lead them to the conclusion that it was the appellant's mare that did the alleged mischief:

"10. That the judge was in error in instructing the jury that the respondent not having given evidence of knowledge in the appellant that his mare was a violent animal, had nothing to do with the question:

"11. That the judge should have told the jury that there was no evidence to support the respondent's plaint, or the alleged liability of the appellant in the said plaint:

"12. That the judge should have told the jury that the gate leading into the close called Rye Bank of the respondent, opening from the alleged occupation-road, was proved and admitted by his own case to have been at the time in question out of repair and in a state insufficient to keep closed the small opening of the gateway, being reared only against such opening, and was a gate which was repairable by himself, and that by reason of the want of proper repair of such gateway, even upon the assumption of the respondent's own case, he had thereby, by reason of want of proper repair to such gate, contributed to the alleged mischief for which he sought to recover damages against the appellant."

(a) The points marked for argument on the part of the respondent were as follows:—

"1. That there was evidence to go to the jury in support of the plaintiff's claim:

"2. That the defendant was liable for the injury done by his mare, whether the mare was vicious or not."

repair, and that, in consequence of that breach of duty, the mare strayed into the plaintiff's close and did the damage complained of : *Star v. Roakeshay*, 1 Salk. 335. The court there say : " Either trespass or case lies ; trespass, because it was the plaintiff's ground, and not the defendant's ; and case, because the first wrong was a non-feasance and neglect to repair, and that omission is the gist of the action : and the trespass is only consequential damage." In *Powell v. Salisbury*, 2 Y. & J. 391, the plaintiff declared in case against the defendant for not repairing his fences, per quod the plaintiff's horses escaped into the defendant's close, and were there killed by the falling of a hay-stack : and it was held that the damage was not too remote, and that the action was maintainable. Apart from viciousness, that case is not distinguishable from the present. *Anonymous*, 1 Ventr. 265, and *Booth v. Wilson*, 1 B. & A. 59, are to the same effect. It was not a question whether the mare was vicious or not. The defendant would have been equally liable if the mare had lain down, and the plaintiff's horse had fallen over her and injured himself.

Maule, in reply. Most of the cases referred to turned upon the question whether the injury was sufficiently proximate. Here, however, the question [733] is, whether the liability existed in the first instance. This is not a claim for the consequential result of a trespass. If it had been a claim for a trespass, the question of remoteness might have arisen. Here, however, it is expressly limited to the vice of the animal, and the owner's knowledge of that vice.

ERLE, C. J. I am of opinion that our judgment in this case should be for the respondent. The action in substance is, either trespass for breaking and entering the plaintiff's close and doing damage there, amongst other damage, killing a horse belonging to the plaintiff, or an action upon the case for letting down a fence, whereby the defendant's mare escaped into the plaintiff's field and so did the damage complained of. One or other of these is the form of action the plaintiff would have adopted if he had been proceeding in one of the superior courts. In the plaint in the county-court, the cause of action is simply stated to be "one black horse," but the evidence shews what the real cause of action is, and what it was that the judge of the county-court had in his mind in his summing-up. It seems that the defendant's mare escaped in the night-time from his field, and passed into the plaintiff's close in which was the plaintiff's horse, and the two had a contest, in the course of which the defendant's mare broke the leg of the plaintiff's horse. The counsel for the defendant contended that the defendant was not liable, unless the plaintiff was prepared to prove that the defendant's mare was a vicious animal, and that the defendant knew it : and he referred to *Coe v. Burbidge*, 13 C. B. (N. S.) 430, and that class of cases where it has been held that, in the case of an injury done by a domestic or ordinarily tame animal, the owner is not responsible unless it is shewn that the animal was ferocious or of vicious disposition, and that [734] the owner had notice of that vice and ferocity. I am of opinion that in this case it was not the duty of the judge to lay down the law in that way to the jury, because the point put by Mr. Maule,—whose clear perceptions have doubtless led him to the conclusion that the decision we are about to pronounce is against him,—shews that the case is to be governed by a totally different principle. It is plain that the defendant's mare was trespassing on the plaintiff's close ; and I think it is equally clear upon the evidence that the defendant's mare did inflict upon the plaintiff's horse the injury which was the cause of its death : the question is, whether or not the damage was too remote. The contest at the trial seems to have been whether or not the mare was of a ferocious or vicious disposition, and whether the defendant knew it. But I think it was not necessary to go into that question, because the act which upon the evidence must be presumed to have caused the injury was not one which was characteristic of vice or ferocity in the mare in the ordinary sense. The animal had strayed from its own pasture : and it was impossible that her owner could know how she would act when coming suddenly in the night-time into a field among strange horses. That constitutes the difference between this case and those relied on by the defendant, and supports the summing-up of the judge, when he said that it was not a question of vice or scienter in the ordinary sense. That being disposed of, I think there was abundant evidence to warrant the jury in coming to the conclusion that the defendant's mare did trespass on the plaintiff's close, and there did the injury of which the plaintiff complained.

BYLES, J. I am of the same opinion. I do not conceive it to be our duty in a case of this sort jealously to scan what the judge in his summing-up says to the [735]

jury: we must look at the substance of it with reference to the complaint and the evidence before him. I think there was abundant evidence here that the defendant's mare was trespassing, and that the injury to the plaintiff's horse was caused by her kicking him either in sport or a quarrel, and that that kicking resulted in the horse's death. The proximate cause, therefore, of the plaintiff's loss was, the defendant's negligence. I can see but little difference between placing a horse with "caulkings" such as are described in this case in a field with insufficient fences, and turning a horse on a common so armed as to be dangerous to other horses,—in which latter case the defendant would undoubtedly be responsible for the consequences of his so doing.

KEATING, J. I also think the plaintiff is responsible for the consequences of the trespass committed by his mare, and that the damage was not too remote. I see nothing that can fairly be found fault with in the summing-up of the learned judge.

MONTAGUE SMITH, J. I am of the same opinion. The foundation of the action is negligence on the part of the defendant in omitting properly to keep up his fences, by means of which his mare strayed into the close of the plaintiff, and injured his horse. The only question is, whether or not the injury so caused was too remote. It was contended that it was, because the plaintiff gave no proof that the defendant's mare was vicious, and that the defendant knew it. I do not think it was necessary to give any such evidence. The accident might have happened without any vice in the mare; it might have been and probably was occasioned by the sudden meeting together of strange horses in the night-time. If even the plaintiff's horse committed the [736] first assault, the plaintiff would under the circumstances I think have been equally liable. It was through his negligence that the horse and the mare came together. The damage complained of was the result of that meeting; and I think it was not too remote.

Appeal dismissed.

COLES v. TURNER. May 5th, 1865.

[Reversed in Exchequer Chamber, L. R. 1 C. P. 373.]

A stipulation in a trust-deed for the benefit of creditors, under the 192nd section of the Bankruptcy Act, 1861, declaring that "it shall be lawful for the trustees to require any person or persons claiming to be a creditor or creditors of the debtor (notwithstanding that he or they may have executed the deed, and that the amount or alleged amount of his or their debt or debts may have been inserted in the schedule thereto) to verify the nature and amount of such debt or claim, with full particulars shewing the consideration thereof, by statutory declaration proved before the commissioners of bankruptcy, or otherwise, as the said trustee or trustees may think fit,"—is unreasonable, and renders the deed inoperative as against a non-assenting creditor.

This was an action against the defendant as the acceptor of a bill of exchange; with a count for goods sold and delivered, goods bargained and sold, work and materials, money paid, and money found due upon accounts stated.

The defendant pleaded that, after the accruing of the causes of action in the said declaration mentioned, and before action, to wit, on the 19th of May, 1864, the defendant, being indebted to divers persons respectively, made and executed a deed which, without the signatures and attestations thereto, is as follows.—"This indenture made the 19th of May, 1864, between Richard Turner, of, &c., of the first part, George Molyneux, of, &c., of the second part, and *the several persons, companies, and partnership firms who are creditors of the said R. Turner* (hereinafter called 'the said creditors'), of the third part: Whereas the said R. Turner, being indebted to divers persons in divers sums of [737] money which he is unable to pay in full, has proposed to convey and assign all his real and personal estate, subject to the existing incumbrances thereon, to the said G. Molyneux, upon trust for the benefit of the creditors of him the said R. Turner in manner hereinafter contained, and the said creditors have agreed to give to the said R. Turner the release hereinafter contained: Now this indenture witnesseth that, in pursuance of the said agreement, and in consideration of the premises, he the said R. Turner doth hereby grant, bargain, sell, convey, assign, and transfer unto the said G. Molyneux his heirs, &c. (according to the nature and

tenure thereof), all the freehold, copyhold, customary leasehold, and other real estate, tenements, and hereditaments of him the said R. Turner whatsoever and wheresoever, in possession, reversion, remainder or contingency, and all the goods, stock-in-trade, plant, fixtures, household furniture, and household effects, policies of insurance, moneys and securities for money, and all other the personal estate and effects of the said R. Turner whatsoever and wheresoever, in possession, reversion, remainder, or contingency (subject to the existing incumbrances thereon, and except the wearing apparel of the said R. Turner and of his wife and children), and all the estate, &c., with full power for the said G. Molyneux his executors, &c., to demand, sue for, &c. : To have, hold, receive, and take all and singular the said real and personal estate, effects, and premises unto and by the said G. Molyneux, his heirs, &c. (according to the nature and tenure thereof), upon trust that he the said G. Molyneux, his heirs, &c. (all of whom are hereinafter referred to as 'the said trustee or trustees'), do and shall, as soon as may be, and in such way or manner as to him or them may seem best, call in, collect, and receive the said personal estate, effects, and premises, [738] and sell and convert into money all the saleable parts of the said personal estate, and all the said real estate (*with power nevertheless for the said trustee or trustees, in his or their discretion, to postpone the sale of all or any part thereof, and to lease such unsold portion either from year to year or for a term of years, for such rents as he or they may think fit*), and with power for the said trustee or trustees to make any such sales either by public auction or private contract, or partly in either mode, and either with or without the concurrence of any mortgagee or mortgagees of the property, and subject to such conditions, upon such terms, and generally in such manner as he or they may think fit (and, as to any policies of insurance, either by way of surrender to the office or offices which may have granted the same or otherwise); *and to give credit for the whole or any part of the purchase-money, either with or without taking security for the same*: And the said R. Turner doth hereby, for himself, his heirs, &c., covenant with the said G. Molyneux, his heirs, &c., that he the said R. Turner, his heirs, &c., will at all times hereafter, at the request of the said trustee or trustees, and at the cost of the trust-estate, do, sign, and execute, or join or concur in doing, signing, and executing, all such acts, deeds, and documents as the said trustee or trustees may require for the purpose of giving effect to the conveyance and assignment hereinbefore contained, and carrying out the trusts and provisions of these presents: And it is hereby agreed and declared that the said trustee or trustees shall stand possessed of the moneys to arise from such calling in, collection, receipt, leasing, and sale as aforesaid (after payment thereof of all costs and expenses of and incidental to such calling in, collection, receipt, leasing, and sale, upon trust thereof in the first place to pay all costs, charges, and expenses of and incidental to the investi-[739]-gation of the affairs of the said R. Turner, with a view to the preparation, execution, and registration of these presents, and procuring the signature or assents of the said creditors thereto; and in the second place to pay and discharge all costs, charges, and expenses, of and incidental to the carrying out the trusts and provisions of these presents (including therein any remuneration payable as hereinafter mentioned); and in the third place to pay and discharge rateably and without preference or priority the debts due and owing from the said R. Turner to the creditors, and to pay the surplus (if any) of the said moneys to the said R. Turner, his executors, &c. : Provided always, and it is hereby agreed and declared, that the said trustee or trustees shall have full discretion from time to time to determine the amount of dividends which shall from time to time be declared and paid out of the moneys in hand to and among the said creditors in respect of their respective debts, and *to pay such dividends at such place and in such manner as he or they shall think fit*: And it is hereby further agreed and declared that it shall be lawful for the said trustee or trustees to require any person or persons claiming to be a creditor or creditors of the said R. Turner (notwithstanding that he or they may have executed these presents, and that the amount or alleged amount of his or their debt or debts may have been inserted in the schedule hereto,) *to verify the nature and amount of such debt or claim, with full particulars shewing the consideration thereof, by statutory declaration proved before the commissioners of bankrupts, or otherwise, as the said trustee or trustees may think fit*: And it is hereby further agreed and declared, that it shall be lawful for the said trustee or trustees to give time for the payment of any debt or debts owing to the said R. Turner, and to accept payment thereof by instalments, composition, [740] or otherwise, and to abandon any debt or debts which

he or they the said trustee or trustees shall consider bad; and also to make such arrangements as he or they may think expedient with any creditor or other person holding any portion of the estate and effects of the said R. Turner by way of mortgage, pledge, or lien, in order to redeem or discharge such mortgage, pledge, or lien, or to release the equity of redemption thereof, or otherwise: And it is hereby further agreed and declared, that it shall be lawful for the said trustee or trustees to employ any accountant, &c., and to pay him out of the trust-estate such a fair remuneration for services rendered as the said trustee or trustees may think fit: Provided always and it is hereby agreed and declared, that these presents shall not in anywise prejudice or affect the rights or remedies of any of the said creditors against any surety or sureties, or any person or persons other than the said R. Turner, his heirs, &c., nor shall these presents in anywise prejudice or affect any security which any of the said creditors may have or claim for his debt; but, nevertheless, if such security shall be enforceable against the said R. Turner or his estate or effects, then and in that case such creditor, unless he shall consent to abandon the said security, shall be entitled to receive dividends under these presents upon so much only of his said secured debt as may remain after such security shall have been realized, or after credit shall have been given for the full value thereof, *such value to be agreed upon between the said creditor and the said trustee or trustees, or, in case of dispute, to be ascertained by two impartial valuers, one to be chosen by such creditor and the other by the said trustee or trustees, or an umpire to be named by such valuers before proceeding to the valuation*: And this indenture lastly witnesseth that, in pursuance of the said agreement in this behalf, and in [741] consideration of the conveyance and assignment hereinbefore contained, the said creditors do hereby, for themselves and their respective heirs, &c., partners and successors, acquit, release, and for ever discharge the said R. Turner, his heirs, &c., estate and effects, of and from all the debts, claims, and demands of them the said creditors respectively, and of and from all actions, suits, and other proceedings at law or in equity which the said creditors respectively, or their respective partners or partner, have at any time heretofore brought, instituted, or taken, or which they the said creditors respectively or their respective heirs, &c., partners or successors, may or might (but for these presents) at any time hereafter bring, institute, or take against the said R. Turner, his heirs, &c., estate or effects, for or by reason or on account of such debts, claims, and demands, or any of them: Provided always, &c. [for the appointment of a new trustee]: And it is hereby agreed and declared that the receipt or receipts in writing of the said trustee or trustees for all moneys payable to him or them as such trustee or trustees shall effectually discharge all persons paying the same from all liability by reason of such payment, or of the misapplication or non-application of such moneys, and from all obligation to see to the application of such moneys; and that the said trustee or trustees shall not be answerable for the acts or defaults of each other, nor for any loss which may befall the trust-estate otherwise than through his or their wilful default respectively; *and that it shall be lawful for him or them to reimburse himself or themselves out of the trust-estate all costs and expenses actually incurred in the execution of the trusts*: And it is hereby lastly agreed and declared, that these presents are intended to be, and shall (so far as lawfully may be) operate as, a trust-deed for the benefit of the creditors of the said [742] R. Turner within the meaning of the provisions of the 192nd section of the Bankruptcy Act, 1861, in that behalf; and that it shall be lawful for the said trustee or trustees from time to time, at the expense of the trust-estate, to institute, take, adopt, and defend all such actions, measures, suits, and proceedings as he or they may be advised, for the purpose of giving effect to these presents, and establishing the validity thereof as such trust-deed; In witness," &c.: Averment, that a majority in number, representing three fourths in value, of the creditors of the defendant whose debts amounted respectively to 10l. and upwards had in writing assented to and approved of the said deed; and that the trustee appointed by the said deed executed the same; and that the execution of the said deed by the defendant was attested by an attorney or solicitor; and that, within twenty-eight days from the day of the execution of the said deed by the defendant, and before action, the same was produced and left (having been first duly stamped) at the office of the chief registrar of the court of bankruptcy for the purpose of being registered: and that, together with such deed, there was delivered to the said chief registrar such affidavit as by the Bankruptcy Act, 1861, in that behalf was required; and that the said deed did before the registration thereof bear such ordinary and ad

valorem stamp-duties as by the said act in that behalf was required ; and that immediately on the execution of the said deed by the defendant, possession of all the property comprised therein of which the defendant could give or order possession, was given to the said trustee ; and that, at the time of the execution of the said deed, the plaintiff was a creditor of the defendant in respect of the claim sued for, within the meaning of the said act ; and that all other conditions prescribed by the said act were observed and performed, and all [743] things were done and happened, necessary to give validity to the said deed as a deed under the Bankruptcy Act, 1861; and that the plaintiff became and was and is bound by the said deed as if he had been a party thereto, and had duly executed the same.

The plaintiff demurred to this plea, the ground of demurrer stated in the margin being, "that the deed is not binding on the plaintiff, as it contains unreasonable provisions, and, amongst others, that the debts are to be proved as the trustees may think fit." Joinder.

Prentice, in support of the demurrer (*a*). The deed contains unreasonable provisions, and is therefore void as against a non-assenting creditor. The property of [744] the debtor is assigned to trustees, in trust to sell for the benefit of the creditors, with power to them to postpone the sale indefinitely, and to lease the unsold portions of the property. This clearly is an unreasonable power to vest in trustees under a deed of this sort : it would be placing the creditors at the mercy of a friendly trustee, and giving the trustees powers which an assignee in bankruptcy could not exercise. The proviso that the trustees may pay the dividends at such place and in such manner as they shall think fit, is also unreasonable. So also is the stipulation that the trustees may require the creditors to verify the nature and amount of their debts or claims by statutory declaration, *or otherwise, as the trustees may think fit*. It might not be an unreasonable thing to require them to be proved before a commissioner of bankruptcy : but the stipulation goes beyond that. A similar provision was held in *Leigh v. Pendlebury*, 15 C. B. (N. S.) 815, to render the deed void. "I think," said Erle, C. J., "the clause giving the trustee power to admit or reject a debt which he might deem insufficiently proved, is most unreasonable, if carried out in terms. I must take the covenant, sitting in a court of law, according to its legal effect. I cannot modify or alter it. It seems to me to be altogether unreasonable to call upon a creditor to submit his claim to the decision of the trustee." And Willes, J., said : "The deed contains, amongst others, the following clause,—'Provided, nevertheless, that it shall be lawful for the trustees or trustee for the time being to require the amount of any debt or debts of any of the several creditors, or any security for the same, to be verified by solemn declaration, or in such other manner as to such trustees or trustee shall seem expedient : ' and, in the event of a refusal to submit to this, the creditor so refusing is to lose all benefit under [745] the deed. Is that reasonable? I must say I think it is not. There is nothing in any of the decisions to justify a non-executing creditor being thus placed at the mercy of the trustee." The provision also as to the mode of valuation of securities is objectionable. Suppose one party declines to appoint a valuer?

(*a*) The points marked for argument on the part of the plaintiff were as follows :—

"1. That the deed referred to in the plea is not binding upon non-assenting creditors under the Bankruptcy Act, 1861 :

"2. That it is not so binding, as it contains unreasonable covenants and provisions : and the following, amongst others, are unreasonable provisions,—

"That the trustees may give unlimited credit,—that they may lease the property for any term they like, and are not bound to sell the same within a reasonable time,—that the trustees may pay the dividends at such place and in such manner as they shall think fit,—that the trustees may abandon debts due to the defendant, and make arrangements with persons holding mortgages, &c., without regard to the same being reasonable,—that the mode of valuing a creditor's security is unreasonable, it does not appear what is to be done if the creditor is a lunatic or an infant, or if the trustees refuse to appoint an arbitrator,—that the creditors are to prove their debts in such a way as the trustees may think fit, —that the trustees may reimburse themselves costs actually incurred, although the same were not reasonably incurred, and even though the same were improperly incurred :

"3. That the deed is not for the equal benefit of all the creditors.

Or, suppose the creditor, by reason of his being an infant or a lunatic or otherwise, unable to appoint a valuer? The release also is too extensive. Then, the power to the trustees to reimburse themselves all costs actually incurred, without reference to whether or not they were incurred reasonably, is too large: see *Ex parte Hitchchurch*, 1 Atk. 210, and the 153rd section of the Bankrupt Law Consolidation Act, 1849, 12 & 13 Vict. c. 106.

Hannay, *contra* (a)¹. The stipulation that the trustees may reimburse themselves all costs actually incurred by them in the execution of the trusts, has passed unchallenged in many cases, and, amongst others, in *Leigh v. Pendlebury*, and also in *Strick v. De Mattos*, 33 Law J., Exch. 276. [Erle, C. J. If it were only costs, you probably might float.] As to the mode of proving debts, in *Leigh v. Pendlebury* the stipulation went beyond that contained in this deed: for, in the event of the creditor's refusal to submit to the inquisition, he was to lose all benefit under the deed: and the judgment turned very much upon that, which, it is submitted, is a very substantial distinction. In *Ex parte Spicer, In re Josephs*, 32 Law J., Bankruptcy, 62, a deed which contained a similar [746] clause was held good. Bramwell, B., in delivering the judgment of the court in *Strick v. De Mattos* (a)² on this point says: "Clause 13, as to proof of debts, was objected to, and it was said that by virtue of its provisions a creditor might be required, though at a distance, or under other circumstances of difficulty or unreasonableness, to make written statements of debt, and declarations under the statute. But the answer is, that this clause is not unreasonable because an attempt might be made to apply it unreasonably. We say an attempt, because it seems to us it would be a breach of duty in the inspectors to exact these statements and declarations in such cases as those put at the bar, and consequently that requisitions to that effect could not be enforced. As relating to an insolvency, when there is a large number of creditors, if honestly applied, as we are to assume it will be, this clause is not unreasonable." [Byles, J. There is no power given to the trustee to reject claims!] No. The words "or otherwise, as the said trustee or trustees may think fit," were introduced for the purpose of enabling the trustees to require less stringent proof. [Erle, C. J. I must say I do not see any substantial distinction between the deed in *Leigh v. Pendlebury* case and the present.] In *Wells v. Hacon*, 5 Best & Smith, 196, 33 Law J., Q. B. 204, Cockburn, C. J., says: "If we see that the deed is unreasonable and contrary to the intention of the statute, it is not to be upheld: but, *primâ facie*, a deed agreed to by three fourths of the editors must be taken to be reasonable."

ERLE, C. J. I am of opinion that our judgment in this case should be for the plaintiff. I think the provision here enabling the trustee or trustees to require [747] any person claiming to be a creditor to verify the nature or amount of his debt or claim, with full particulars shewing the consideration thereof by statutory declaration proved before the commissioners of bankruptcy, or otherwise as the trustee or trustees might think fit, is a provision having exactly the same effect as the provision in *Leigh v. Pendlebury*. In both cases, unless the creditor proved his debt, he could not be entitled to dividends. In that case, we held that it was unreasonable that the creditor's failure to prove his debt as the trustees might choose should deprive him of his right to participate in the dividend. I for one am prepared to abide by that judgment; but, at the same time, I think it right to say that there are two or three other provisions in this deed which seem to me to be equally objectionable.

BYLES, J. I am of the same opinion. The only difference between *Leigh v. Pendlebury* and the present case is, that there the deed expressed the consequence which is implied here.

MONTAGUE SMITH, J. I am of the same opinion. I think the case is not substantially distinguishable from *Leigh v. Pendlebury*.

Judgment for the plaintiff.

(a)¹ The points marked for argument on the part of the defendant were as follows:—"That the deed does not contravene the Bankruptcy Act: and that the powers given to the trustee are reasonable, and their exercise may be controlled by the court of Bankruptcy.

(a)² *Strick v. De Mattos* is now standing for judgment in the Exchequer Chamber. Trin. Vac. 1865.

[748] THE GREAT WESTERN RAILWAY COMPANY, *Appellants*: JOHN CHARLES WILLIS, *Respondent*. May 5th, 1865.

[S. C. 34 L. J. C. P. 195 ; 12 L. T. 349.]

In an action against a railway company for not conveying cattle to market within a reasonable time, a county-court judge allowed evidence to be given of a conversation which took place a week after the alleged cause of action arose, between the plaintiff and a "night-inspector" at one of the company's stations, whose duty it was to forward the cattle, in which the latter, in answer to a question as to why he did not send the cattle on, stated that "he had forgotten them:"—Held, that such evidence was improperly admitted,—it not being within the scope of the man's authority to make admissions as to by-gone transactions.

1. This was an action tried before the judge of the county-court of Staffordshire, and a jury, at Wolverhampton. It was brought to recover 21l. 7s. 6d. for the non delivery within a reasonable time of seven cows, thirty-five sheep, and six pigs, which were delivered to the defendants at Minety, on the 12th of July, 1864, to be carried to Wolverhampton,—the cows, sheep, and pigs being, as was alleged, thereby much injured, and the plaintiff put to expense, and the market at Wolverhampton being lost.

2. The cattle were delivered at the Minety station by the plaintiff about 5 p.m. on the afternoon of the 12th of July ; the plaintiff paying the carriage-charges, 3l. 11s., and signing a consignment-note in the following terms:—

"Cattle, sheep and pigs. (Reduced rates).

"To the Great Western Railway Company, Minety Station.

July 12th, 1864.

"Receive from J. Willis, of, &c., the under-mentioned animals, on the conditions stated below, and at the special reduced charge below the rates authorized by law.

"To be sent to Wolverhampton station.

"*Special Conditions* The loading and unloading is to be performed by the sender, and any assistance voluntarily given by the company's servants to be at the risk of the owner. The company are not to be subject to any risk in the receiving, loading, forwarding, in transit, and unloading ; nor to be answerable for any damage actual or consequential arising from suffocation, from being trampled on, bruised, or other-[749]-wise injured, from fire or any other cause whatsoever, nor for any consequences arising from over carriage, detention, or delay in or in relation to the conveying or delivery of the said animals, however caused :

"The company is not bound to send the animals by any particular train, or to carry or deliver them within any certain or definite time, or in time for any particular market :

"If on the arrival of cattle and other animals at their destination no one shall be ready to receive the same on behalf of the consignee, the company will at the discretion of the superintendent of any station send such animals into yards or other convenient places, at the expense and risk of the sender or consignee ; and, if not claimed within seven days, the same will be sold to defray expenses and pay charges :

"In order to guard against disappointment, the public are recommended to give two clear days' notice of their intention to send cattle from any station, so that the company may if possible provide trucks ; and, to afford time for receiving and loading such cattle and stock, they should be at the station not less than two hours before the departure of the train by which they are intended to be conveyed :"

[Then followed a description of the cattle, &c., and the price charged for their carriage.]

"Free passes for drovers to take charge of cattle and other animals will be allowed, according to the company's regulations.

"N.B.—The conditions cannot be altered or dispensed with by any person whomsoever, and are applicable for the whole distance carried over the Great Western, the Bristol and Exeter, the South Devon, and the South Wales railways, and any other railway or conveyance in connection therewith, or with either of them."

[750] Although the consignment-note is headed "reduced rates," and contains the language "at the special reduced charge below the rates authorized by law," there was no evidence upon the point, and indeed it had no reference to any higher scale of charges that was in operation.

3. The plaintiff proved that he saw the cattle loaded into trucks at Minety, ready for a goods train which usually leaves Minety about 7 p.m., that he had been in the habit of sending cattle by the defendant's railway for six or seven years, and that cattle loaded in time for that train usually arrived at Wolverhampton about 7 the next morning; that he and other cattle-dealers had been in the habit of sending cattle to the Wolverhampton market by that train; that he informed the defendants' clerk at Minety that the cattle were intended for the next day's market at Wolverhampton; that he sent his man to meet the cattle the next morning by the first train, but they did not arrive by that train; that the next train was due at 10.30, but was late, and did not arrive till between 12 and 1; that witness was in the market all day, waiting the arrival of the cattle; that the cattle were brought up to the market by his man Grant about 1 or half past 1, when the market was over; that he then had the cattle turned out and fed, and sent them to the market at Birmingham the next day, where they were sold; and that, on their arrival, the cattle were very dirty and badly off for something to eat and drink, and were out of condition in consequence of the delay, and the sheep were also very dirty and out of condition in consequence of the delay.

4. The plaintiff further proved that he lost some 17l. or 18l. by the lot of cattle between what they cost him and what he sold them for at Birmingham; and he attributed that partly to the depreciation in value [751] from delay, and partly to having lost the market at Wolverhampton.

5. The plaintiff then proposed to state something relating to the cause of the delay in delivering the cattle by the company, which had passed in conversation about a week after the 12th of July between him and the defendant's night inspector, named East, at Didcot, through which station the trucks in which plaintiff's cattle were would pass, when the defendants submitted that a statement by a subordinate servant at Didcot, not in course of the transaction, but some time afterwards, was not admissible: but the learned judge allowed the question to be put; and the plaintiff then stated that he said to East, "How is it you did not send my cattle on?" and that he said in reply, that he had forgotten them.

The plaintiff also stated that East had the charge of the night cattle-trains at Didcot, and that he would be on duty when the trucks in which the plaintiff's cattle were would pass through Didcot, and that he knew East well, and had frequently seen him on duty at Didcot.

6. In cross-examination, the plaintiff was asked whether the cattle were not usually taken on by the empty coal-train from Didcot, which train, it was suggested by the defendants, was the one which left Minety at 7 in the evening and arrived at Wolverhampton about 7 a.m.; but the plaintiff said that his cattle were generally carried by the same train by which he sent his cattle on the 12th of July, and that other persons sent their cattle by the same train, and that the cattle usually arrived at Wolverhampton on the following morning a little after 7; that generally he got his cattle at Wolverhampton at about 7, and sometimes at 8, and sometimes at $\frac{1}{2}$ past 10, or later.

7. He further stated that there was a fall in the [752] market between the 13th and 14th; and that the letter written by his attorney in answer to the defendants' goods manager's letter of the 27th of July, specifying the items composing the 21l. 7s. 6d., was written by his directions,—the letter being as follows:—

"Exchange Chambers, Wolverhampton,

"July 27th, 1864.

"*Willis's Claim.*

"Sir,—On the other side we send particulars, as requested.

"H. & J. E. UNDERHILL.

"A. Bell, Esq., Great Western railway, Wolverhampton.

"7 cows made 1l. 15s. each less than they would have made at Wolverhampton market	£12 5 0
35 sheep made 3s. 6d. each less than they would have done at Wolverhampton market	6 2 6
6 pigs made at least 1l. less than they would have made	1 0 0
Extra expenses of carriage to Birmingham, driving, and man, loss of time at Wolverhampton	2 0 0
	<hr/>
	£21 7 6"

8. The markets were all down after the Wednesday. It was contended by the defendants, that the true interpretation of this letter was that the whole of the damages were originally claimed for loss of market only; but the plaintiff contended that the letter referred to damages from several causes, one of which was loss of market.

9. William Grant, the plaintiff's man, proved going to the station frequently on the early morning of the 13th of July, and that the cattle had not come up to 12 o'clock, when he left without them. He came down to the station about 10 minutes to 1, and they had just arrived; that he saw the train arrive; that he took the cattle out of the trucks, and took them into [753] the market at Wolverhampton at once; that the cattle were much out of condition in consequence of being kept so long in the trucks: that, when he got to the market, it was over, and he took the cattle and turned them out to feed against the next day.

10. In cross-examination he accounted for not feeding or watering the cattle before taking them into the market, by saying that there was no convenience at the station, and that he did not like to take them elsewhere for fear of losing any chance of selling them at the market.

11. The Wolverhampton cattle-market is usually over between 12 and 1 o'clock.

12. George Foxall, a cattle-salesman, proved seeing the cattle in Wolverhampton market, and that they were very dirty and out of condition, but that they would be all right again in the course of a week, by being properly fed and attended to.

13. The defendants upon this case submitted that the plaintiff ought to be nonsuited, having proved no breach of contract, and the company not being bound to send the animals by any particular train, or to carry or deliver them within any certain or definite time, or in time for any particular market: but the learned judge refused to nonsuit the plaintiff.

14. The defendants called two of the defendants' servants, who proved that there were only two trains by which the cattle could have arrived from Minety, by a return coal-train, which usually arrived at Wolverhampton at about 7 a.m., and a goods train which was timed to arrive at Wolverhampton at 10.30, but which was late on the morning of the 13th of July, 1864, and did not come in till a few minutes after 12; and that the cattle were delivered to the plaintiff's man without delay on arrival, and were not more [754] out of condition than cattle usually are after a journey in trucks by rail.

15. The learned judge ruled that the special conditions relating to the non-liability of the defendants for detention or delay in conveying or delivering the cattle, were unreasonable, and left it to the jury to say whether there had been an unreasonable delay in the carriage and delivery of the plaintiff's cattle; and, if so, to find for the plaintiff for the agreed damages, 21l. 7s. 6d., stating, at the request of the defendants, whether the damages were, loss of condition in the animals, or for loss of market.

16. The jury found for the plaintiff, that there had been an unreasonable delay, and assessed the damages for loss of market at 14l., and injury to the condition of the cattle at 7l. 7s. 6d.

17. The questions for the decision of the court were,—first, whether the learned judge was right in admitting the evidence of the conversation with East, set forth in the fifth paragraph, —secondly, whether the learned judge was right in refusing to nonsuit the plaintiff, and whether he ought not to have ruled and directed that there was no evidence for the jury, —thirdly, whether the learned judge was right in his direction to the jury.

T. J. Clark (with whom was Digby), for the appellants (*a*). The evidence of what

(*a*) The points marked for argument on the part of the appellants were as follows:—

"1. That the evidence of the alleged conversation with East was inadmissible:

"2. That the judge was wrong in refusing to nonsuit, and ought to have ruled and directed that there was no evidence to go to the jury in support of the plaintiff's case:

"3. That the conditions in the consignment-note, having been duly signed, constituted a valid special contract, and under the circumstances stated afforded a defence to the action:

"4. That it was not competent for the judge, under the circumstances, to adjudge

was said by East, the [755] night-inspector, clearly was inadmissible: it was no part of his duty to make admissions hostile to the interest of his employers. The learned judge's construction of the consignment-note was also erroneous. It was a special contract which it was perfectly competent to the parties to make.

Macnamara, for the respondent, was called upon to support the ruling of the judge (a). Where a person has the general control and superintendence of a particular department of the great business of a railway company, it would be extremely inconvenient to hold that he is not the agent of the company for the purpose of answering inquiries made by one having an interest in the matter inquired into. Such a person [756] necessarily stands in the position of one to whom the public are referred by the company for information. If so, anything said by him within the scope of his authority would be evidence against the company. In a more especial manner is this so in the case of a corporate body, who can only speak by the mouths of its agents. The case comes directly within the dictum of Tindal, C. J., in *Garth v. Howard*, 8 Bingh. 451, 1 M. & Scott, 628, where the question was whether the declarations of a shopman were evidence against his employer. "If," said that learned judge, the transaction out of which this suit arises had been one in the ordinary trade or business of the defendant as a pawn-broker, in which trade the shopman was agent or servant to the defendant, a declaration of such agent that his master had received the goods, might probably have been evidence against the master, as it might be held within the scope of such agent's authority to give an answer to such an inquiry made by any person interested in the goods deposited with the pawn-broker." There, as here, the statement was made after the transaction. So, in *Clifford v. Burton*, 1 Bingh. 199, 8 J. B. Moore, 16, where a wife served in her husband's shop, and carried on the business of it in his absence, admissions made by her on application for payment for goods before delivered at the shop, were held to be receivable in evidence against her husband. There are many cases where statements made by an agent or servant in the ordinary scope of his authority in the conduct of his master's business are admissible against the master.

ERLE, C. J. I am of opinion that this night-inspector is not to be presumed to have had authority to make admissions relative to transactions gone by, so [757] as to bind his employers. I think neither of the cases cited has any application here. I therefore think there must be a new trial, and that the appellants are entitled to costs.

The rest of the court concurring,
Rule accordingly.

BLIGHT v. GOODLIFFE AND OTHERS. May 11th, 1865.

Interrogatories under the 51st section of the Common Law Procedure Act, 1854, in an action for a false and fraudulent representation on the sale of a business.

This was an action brought by the plaintiff to recover damages for misrepresentation of the value and profits of the business of a ship and insurance-broker sold by the

the conditions to be unjust or unreasonable under the Railway and Canal Traffic Act, 1854, 17 & 18 Vict. c. 31:

"5. That the conditions were just and reasonable; and, at all events, if bad in part, were severable, and afforded a defence to a portion of the claim:

"6. That the judge was wrong in his direction, and that he ought to have directed the jury to find for the defendants, or, at all events, to return a verdict for them in respect of so much of the claim as was answered by the conditions."

(a) The points marked for argument on the part of the respondent were as follows:—

"1. That the conditions in the consignment-note were unreasonable:

"2. That there was evidence to go to the jury of negligence on the part of the company:

"3. That evidence of the statement made by the night-inspector, East, was admissible:

"4. That, notice having been given to the defendants' agent at Minety station that the cattle were intended for the next day's market at Wolverhampton, damages were recoverable for loss of the market."

defendants to the plaintiff, and to recover back the sum of 5000l. paid by him to the defendants as the consideration for such sale.

Sir G. Honyman, on a former day in this term, obtained a rule calling upon the defendants to shew cause why the plaintiff should not be at liberty to deliver to them or to their attorney interrogatories in writing under the 51st section of the Common Law Procedure Act, 1854. The affidavit upon which the application was founded,—by the plaintiff and his attorney,—stated that the plaintiff had a good cause of action against the defendants on the merits; that they believed the plaintiff would derive material benefit in this cause from the discovery which he sought to obtain by the interrogatories proposed to be exhibited for the examination of the defendants; that, previously to the plaintiff's purchasing the said business, and for the purpose of inducing him to do so, F. G. [758] Goodliffe, one of the defendants, produced to him a certain book which he alleged contained accurate entries of the net amount of profits which the defendants, or some of them had made in respect of the said business during a period of about fourteen or fifteen years, and the said F. G. Goodliffe also urged him to purchase the said business, and to do so promptly, on the ground that another party was desirous of having the business, and that the said defendant was authorized by such other party to offer the plaintiff a cheque for 250l., to relinquish the negotiation in his favour; that the plaintiff believed that the entries in the said book so produced to him as aforesaid were untrue, and that the defendants had not been authorized to offer him 250l. in manner aforesaid; and that he was advised and believed that it was material and necessary, for the purpose of establishing his case in this action, that the defendants should be required to answer the said interrogatories.

The matter had already been before a judge at Chambers, who had allowed certain interrogatories, but declined to allow the following,—

“Does the book produced and shewn by you to the plaintiff contain accurate entries of the earnings of your business of ship and insurance-brokers during the period comprised therein?”

“Is it not true that you stated to the plaintiff that you were authorized by a certain person to offer him 250l. to relinquish the negotiation for the purchase of your business in his favour? and was not that statement false?”

“Did any person so authorize you? and, if so, what is the name of the person who so authorized you?”

Murphy now shewed cause. He submitted that the above interrogatories had been properly disallowed.

[759] Sir G. Honyman, in support of his rule, insisted that the interrogatories were such as the statute contemplated should be allowed; that the statement as to the 250l. was not simplex commendatio; and that the plaintiff ought not to be shut out from proving it in any way he could.

Per Curiam. We think the proposed interrogatories ought to be allowed.

Rule absolute.

BARKER AND ANOTHER v. M'ANDREW. May 16th, 1865.

[S. C. 34 L. J. C. P. 191; 12 L. T. 459; 11 Jur. N. S. 637; 13 W. R. 779. Approved *Harrison v. Garthorne*, 1872, 26 L. T. 509; *Hudson v. Hill*, 1874, 43 L. J. C. P. 279. Distinguished, *Cohn v. Davidson*, 1877, 2 Q. B. D. 460; Applied, *Nottebohm v. Richter* 1886, 18 Q. B. D. 66. Followed, *The Carron Park*, 1890, 15 P. D. 206.]

By a charterparty it was agreed that the ship (then at Newcastle), “being tight, staunch, and strong, and every way fitted for *the voyage*,” should with all convenient speed “sail and proceed to the usual loading place, guaranteed for cargo in all this month (October), or so near thereunto as she might safely get, and there load in the customary manner a full and complete cargo of coal,” and, being so loaded, should proceed therewith to Alexandria, and deliver the same on being paid certain freight, —“the act of God, the Queen's enemies, restraints of princes and rulers, fire, and all and every other dangers and accidents of the seas, *rivers*, and navigation of whatever nature and kind soever *during the said voyage* always excepted.”—To an action upon this charterparty, alleging for breach that the vessel was not ready to receive, and did not in fact receive the agreed cargo until long after the time stipulated, the defendant pleaded that, at the time of the making of the charterparty, the vessel,

so being at Newcastle, was at a place there far distant from the usual place there for loading to which she was to sail and proceed, and before reaching such usual place would necessarily be exposed to divers dangers of seas, rivers, and navigation, —all which the plaintiffs and defendant at the time well knew; that the voyage in the charterparty mentioned was a voyage from the place at Newcastle at which the vessel was at the time of making it to the said usual place for loading, and from thence to Alexandria; and that the vessel, during the said voyage, that is to say, during such part of the said voyage as took place before she sailed or proceeded from the said usual place on her way to Alexandria, and after she had received on board part of the said cargo, and before any breach of the charterparty, was hindered and prevented by the dangers of seas, rivers, and navigation then happening, from receiving on board and from being ready to receive on board the residue of the said cargo, &c.:—Held, that the plea was a good answer to the action,—the exception in the charterparty applying as well to the preliminary transit of the vessel to the place of loading as to the subsequent part of the voyage.—Held also, that the expression in the charterparty, “*guaranteed for cargo in all this month*,”—which was admitted to mean “ready to receive cargo within the month,”—did not take the case out of the exception.

This was an action against a ship-owner for not having the vessel ready to load pursuant to the guarantie contained in a charterparty.

[760] The first count of the declaration stated that, by a charterparty, dated the 3rd of October, 1863, it was mutually agreed between the plaintiffs and the defendant, that the defendant's steamer called the “Smyrna,” then at Newcastle, should with all convenient speed sail and proceed to the usual place of loading there, or so near thereunto as she might safely get (the defendant guaranteeing the said steamer for cargo in all the said month of October), and there load from the factor of the plaintiffs, in the customary manner, a full and complete cargo of about 1500 tons of coal; and that, being so loaded, the said steamer should therewith proceed to Alexandria, Egypt, and there deliver the same on payment of freight,—the act of God, the Queen's enemies, restraints of princes and rulers, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of whatever nature and kind soever during the said voyage always excepted: Averment, that the plaintiffs did all things on their part to be done, and all things happened, to entitle them to have the said charterparty performed by the defendant on his part: Breach, that the said steamer did not with all convenient speed sail and proceed to such usual place of loading at Newcastle as before mentioned, nor was the said steamer ready to receive and load on board the said agreed cargo during any time in the said month of October: and the plaintiffs in fact said that the said steamer was not ready to receive and load on board, and did not in fact receive and load on board, the said agreed cargo, until long after the said month of October, and after a long and unreasonable delay.

The second count stated that it was mutually agreed between the plaintiffs and the defendant that the defendant's steamer called the “Smyrna,” then at Newcastle, should with all convenient speed sail and proceed [761] to the usual place of loading there, or so near thereto as she might safely get, being ready there for cargo in the month of October or the early part of the month of November, 1863, and there load from the factor of the plaintiffs, in the customary manner, a full and complete cargo of about 1500 tons of coal; and that, being so loaded, the said steamer should therewith proceed to Alexandria, Egypt, and there deliver the same on payment of freight, the act of God, the Queen's enemies, restraints of princes and rulers, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of whatever nature and kind soever during the said voyage always excepted: Averment, that the plaintiffs did all things on their part to be done, and all things happened, to entitle them to have the said agreement performed by the defendant on his part: Breach, that the said steamer did not with all convenient speed sail and proceed to such usual place of loading at Newcastle as before mentioned, nor was the said steamer ready to receive and load on board the said agreed cargo during any time in the said month of October or in the early part of the said month of November: and the plaintiffs in fact said that the said steamer was not ready to receive and load on board, and did not in fact receive and load on board, the said agreed cargo until long after the early part of the said month of November, and after a long and unreasonable delay: and, by reason of the premises

in the first and second counts respectively mentioned, the plaintiffs were prevented from receiving the said cargo at Alexandria aforesaid, and from selling and disposing of the same there, until long after the time when the same might and would according to the said charterparty and agreement respectively have been delivered there, and lost the opportunity of selling and disposing of the said cargo at a profit, and were compelled to sell [762] and dispose of the same at a loss, and were otherwise delayed and put to great additional expense upon and about the said cargo: Claim, 3000l.

The defendants pleaded,—fourthly, that the charterparty in the first count mentioned was and is as follows:—"London, 3rd October, 1863. It is this day mutually agreed between Messrs. R. M'Andrew & Co., of the good ship or vessel called the new steamer 'Smyrna,' of the burthen of _____ tons or thereabouts, now at Newcastle, and Messrs. J. Barker & Co., of London, merchants, that the said ship, being tight, staunch, and strong, and every way fitted for the voyage, shall with all *convenient speed* sail and proceed to the usual loading place, *guaranteed* * for cargo in all this month, or so near thereunto as she may safely get, and there load from the factor of the said freighters, in the customary manner, a full and complete cargo of about 1500 tons of coal, which the said merchants bind themselves to ship, not exceeding what she can reasonably stow and carry over and above her tackle, apparel, provisions, and furniture: and, being so loaded, shall therewith proceed to Alexandria, Egypt, or so near thereto as she may safely get (cargo to and from alongside and at merchants' risk and expense) and deliver the same on being paid freight as follows, 30l. per keel of 2 tons and one fifth, with fifteen guineas gratuity, in full of all port-charges and pilotage (the act of God, the Queen's enemies, restraints of princes and rulers, fire, and all and every other dangers and accidents of the seas, rivers, and navigation of whatever nature and kind soever during the said voyage always excepted); the vessel to be addressed to the charterers' agents, paying the one usual consignment commission of 2 per cent., and to have a lien on cargo for all freight, dead-freight, and demurrage. Captain to sign bills of lading at any rate of freight, [763] without prejudice to this charter. Freight to be paid on unloading and right delivery of the cargo, in cash at current exchange: 125 tons to be allowed the said merchant per weather working day (if the ship is not sooner dispatched) for unloading, and all days on demurrage over and above the said laying days at 30l. per day. Penalty for non-performance of this agreement, estimated amount of freight. The brokerage at 5 per cent. by the ship on account of freight, primage, and demurrage, is due, on consignment of this agreement, to William Nance." Averment, that the agreement in the second count mentioned was the same charterparty, with an extension of time mutually agreed on by the plaintiffs and the defendant for being ready for cargo until the early part of November, 1863: that, at the time of the making the said charterparty and agreement in the first and second counts respectively mentioned, the said steamer, so being at Newcastle as in those counts mentioned, was at a place there far distant from the usual place there for loading, to which the said steamer was to sail and proceed, and the said steamer, before reaching such usual place, would necessarily be exposed to divers dangers of seas, rivers, and navigation, all which the plaintiffs and defendant at the said time well knew: and the said voyage in the said charterparty mentioned and referred to was a voyage from the place at Newcastle at which the said steamer was at the time of making the said charterparty and agreement to the said usual place at Newcastle for loading, and from thence to Alexandria: and that the said steamer, during the said voyage, that is to say, during such part of the said voyage as took place before the said steamer sailed or proceeded from the usual place on her way to Alexandria, and after she had received on board part of the said cargo, and before any breach of [764] the said charterparty or agreement, was hindered and prevented by the dangers of seas, rivers, and navigation then happening, from receiving and loading on board, and from being ready to receive and load on board, the residue of the said cargo, and was thereby greatly and necessarily delayed therein, which were the supposed breaches of contract in the first and second counts respectively complained of.

The plaintiffs demurred to the fourth plea, the ground of demurrer stated in the margin being, "that, according to the true construction of the charterparty, the voyage had not been commenced at the time when the steamer was hindered and prevented as in that plea mentioned, and consequently that the exception did not apply." Joinder.

* I.e. so as to be ready.

H. Lloyd (with whom was Biron), in support of the demurrer (a). This was an absolute guarantie that the vessel should be ready to load at all events in October, or the beginning of November: the exception did not [765] attach until the voyage had commenced. *Crow v. Falk*, 8 Q. B. 467, is expressly in point. There, the plaintiff and defendants agreed by charterparty that a ship, then at Liverpool, of which the plaintiff was master, should with all convenient speed be made ready, and should at Liverpool receive and load from the charterers' agents a full cargo, and, being so loaded, should proceed to Stettin and deliver the same, and so end the voyage,—restraints of princes, &c. “during the said voyage” always mutually excepted; and the ship was to be loaded at Liverpool without detention; and the defendants thereby agreed to load the vessel at Liverpool as in the charterparty stated, with the said cargo at Liverpool. On general demurrer to an action assigning for breach of the above agreement that the defendants did not load the ship at Liverpool without detention, but detained her at Liverpool an unreasonable time (not negating restraints of princes, &c.,—it was held that the exception as to restraints of princes, &c. was applicable only after the ship quitted Liverpool. It was suggested in argument there that “a policy would not attach till the anchor was weighed, unless it contained the word ‘at’ as well as ‘from.’” And, in giving judgment, Lord Denman says, —“The voyage could not begin before the ship's loading was completed: the exception is confined to the time during the voyage.” That has been followed by two cases, viz. *Bruce v. Nicolopulo*, 11 Exch. 129, which questioned it, and *Valente v. Gibbs*, 6 C. B. (N. S.) 270, which approved of it. In *Valente v. Gibbs*, by a charterparty it was agreed that the ship, then lying at Genoa, should sail, “on or before the 30th of July, 1856,” to Monte Video and Lima (with goods for third parties), and thence proceed with all convenient dispatch to Callao, where the master was to report his arrival to the agents of [766] the charterers, by whom he was to be sent to the Chincha Islands for a cargo of guano for a port in the United Kingdom. Thirty days were to be allowed to the charterers for loading the ship, and to the owners for taking in certain specified light freight, and thirty days over and above the lay days, at 7l. per day; and then came the following provision, —“Should the vessel be unnecessarily delayed at any other period of the voyage, such detention to be paid for by the party delinquent to the party observant, at the above-named rate of demurrage or compensation.” *The vessel did not leave Genoa until the 8th of September*: and it was held that this was not a detention “during the voyage” within the meaning of the penalty clause. Cockburn, C. J., there says: “The word ‘voyage’ has a well-recognized meaning, and has on various occasions received a legal interpretation. Still, no doubt, it is susceptible of a certain degree of flexibility; and, if the context clearly shewed that it was intended by the parties to have a larger meaning than that which in common parlance belongs to it, we must so construe it. But, unless we can see beyond all doubt that the word is not used in its ordinary sense, we must give it its generally received signification. I see nothing in this case to justify us in holding that it means more than the transit from the terminus à quo to the terminus ad quem. The case of *Crow v. Falk*, 8 Q. B. 467, is an authority in point: and, although it seems to have been reflected on by the court of Exchequer in *Bruce v. Nicolopulo*, 11 Exch. 129, it was not necessary on that occasion to overrule it, and I for one am not disposed to dissent from it.” Crowder, J., said: “I incline to think that the voyage here agreed on is the voyage which commenced at Callao, as was contended by Mr. Wilde. The charterers had no interest in the inter-

(a) The points marked for argument on the part of the plaintiffs were as follows:—

“1. That the guarantie as to the vessel taking or being ready for cargo is absolute and unconditional, and is not controlled by the subsequent exception:

“2. That the exception relates and applies only to the carriage and delivery of the cargo, and not to the loading it on board, or at any rate not to the being ready to receive and load it:

“3. That the exception applies and takes effect only *during the voyage*; and that, at the time when the steamer was hindered or prevented as in the fourth plea mentioned, the voyage contemplated by the parties had not according to the true construction and effect of the charterparty commenced: see *Crow v. Falk*, 8 Q. B. 467, and *Valente v. Gibbs*, 6 C. B. (N. S.) 270:

“4. That, for the above reasons, the fourth plea is no answer to the declaration, and is bad in substance.”

mediate voyages. It is, however, unnecessary to [767] decide that ; for, I think it is quite clear upon the language of the charterparty that the voyage did not in any sense commence before the ship left the port of Genoa ; and that is sufficient to entitle the plaintiff to judgment." And Willes, J., said : " The charterparty contains a stipulation that the vessel shall sail from Genoa on or before the 30th of July, 1856. When she sails, the voyage commences. Before her departure, no voyage exists to which the penalty could attach. In *Bruce v. Nicolopulo*,—upon which the defendant will rely,—the plaintiff and defendant agreed by charterparty that the plaintiff's ship should, after discharging her outward cargo, proceed to Galatz or Ibraila, as ordered at Constantinople by the charterer's agents, and there receive a full cargo of wheat ; and, being so loaded, should therewith proceed to Cork for orders to discharge at a safe port in the United Kingdom, and deliver the same agreeably to bills of lading, and so end the voyage (restraints of princes and rulers, the dangers of the seas, &c., during the said voyage, always mutually excepted). The vessel, after discharging her outward cargo, proceeded to Constantinople ; and, in consequence of orders there given by the defendant's agent, the master took the vessel to Ibraila. Before her arrival there, a proclamation had been promulgated by the Russians, who had invaded Wallachia, prohibiting the exportation of wheat. And it was held that the exception of the restraints of princes, &c. applied whilst the vessel was at Ibraila. The Lord Chief Baron thus summarily disposes of *Crow v. Falk*,—"I have read the case of *Crow v. Falk* and cannot subscribe to it." And Martin, B., says : "Assuming the case of *Crow v. Falk* to be good law, this case is clearly distinguishable, because here the ship was to go to Constantinople, and from thence to Galatz or Ibraila, as ordered by the charterer's agents at Con[768]stantinople. Therefore, by the contract, the ship was to be in one sense on her voyage from the time of leaving Constantinople." The question is whether the present case is to be governed by *Crow v. Falk* and *Valente v. Gibbs*, or by *Bruce v. Nicolopulo*. The plea does not deny that the vessel was not ready within the time stipulated. It is admitted that she was not ready : some coals were put on board, but only for the purpose of stiffening her, in order that she might safely proceed to the spout. The "voyage" to which the exception applies is that which commences on the vessel breaking ground with her intended cargo on board,—like a voyage insured "from" a given port to a given port. The object of the charterparty was, the conveyance of a cargo of coals from Newcastle to Alexandria. [Willes, J. The charterparty obviously contemplates that there are dangers to be encountered in getting to the spout : it excepts a certain class of dangers.] At all events, the charterparty contains an absolute guarantee that the vessel shall be at the loading-place ready to receive cargo during all the month of October, which clearly takes it out of the exception. The obligations which the ship-owner contracts are four,—1. That the ship shall proceed with all convenient speed to the usual loading place, and be there ready to receive her cargo in the month of October,—2. That she shall take on board a full cargo of coal,—3. That, being fully laden, she shall proceed with her cargo on the voyage contemplated,—4. That, on her arrival at Alexandria, her port of destination, she will deliver the coals, on payment of the stipulated freight. Then comes the exception,—"The act of God, the Queen's enemies, restraints of princes and rulers, fire, and all and every other dangers and accidents of the seas, rivers, and navigation of whatever nature or kind soever during the said voyage always excepted." [769] [Byles, J. The coal taken on board before the vessel got to the spout was part of the cargo she was to carry to Alexandria?] It must be so assumed. [Montague Smith, J. The words "with all convenient speed," which are material, form part of the guarantee. Willes, J. It is consistent with the plea, that the damage was sustained after the vessel arrived at the spout. The breach can only be read as stating what is necessary : special matter must be replied : *Butt v. The Great Western Railway Company*, 11 C. B. 140.] That which is complained of here is the breach of the first of the obligations above mentioned. The exception could not apply to any time anterior to the ship's starting loaded. The words "during the voyage" are wholly inapplicable to this portion of the risk.

Rew, contra (a). Two questions arise here, —first, whether the words of the excep-

(a) The points marked for argument on the part of the defendant were as follows :—

"1. That the plea brings the alleged breach of contract within the exception of

tion "during the said voyage" exclude the peril on which the fourth plea is founded, —secondly, whether the guarantie that the vessel shall be ready at the spout during the whole of [770] October (or the extended period), altogether takes the case out of the operation of the exception. *Crow v. Falk*, 8 Q. B. 467, is relied on to shew that "voyage" means the period commencing after the sailing of the vessel on the adventure contemplated. Neither that case nor *Valente v. Gibbs*, 6 C. B. (N. S.) 270, was intended to convey any such notion. In the former case, the voyage could not in any sense be held to commence before the sailing of the ship from Liverpool; and, in the latter, the detention at Genoa was a detention long before the charterparty attached. *Bruce v. Nicolopulo*, 11 Exch. 129, is precisely in point, and cannot be distinguished from this case. As a general rule, the voyage is the journey which the contract requires the ship to take for the benefit of the charterers. Much stress is laid on the word "guaranteed." It may import a condition, but it does not exclude the application of the exception. [Willes, J. Who puts the vessel on the "turn-book" under the Tyne Acts (a)?] Either party may do it.

H. Lloyd, in reply. Looking at the analogy of cases on policies of insurance, the "voyage" commences only from the time the vessel breaks ground.

WILLES, J. I am of opinion that our judgment should be for the defendant. The action is founded upon a charterparty by which it was agreed that the ship "Smyrna," then at Newcastle, should with all convenient speed proceed to a loading place so as to be ready to receive a cargo of coals in the month of October,—altered by a subsequent agreement to the beginning of November,—and proceed therewith to Alexandria. The charterparty contained the usual exceptions of the act of God, the Queen's enemies, [771] restraints of princes and rulers, fire, and all and every other dangers and accidents of the seas, rivers, and navigation during the said voyage. From the facts disclosed upon the record, it should seem that the vessel broke ground for the purpose of proceeding to a usual place of loading. I assume that it is not clear from the pleadings whether she arrived there or not: but it is clear that the vessel did break ground, and took some cargo on board, and did proceed towards the place of loading, and, if she did not arrive there so as to take on board the remainder of her cargo, she was prevented from so doing by a danger or accident of the seas, rivers, and navigation. The question arises whether it can be said that the voyage contemplated in the exception included the preliminary transit from the place in which the vessel was at the time the charterparty was made, to the loading place. And then arises a second question, viz. whether, assuming that was part of the voyage, the use of the word "guaranteed" in the clause which stipulates that "the vessel shall with all convenient speed proceed to the usual loading place, guaranteed for cargo in all this month," shews that the parties intended that the exception should not apply to this particular case. The first is a general question; the last is merely a question upon the construction of this charterparty. The first is, in effect, whether where a charterparty stipulates that the vessel shall proceed to a particular port for the purpose of receiving a cargo, and proceed thence to her port of destination, the exception of perils of the seas, &c. applies only to the voyage of the vessel with the cargo on board, or to the preliminary transit also. In order to determine that satisfactorily, we must see what is the meaning of the exception, "the act of God, &c., and all and every other dangers and accidents of the seas, rivers, and navigation during [772] the said voyage." But for that stipulation, the shipowner would be

the dangers of the seas, &c. contained in the charterparty, and so contains a complete defence:

"2. That such exception extends to everything to be done on the part of the shipowner during the voyage:

"3. That the terms of the charterparty are, under the circumstances stated in the plea, quite consistent with the voyage commencing at the place where the vessel was before sailing to take in her cargo; and, as the plea expressly alleges the voyage to have commenced there, the excepted dangers are shewn to have occurred during the voyage:

"4. That the allegations in the plea bring the question as to the commencement of the voyage within the authority of *Bruce v. Nicolopulo*, 11 Exch. 129, rather than that of *Crow v. Falk*, 8 Q. B. 467."

(a) See 8 & 9 Viet. c. lxxii.

liable for the consequences of all dangers and accidents except those arising by the act of God. I presume it was for that reason the exception was introduced. It was intended to embrace every case of accident happening without any default on the part of the master and crew. That being so, it is clear that the reason for the exception applies as well to the preliminary voyage as to the voyage with the cargo on board. When one considers, therefore, the origin and the object of the exception, there can be no reason why it should be held to apply to one part of the transit rather than to the other. In truth, it comes to this, was the preliminary transit a part of "the voyage?" I apprehend the voyage is nothing more than the passage of the vessel on the transit. The commencement of the voyage is the commencing to do that for which the ship-owner is to be paid freight. Mr. Lloyd says the contrary has been already decided in two cases, viz. *Crow v. Falk*, 8 Q. B. 467, and *Valente v. Gibbs*, 6 C. B. (N. S.) 270. I apprehend, however, that, when the cases come to be looked at, it will be found that there is no decision upon the point except the case of *Bruce v. Nicolopulo*, 11 Exch. 129, which is an authority against the present plaintiff. In *Crow v. Falk*, there was no preliminary transit. The vessel was at Liverpool: and it was for that reason the court held that the exception did not apply while the vessel was at the port. As to *Valente v. Gibbs*, that was a very peculiar case. It was a claim for a penalty for a delay on the voyage. All that the court decided was that delay at the port at which the vessel then was, was not a delay "on the voyage" within the meaning of the contract,—going no further than *Crow v. Falk* went. It is true that the Lord Chief Justice and Crowder, J., expressed an inclination to hold that [773] the voyage did not begin until the arrival of the vessel at the place where her cargo was to be taken on board: not, however, on the ground that the taking in of cargo was necessary to constitute a voyage, but on the peculiar language of the contract then under consideration. It was not at all a decision that there can be no voyage before the cargo is put on board. Then there is distinct authority in favour of the plea, in the case of *Bruce v. Nicolopulo*. It was there held that the preliminary voyage to the port of loading was to be considered part of the voyage within the contract. That is a decision which is precisely in point, and, as it seems to me, in accordance with the good sense of the matter. It appears to me, therefore, that the owner has made a stipulation that he is not to be responsible for delay caused by a peril of the seas, rivers, or navigation whilst the vessel is proceeding to the place of loading, subject to the construction to be put upon the word "guaranteed." I am not aware that that word has any technical meaning, except in the case of a guarantee for the debt or default of another. As used in this charterparty, it means no more than a contract or engagement on the part of the owner that the vessel shall be ready at the loading place to receive her cargo within the stipulated time, unless prevented by an accident happening from a peril of the sea without any default on his part: and that, if the vessel is not so ready, the other party may treat it as a warranty, and throw up the charterparty. I entirely adopt the argument of Mr. Rew, that "guaranteed" is to be taken with the exception,—that it means guaranteed, subject to the defendant not being prevented by the excepted perils. I am therefore of opinion that the plea is good and an answer to the action.

BYLES, J. I am of the same opinion. The question [774] is, what was meant by the words "the act of God, the Queen's enemies, restraints of princes and rulers, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of whatever nature and kind soever during the said voyage always excepted." Voyage means "passage by water from one port or place to another port or place" (a). That definition assists us but little in arriving at the true construction of this instrument. The plea informs us that, at the time of the making of the charterparty, the said steamer, so being at Newcastle, was at a place there far distant from the usual place there for loading to which she was to sail and proceed: and it adds,—“and the said steamer, before reaching such usual place, would necessarily be exposed to divers dangers of seas, rivers, and navigation, all of which the plaintiffs and defendant at the time well knew.” They must, therefore, be taken to have contemplated those facts at the time of making the charterparty. The ship-owner engages that the ship shall with all convenient speed sail and proceed to a usual loading place. She was

(a) See Webster's Dictionary and Johnson's Dictionary. See also the case of *Gether v. Capper*, 15 C. B. 696.

bound to proceed to that destination, to face that danger. Further, the charterparty provides that the ship, being tight, staunch, and strong, and every way fitted for the voyage, shall sail and proceed, &c. She is to be tight, staunch, and strong when she begins the former part of the transit. Looking at the place where the word "voyage" is first mentioned, it must necessarily include the previous portion of the transit, from the place where the vessel was at the time to the loading place. "Sail" is certainly a very strong expression. In insurance cases it is almost a technical word: it means "start on the voyage." Willes, J., in *Valente v. Gibbs*, says,—“When the ves-[775]-sel sails, the voyage commences.” I have no hesitation in saying that I think the plea good. I quite concur with my Brother Willes that a guarantie, like any other contract, may be either absolute or conditional.

MONTAGUE SMITH, J. I am of the same opinion. It seems to me that, under this charterparty, the voyage of the “Smyrna” commenced when she sailed from the place where she was at the time the charterparty was entered into. She was bound to make that voyage with all convenient speed. The place whence she started was the terminus à quo for the performance of the voyage mentioned in the charterparty. Then, does the exception apply to that voyage? The vessel is at a distance from the loading place, and she is to encounter perils and dangers of the seas, &c., in proceeding thither. Why should not the exception attach to the commencement as well as to the rest of the voyage? I think the fair meaning and intention of the parties was that it should apply to the whole. As far as authority goes, the decisions seem to me to be in favour of the view we are now taking. In *Crow v. Falk*, 8 Q. B. 467, this question did not arise. Lord Denman there says: “The words of the charterparty and declaration are perfectly clear. The end of the voyage is expressly marked out: the beginning is not: but the voyage could not begin before the ship’s loading was completed. The exception is confined to the time during the voyage; and the breach takes place before it begins.” In that particular case, the vessel never could sail until the goods were put on board. I do not think any argument is to be derived from the way in which policies of insurance are framed. They necessarily vary with the circumstances of each particular case. Construing this charterparty with the surrounding circumstances, I can come to no other [776] conclusion than that the exception was intended to apply. I also agree with my Brother Willes as to the guarantie. I think the exception applies to that as well as to the rest of the charterparty. It was to cover perils which neither party could foresee

Judgment for the defendant.

RAWLINGS v. MORGAN. May 2nd, 1865.

[S. C. 34 L. J. C. P. 185; 12 L. T. 348; 11 Jur. N. S. 564; 13 W. R. 746. Referred to, *Lidgett v. Secretan*, 1871, L. R. 6 C. P. 626; *Morgan v. Hardy*, 1886-88, 17 Q. B. D. 780; 18 Q. B. D. 646; 13 App. Cas. 351; *Joyner v. Weeks*, [1891] 2 Q. B. 34.]

The defendant held premises under a lease, with a covenant to keep and yield them up in repair. At the expiration of the lease, at Christmas, 1863, the premises were dilapidated to an amount fixed by the jury at 22l. The plaintiff (the reversioner) had before this time made a verbal agreement with a third person to grant him a lease for a long term, and he at once proceeded to pull down the premises:—Held, that the plaintiff was notwithstanding entitled to recover substantial damages.

This was an action brought to recover damages for breach of covenants in a lease, to repair and to yield up in repair a messuage and premises No. 24 Savage Gardens, in the city of London, together with certain fixtures therein.

At the trial before Willes, J., at the sittings in London after last Michaelmas Term, the following facts were agreed to by the respective counsel:—

The lease was for twenty-one years from the 25th of December, 1842, and expired on the 25th of December, 1863: the rent payable thereunder was 179l. per annum. At the making of this lease, the premises were about a century old.

The plaintiff is interested in one fifth of the reversion; and the defendant became

assignee of the term in 1847, and continued in possession of the premises up to the end of the term. The defendant gave up possession at the end of the lease.

For a considerable period before and at the expiration of the lease the premises were out of repair. The [777] amount required to put them into repair conformably with the covenant, was estimated at and was to be taken to be 130l.

By letter dated the 1st of June, 1863, addressed to their solicitor, the defendant made an offer to the reversioners for a new lease. This letter was as follows:—

“15 London Street, Fenchurch Street,
“June 1st, 1863.

“24 Savage Gardens.

“Dear Sir,—We are instructed by our clients, Messrs. Morgan, Brothers, the tenants of the above premises, to make the following proposal to you, viz. They will be willing, on the expiration of their present tenancy, on the 25th of December next, to repair the premises pursuant to the covenant in the present lease, and to take a fresh lease of the premises as they now enjoy them, for twenty-one years from the 25th of December next, at a rental of 250l. per annum. The fresh lease to contain the same covenants as the existing one. But, if this proposal is entertained, it must be carried out at once, or our clients must be driven to seek other premises, in consequence of the nature of their business.
“WRIGHT & BONNER.”

This offer was not accepted.

Before the expiration of the lease, Messrs. Myers, the builders, of Lambeth, became the owners of one fifth of the said reversion. Some time before the expiration of the lease, it was agreed between Messrs. Myers and the reversioners (the plaintiff being one of them) that the premises should be pulled down, and a new lease of the ground granted to Messrs. Myers, at a rent of 300l. a year from the 25th of December, 1863, and that they should lay out about 4000l. in the erection of new buildings upon it.

[778] Upon this the Messrs. Myers entered into possession on the 26th of December, 1863, and in January, 1864, commenced pulling down the old premises; and they were wholly demolished by the following June.

The said agreement between Messrs. Myers and the reversioners was reduced into writing on the 21st of March, 1864, and a lease has since been prepared in compliance with it. The agreement was put in.

The condition in which the premises would be at the expiration of the lease formed no ingredient one way or the other in the Messrs. Myers's calculation, in making their aforesaid bargain.

It was admitted by the plaintiff that the amount paid into court was sufficient to cover the plaintiff's share of the value of the fixtures mentioned in the declaration and nominal damages for the breach of the covenants to repair and yield up in repair: and it was admitted that, if the plaintiff was entitled to more than nominal damages in respect of the covenant to repair, he was entitled to a verdict for 22l.: if not, the verdict was to be entered for the defendant.

Huddleston, Q. C., in Hilary Term last, obtained a rule nisi accordingly.

O'Malley, Q. C., and Holl, now shewed cause. It is not found on the notes that the plaintiff was not influenced in the bargain he made with Messrs. Myers & Son by the dilapidated state of the premises. Whatever might have been the equities of the Messrs. Myers, the plaintiff had the legal title to the premises at the time the cause of action accrued, and they were by reason of their dilapidated condition of less value to him than they would have been if the defendant had performed his contract, by the sum of 22l. If the plaintiff had on the 25th of December, 1863, a vested [779] right of action for substantial damages, no subsequent act of his in relation to the premises could entitle the defendant to say the damage should be nominal only. [Byles, J. Here, the contingency was reduced to a certainty before action brought.] Would it be any answer to a landlord's claim for non-repair, that the next tenant agreed to pay the same rent notwithstanding the dilapidations? There is no authority directly in point: but the principle seems clear enough. In *Clow v. Brogden*, 2 M. & G. 39, 2 Scott, N. R. 302, under circumstances very like these, the plaintiff was held entitled to substantial damages. Tindal, C. J., says: “I see no reason why the

plaintiffs should not recover in this action the sum of 29l., the amount agreed upon as the damages for the dilapidations caused by the breach of the covenant to repair entered into by the defendants. The answer set up is that the plaintiffs have sustained no actual damage, because (partly, at least, by the default of the defendants,) the term in the premises has been determined. I think that it does not lie in the mouths of the defendants to make such an objection." In *Smith v. Peat*, 9 Exch. 161, in an action by a lessee against an assignee for damage sustained by the former in consequence of the neglect of the latter, while he continued assignee, to repair the premises, pursuant to a covenant in the lease, it appeared that, in June, 1843, the plaintiff assigned the lease to the defendant; in October, 1851, the defendant assigned the lease to T.; and in June, 1852, T. assigned the lease to H., who in August, 1852, surrendered it to the ground-landlord: it was proved that, in July 1852, the premises were dilapidated, but there was no evidence of their state at any prior time: and it was held that the plaintiff was entitled to recover from the defendant substantial, and not merely nominal damages. "Where," says [780] Parke, B., "there is a covenant to repair, the lessor has a right to have the premises in good repair; and, according to Lord Holt, *Virian v. Champion*, 2 Lord Raym. 1125, 1 Salk. 141,—the measure of damage is the sum of money required to be expended in putting the premises in repair. That doctrine, however, has not been adopted in modern cases. In *Doc d. The Trustees of the Schools, &c., of Worcester v. Rowlands*, 9 C. & P. 734, my Brother Coleridge ruled that the true measure of damage is the amount to which the reversion is injured by the premises being out of repair." In *Nixon v. Denham*, 1 Irish Law Rep. 100, in covenant for suffering premises to be out of repair during the continuance of the term, it was held to be no objection to a verdict giving full damages for the injury which the property suffered, that the defendant was lessee in a lease for lives containing a covenant for perpetual renewal on the part of the lessor. The real question is, what is the amount of injury which the defendant's breach of covenant has inflicted upon the reversioner. What other measure can there be than the value of the dilapidations? [Byles, J. It may be that competitors were kept out of the market by the condition of the premises.] Just so. In *Davies v. Underwood*, 2 Hurlst. & N. 570, the defendant, an underlessee, who had covenanted with the plaintiff, his lessor, to keep, and at the expiration or other sooner determination of the term to leave and deliver up the premises in repair, allowed them to become out of repair. While they remained in this condition, the plaintiff having committed a forfeiture by non-payment of rent, the superior landlord brought ejectment, and evicted the plaintiff and defendant: and it was held that the plaintiff was entitled to recover against the defendant substantial damages for the non-repair of the premises.

[781] Huddleston, Q. C., and Beasley, in support of the rule. The defendant's term being about to expire, he writes to the plaintiff, offering to put the premises in repair, and take a renewed lease, at an increased rent. The plaintiff, having already made a bargain with Messrs. Myers & Son upon more advantageous terms, rejects the offer: and now, when the prostration of the premises has rendered the defendant's breach of contract unimportant to him, he sues for dilapidations. At the time the action was brought, the plaintiff was in no respect a sufferer from the breach of the defendant's covenant to repair. The object of damages in all these cases is to enforce the performance of the covenant. This is the view taken by Watson, B., in *Davies v. Underwood*, 2 Hurlst. & N. 570. "The great object," he says, "of a covenant of this sort is not to put money into the pockets of a lessor, but to enforce the performance of the acts stipulated for." Where, as here, the lessor contemplates the destruction of the premises, he can have sustained no substantial injury from their non-repair. In *Marriott v. Cotton*, 2 Carr. & K. 553, it was held that, where a tenant for years agrees to keep the premises in repair during the tenancy, and, before the expiration of the term, an action is brought against him for breach of this agreement, the plaintiff is entitled to recover nominal damages only (a). The verdict therefore should be entered for the defendant, the damages really sustained having been sufficiently compensated by the 1s. paid into court.

ERLE, C. J. I am of opinion that this rule should be discharged. The action is brought by the plaintiff [782] as lessor, against the defendant, who had been tenant

(a) The propriety of this decision is questioned, and, it seems, justly, in *Macnamara v. Vincent*, 2 Irish Ch. 481, and *Bell v. Hayden*, 9 Irish Com. L. R. 301.

of premises under a lease, for the breach of a covenant to keep and to leave the demised premises in repair. It appeared that at the expiration of the lease the premises were out of repair, and that the sum which would be required to put them in repair in conformity with the covenant would be about 110*l*. The plaintiff was interested in one fifth of the reversion. Ordinarily speaking, where there has been a breach of contract, the covenantee is entitled to recover such an amount of damages as would place him as nearly as possible in the same position as he would have been in if the covenant had been performed. That in this case is agreed to be 22*l*. Why, then, should not the defendant pay that sum? He says he offered to take the premises of the plaintiff for a renewed term, but that the plaintiff declined to accept his offer. This the plaintiff had a perfect right to do. Then he says there was a very advantageous proposal on the part of Messrs. Myers under which the premises were to be pulled down, and therefore no damage could have resulted to the plaintiff from their dilapidated state. But, in the first place, it is to be observed that that merely lay in proposal: it was a mere oral agreement. And, if it had been a complete and absolute binding contract, that was not a matter that I should have directed the jury to take into their consideration in estimating the damages. I should not have excluded it; but it certainly is not a matter which it was obligatory on them to look at when measuring the loss the plaintiff had sustained by reason of the defendant's breach of covenant. That being so, the only question is whether the learned judge was bound in point of law to direct the jury to find for the plaintiff with nominal damages only. My answer is that he clearly was not. And it is agreed that, if the plaintiff is entitled to more than nominal [783] damages, he is entitled to the sum above mentioned. If before the cause of action accrued, and during the term, the plaintiff had entered into a binding agreement to assign the reversion to Messrs. Myers, that would have been more material: and I do not say what I should have laid down for the guidance of the jury in that case. But that is not the case now before us.

BYLES, J. I am of the same opinion. As I read the statement of facts, I conclude that the agreement made before the expiration of the defendant's term was not reduced into writing until after its expiration. That being so, and nothing having been done under the parol agreement at the time the cause of action accrued, and no obligation legal or equitable attaching to either of the parties to it, it seems to me that the plaintiff was entitled to sue the defendant for the full amount of the damage arising from the breach of his covenant to repair. It is true the plaintiff has since parted with the reversion: but he still may have sustained damage from the non-repair of the premises. It may be that they sold for a less sum in consequence of their dilapidated condition, or the plaintiff had a narrower market. If the plaintiff once had a vested right to recover substantial damages, I do not see how we can deprive him of that right. In all cases of this sort, the correct direction to the jury, as it seems to me, is not that they ought to give only nominal damages, but that they are not *bound* to give more than nominal damages. Being unable to say that the jury might not give substantial damages, I think it is impossible for us to interfere.

KEATING, J. I am of the same opinion. The defendant's term expired at Christmas, 1863. The agreement with Messrs. Myers was not put into a shape in which it was capable of being enforced until the [784] month of March following. If an action had been brought against the defendant for a breach of covenant between those two periods, could it have been said that the plaintiff was not entitled to recover substantial damages? If not, what happened subsequently clearly could not deprive the plaintiff of that right. If even a binding agreement had been entered into with Messrs. Myers before the expiration of the term, I share in the doubt expressed by my Lord whether that would have made any difference. It is not necessary to decide that upon the present occasion.

MONTAGUE SMITH, Q. C. I am of the same opinion. The premises being out of repair at the termination of the lease, the plaintiff had an undoubted right to maintain an action. The ordinary damages would be the amount which would be necessary to put them in a proper state of repair. The right to damages having accrued on the determination of the term, the lessor's intention to pull down the premises would not in the least affect his right to sue for full damages. But it is said that the agreement entered into with Messrs. Myers before the defendant's term came to an end shews that the plaintiff sustained no more than nominal damages by the defendant's breach

of covenant. But it seems that there was no binding agreement at all with Messrs. Myers until three months after the expiration of the lease. The foundation, therefore, of that objection fails. If there *had* been a binding agreement, I doubt whether that would at all have interfered with the plaintiff's right. I cannot see how that should operate in law or good sense as an estoppel. It was a question for the jury: and I cannot see anything which ought to prevent the plaintiff from recovering such damages as would ordinarily be recoverable.

Rule discharged.

[785] SCRIVENER AND ANOTHER v. PASK. April 20th, 1865.

[Affirmed in Exchequer Chamber, L. R. 1 C. P. 715.]

The mere employment of an architect to prepare plans and a specification for a house, and to procure a builder to erect it, does not render the employer responsible for the accuracy of the bill of quantities furnished by such architect to the builder.

The first count of the declaration was for money payable by the defendant to the plaintiffs for goods sold and delivered, work and labour and materials, and money found due upon accounts stated

The second count stated that, before and at the time of the making of the promise by the defendant thereafter mentioned, the defendant was about to cause to be erected a villa, and had caused to be made certain plans and specifications of the work to be done and of the materials to be provided for the erection of the said villa, and had invited the plaintiffs to make a tender for a contract with the defendant for the plaintiffs' erecting the same for reward to them in that behalf, and the defendant had caused to be taken out certain quantities as and for the quantities of the work to be done and of the materials to be provided for the erection of the said villa according to the said plans and specifications, and had furnished a bill of the said quantities to the plaintiffs, in order that they might make a tender to the defendant to contract with him for the doing of the work and providing the materials for the erection of the said villa, and for erecting the same at a price to be named by the plaintiffs by such tender; and that, in consideration that the plaintiffs would make such tender, the defendant guaranteed and promised the plaintiffs that, if such tender should be accepted by the defendant, and a contract should be entered into by and between the plaintiffs and the defendant for the doing of the said work and providing the said materials, and for the erection of the said villa by the plaintiffs, the said quantities represented and would represent the true [786] and correct quantities of the work to be done and of the materials to be provided for the erection of the said villa according to such plans and specifications: Averment, that the plaintiffs, confiding in the defendant's said guarantee and promise, made an estimate of, and delivered to the defendant a tender for, the plaintiffs' doing the said work and providing the said materials, and for the erection by them of the said villa, at and for a certain price named therein, and the same was founded on the said bill of the said quantities so delivered to them by the defendant; and their said tender was accepted by the said defendant, and a contract was entered into by and between the plaintiffs and the defendant, for the erection of the said villa by the plaintiffs for the defendant according to the said plans and specifications, for a certain price; and all conditions were performed, and all things happened, and all times elapsed necessary to entitle the plaintiffs to have a performance by the defendant of his said guarantee and promise, and to maintain this action for the breach thereof by the defendant as thereafter alleged: Yet the said bill of the said quantities delivered by the defendant to the plaintiffs did not represent the true and correct quantities of the work to be done and of the materials to be provided for the erection of the said villa according to the said plans and specifications; whereby the plaintiffs' said estimate and tender, and the said contract, were made and entered into by the plaintiffs for a lower price for the plaintiffs' erecting the said villa than they would otherwise have been, and the plaintiffs had sustained much loss and damage, and had incurred further great expense in providing under the said contract work and materials required for the erection of the said villa according to the said plans and specifications, which were not set out or stated in the said bill of the said quantities [787] of work and materials so delivered by the defen-

dant to the plaintiffs, and the plaintiffs had been and were by means of the premises otherwise injured: Claim, 500l.

To the first count, except as to 210l. 7s., the defendant pleaded,—first, never indebted,—secondly, payment before action,—and thirdly, as to the 210l. 7s., payment into court. He also pleaded to the special count,—fourthly, that he did not guarantee and promise as alleged,—fifthly, that he had not caused to be taken out certain quantities as and for the quantities of the work to be done and of the materials to be provided for the erection of the said villa, and had not furnished a bill of the said quantities to the plaintiffs,—sixthly, a denial of the breach and every part thereof. Issue.

The cause was tried before Byles, J., at the sittings in Middlesex after last Hilary Term. The facts were as follows:—The defendant, being desirous of erecting a villa residence in the neighbourhood of Twickenham, employed one Paice, an architect, to prepare the necessary plans and specification, and to procure a builder to do the work. The plans and specification were accordingly prepared by Paice, who put himself in communication with the plaintiffs, who are considerable builders carrying on business in Fitzroy Road, Regent's Park: and in the result the following agreement was entered into between the parties on the 15th of April, 1864:—

“Whereas, in consideration of the sum of 440l., the said W. Scrivener and R. White, or their heirs, executors, administrators, or assigns, agree and covenant on his or their part to execute the necessary works in erecting and completing a dwelling-house and certain fencing on plot 52 on the St. Margaret's estate, Twickenham, in the county of Middlesex, according to [788] drawings, specification, and conditions of contract, and under and to the satisfaction of the said William Paice. The said James Pask, or his executors, administrators, heirs, or assigns, agree and covenant on his or their part to pay unto the said W. Scrivener and R. White the above-mentioned sum of 440l. according to the terms set forth in the said conditions of contract. And, lastly, the said William Paice on his part agrees to inspect and superintend the works while in progress; also to furnish detail drawings, certify the payment of advances, and to the actual completion of the works according to the conditions of contract.”

The conditions of contract were in substance as follows:—

“The contractor is to find all the materials, labour, scaffolding, tackle, carriage, water, and everything necessary for the proper performance and due execution and completion of the works described in the specification and the plans therein referred to, and whatever is expressed, set forth, or implied therein. The whole of the works are to be done with the best materials, and in the most workman-like manner, to the entire satisfaction of Mr. William Paice, the architect. . . . The contractor is to perform all the works specified herein, and to complete the same to the satisfaction of the architect: and, should anything be omitted to be specified therein which by the nature of the works or in the opinion of the architect should clearly have been intended to be performed in order to the full completion of the same, the contractor is to perform the same, and no allowance whatever is to be made for so doing:

“The architect shall be at liberty to increase or diminish the dimensions, or alter the situations, or vary the form or dimensions of any part of the work, without in any way vitiating the contract: and the [789] contractor shall, in pursuance of such direction as he may receive in writing, from the architect, but not otherwise, execute the works thereby ordered, and the difference of expense occasioned by any such increase or diminution shall be paid for at the rate of 10 per cent. under Laxton's price-book for the present year: and, in case of dispute, the cost shall be ascertained by the architect, and shall be added or deducted from the amount of the contract, as the case may be: but no allowance will be made for works executed without previous order given in writing under the hand of the architect:

“It is to be clearly understood that no extra charges whatever will be allowed the contractor without written instructions and authority for the same from the architect: and also it is to be clearly understood that, should any extra works beyond that set forth or intended in the specification be ordered, the cost of the same will be ascertained by admeasurement, and charged for at the rate of 10 per cent. less than Laxton's price-book for the current year:

“No extra works will on any account make void this contract. An extension of time beyond the stipulated period of three months will be allowed the contractor for works extra, after the rate of one day for every 3l. worth of additional work. The

contractor shall maintain in complete repair the whole of the above works for a period of six months after the date of the architect's certificate of the completion of the same; but the proprietor shall notwithstanding be at liberty to use the said works during the said six months:

"The contractor to finish the whole works within twelve weeks from the date of the architect's order to commence the same, and to pay 1l. as liquidated damages for each and every day that any part of the said works shall remain unfinished after that time:

[790] "It is to be clearly understood that the architect's opinion and judgment and decisions are to be in all cases considered final and binding:

"Payment to be made on the architect's certificate, as follows, namely, first payment of 60l. as soon as the first-floor joists are laid and the whole of the flooring on the premises: second payment of 80l. as soon as the whole building is properly carcased in: third payment of 100l. as soon as the work is completed, except painting, paper-hanging, and fencing: the balance of contract to be paid within a week of completion."

The specification minutely described the builder's, slater's, mason's, carpenter's and joiner's, smith's, plumber's, glazier's, painters, and paper hanger's works.

Before the contract was signed by the plaintiffs, a bill of quantities, which had been procured by Paice, was sent to them, and they were assured by Paice that those quantities were correct. But, by the time the building had reached the first floor, they discovered that the quantity of materials required had been much under estimated: and, when they communicated the fact to Paice, he admitted it, and assured the plaintiffs that it should be "made right." When the house was completed, it was found that the quantity of materials necessarily used very considerably exceeded those mentioned in the bill of quantities, and in respect of these the plaintiffs claimed 155l. 1s. 7d.

One of the plaintiffs, on cross-examination, admitted that, if shewn a drawing for a building, with the dimensions properly marked thereon, he could with an expenditure of some time and trouble ascertain by calculation the quantity of bricks and other materials which would be required, and that the plans referred to in the contract distinctly shewed the dimensions of the house and the size of the rooms; and the other admitted that the defendant had told him while the [791] building was going on that it was an object to him not to exceed the contract-price, and that no communication as to the incorrectness of the bill of quantities was ever made to the defendant until after the house was finished.

Mr. Lansdowne, a surveyor of experience, who was called as a witness on the part of the plaintiffs, stated that a builder cannot tender without a bill of quantities, and that the bill of quantities is usually prepared by a surveyor. On cross-examination, he stated that the builder sometimes took out the quantities for himself, and sometimes employed a surveyor, but that a careful builder would not rely upon the bill of quantities prepared by the architect. And, in answer to a question put to him by the learned judge, he said that, with the drawings and specification before him, the builder or somebody whom he employed could get out the exact quantities with a little trouble; and that the builder whose tender is accepted invariably pays the surveyor for taking out the quantities, by whomsoever he is employed, and he adds the charge to his tender.

In the present case the bill of quantities was prepared by one Oliver, a surveyor with whom Paice the architect was a partner, and the plaintiffs paid the surveyor's charge, and added 2 per cent. to the amount of their estimate in consequence

On the part of the defendant it was submitted by Chambers, Q. C. (with whom was Clare), that the defendant was not responsible for the inaccurate representation of the architect, and that the plaintiffs were themselves bound to see that the statement of quantities was correct before they made a tender. He referred to a case of *Sherrin v. Harrison*, coram Blackburn, J., at the sittings at Westminster after Hilary Term, 1830, reported only in a periodical called the [792] *Builder* of the 11th of February, 1860, but for the substantial accuracy of which he (having been counsel for the plaintiff) vouched. The action was brought to recover a balance for "extra work" beyond what was contained in a certain contract and specification. It appeared that the defendant, who was desirous of building a church, employed an architect named Mumford to prepare the necessary plans and specification, and that the plaintiff, upon

the faith of an estimate of the quantities furnished to him by Mumford, entered into a contract to erect the church for 1998l. The quantities turned out to be so inaccurate that the expense of the building exceeded 3600l. By the terms of the contract, no extras were to be allowed without the certificate of the architect. Upon this state of facts it was contended for the plaintiff that the conduct of the architect amounted to a species of fraud, and that, as the architect was the agent of the defendant, the latter was responsible for his representations in reference to the contract. The learned judge, however, ruled otherwise, and the plaintiff was nonsuited. The plaintiff afterwards moved for a new trial, on the ground of misdirection; but the rule was refused, —see 25 Law Times, 79.

For the plaintiff it was insisted by Denman, Q. C., on the authority of *Moon v. The Guardians of the Whitney Union*, 5 Scott, 1, 3 N. C. 814, that the architect, in preparing the bill of quantities, was acting as the agent of the defendant, and consequently that the defendant was bound by representations made by him in reference to the contract. He also referred to *Bristow v. Whitmore*, 9 House of Lords Cases, 391.

The learned judge intimated that the architect seemed to have been employed and paid by the plaintiffs to take out the quantities, and that, if so, the defendant was not responsible for his blunder: and ultimately he nonsuited the plaintiff, on the ground that there was no evidence to shew that Paice was the defendant's agent to make the representation he did as to the correctness of the quantities, or that the defendant guaranteed and promised the plaintiffs that they were accurate. He however reserved leave to the plaintiffs to move to enter a verdict for them for such sum as an arbitrator might fix, if the court should be of opinion that there was evidence which ought to have been left to the jury, —the court to be at liberty to draw any inferences of fact which the jury might have drawn.

Denman, Q. C., pursuant to the leave so reserved to him, now moved accordingly. He submitted that the architect was the agent of the defendant, that it was the architect's duty to prepare the quantities, and that the defendant was bound by representations made by him in the performance of that duty: and for this he relied upon *Moon v. The Guardians of the Whitney Union*, 5 Scott, 1, 3 N. C. 814. There, K., an architect retained by the defendants to prepare plans and a specification for the erection of a workhouse for a union of which the defendants were guardians, employed the plaintiff, a surveyor, to make out the bill of quantities. An advertisement for tenders was prepared, referring the builders desirous of tendering to the office of the defendants' clerk for a view of the plans and specification. The instructions given to the defendants' clerk to shew to the builders contained an intimation that the quantities were being taken out, and that the expense of taking them out was to be defrayed by the successful competitor. It was proved to be the custom for the architect to employ a surveyor to make out the bill of quantities, and for the successful competitor to pay his charge. A misunderstanding [794] having arisen between the defendants and K., another architect was employed, and when K. sent in his bill claiming 113l. for the plans and specification, and 65l. as "the surveyor's charge for making out the quantities," the defendants paid him 80l., which he received in satisfaction of his demand, nothing being said about the surveyor's charge. This court held that, under the custom proved, the architect K. must be considered the defendants' agent in the employment of the surveyor, and consequently the latter was entitled to sue the defendants for the value of his services, —the want of a successful competitor being occasioned by their act. [Erle, C. J. I should have thought it was the builder's duty to see to the accuracy of the quantities before he tenders. If he choose to trust to the accuracy of the information given to him by the architect, well and good.] In all cases where a man accredits another as his agent, he gives him authority to do all that is fairly necessary to the performance of his duty as agent. In *Udell v. Atherton*, 7 Hurlst. & N. 172, —where all the authorities, including *Cornfoot v. Fowke*, 6 M. & W. 373, were considered, —Pollock, C. B., and Wilde, B., held that a principal is liable, in an action of deceit, for the false and fraudulent representations of his agent as to the quality and value of an article, whereby a person has been induced to purchase it for more than its worth, notwithstanding that the principal neither authorized nor knew of the fraudulent conduct of his agent. Wilde, B., in delivering his opinion in that case, refers to and adopts what is said by Mr. Justice Story in his *Principal and Agent*, §§ 134, 135, —"Where the acts of the agent will bind the principal, there his representations, declarations, and admissions respecting

the subject-matter will also bind him, if made at the same time and constituting a part of the *res gestæ*." "If the agent at the time of [795] the contract makes any representation, declaration, or admission touching the matter of the contract, it is treated as the representation, declaration, or admission of the principal himself." The learned Baron goes on to say,—p. 184,—“Whatever his previous authority to the agent, whatever his own innocence, he (the principal) must adopt the whole contract, including the statements and representations which induced it, or repudiate the contract altogether.” In *Routh v. Macmillan*, 2 Hurlst. & Colt. 750, the defendants, shipowners at Liverpool, by power of attorney appointed one Periam their agent, inter alia, to charter their ship “Hannah Easter,” or employ her as a general ship, on such terms or in such manner as he should think proper, and generally to represent them in relation to the premises, and to the said brig, her management, or sale, as fully as if they were personally present. The “Hannah Easter” had been an A1 ship at Lloyd’s, but had run off her letter before the power was executed, and was not described as A1 in the power. The plaintiffs, British subjects and merchants at New York, having an order from England for a cargo of wheat, chartered the “Hannah Easter” to carry it from New York to Gloucester. The charterparty, which was not under seal, purported to be made between the plaintiffs and Periam, “agent for the owners of the A1 Br. brig ‘Hannah Easter,’ of Liverpool.” The consignee of the cargo, on learning that the ship was not A1 at Lloyd’s, refused to accept. Ultimately, however, he agreed to accept, upon the plaintiffs’ agent in England undertaking to pay the extra expense of insurance in consequence of the ship not being A1. The cargo arrived safe. In an action for breach of warranty of the ship’s class, the plaintiffs sought to recover the extra expense of insurance which they had re-paid their agent: and it was held that the power of at-[796]-torney authorized the warranty. *Stucley v. Baily*, 31 Law J., Exch. 483, 1 Hurlst. & Colt. 405, is an authority to the same effect. In *Bristow v. Whitmore*, 9 House of Lords Cases, 391, 418, Lord Kingsdown says: “If an agent makes a contract on behalf of his principal, whether with or without authority, the principal cannot at once approbate and reprobate it. He must adopt altogether or not at all: he cannot at the same time take the benefits which it confers, and repudiate the obligations which it imposes.” That doctrine precisely applies here.

ERLE, C. J. I think there should be no rule in this case. It appears that the defendant wanted a house built, and accordingly employed an architect to prepare the necessary plans and specification, and to get a builder to undertake the work. The plans and specification were laid before the plaintiffs, builders, and they undertook the work at a given price. In the course of the construction of the house, the plaintiffs found that the quantity of materials required for the purpose was very considerably more than they had expected; and they now call upon the defendant to pay for the excess. It appears that, before the work was undertaken, the plaintiffs had a conversation with the architect, who informed them that he had got the quantities made out, and that they were so and so: and it turned out that the information so given was inaccurate. The question is, whether the defendant is responsible for the representation so made by the architect to the builders, which the latter were at liberty to adopt or to reject at their pleasure. Having acted upon the representation, and finding it mistaken, they now turn round upon the defendant and insist that the architect was employed by him, and therefore he is responsible for the architect’s acts. I cannot, however, [797] discover any evidence that the defendant employed the architect to tell the builders that the quantities of materials required to complete the structure would be so much and no more. Indeed, there was evidence from the mouth of one of the plaintiffs’ own witnesses, that a careful builder always calculates the quantities for himself before he makes a tender.

BYLES, J. concurred.

KEATING, J. I also think the nonsuit right, upon the ground stated by my Lord. The case mainly relied on by Mr. Denman, that of *Moon v. The Guardians of the Witney Union*, is quite distinguishable from the present. That was an action by the surveyor who had taken out the quantities, against the guardians who had employed the architect, amongst other things, to cause that work to be done. The advertisement for tenders referred builders desirous of tendering to the office of the clerk to the guardians for the purpose of seeing the plans and specification; and the instructions given to the defendants’ clerk to shew to builders applying contained an intimation

that the quantities were being taken out, and that the expense of taking them out was to be defrayed by the successful competitor. And, when the architect sent in his bill to the guardians containing the surveyor's charge for taking out the quantities, no objection was made to that item, but they paid him a sum, which he received in satisfaction of his charge, nothing being said about the surveyor's charge. That was much relied on: and the court held that there was evidence to go to the jury in support of the plaintiff's claim. That clearly is no authority for the contention here, that the customer is responsible for a representation made by the architect [798] to the builder as to a matter of which the employer must necessarily be entirely ignorant.

Rule refused (a).

PIGRIM v. SIR NORTON KNATCHBULL, BART. April 25th, 1865.

[S. C. 34 L. J. C. P. 257; 12 L. T. 383; 11 Jur. N. S. 389; 13 W. R. 657.]

A writ of summons issued against the defendant on the 5th of January, 1865. The defendant had two residences, one in London, the other in Kent, more than twenty miles distant from the plaintiff's residence, which was in London. On the 4th of January, the plaintiff's attorney received a letter from the defendant, *dated from his residence in Kent*, referring him to his attorneys in London to accept service of process for him. The defendant's attorneys on the day of the issuing of the writ gave an undertaking to appear: and *on that day one of them had an interview with the defendant at his London residence*:—Held, on the authority of *Butler v. Ablewhite*, 6 C. B. (N. S.) 740,—that the result of the facts thus appearing was, that the defendant was residing in Kent at the time of the commencement of the action, and consequently that there was concurrent jurisdiction, and the plaintiff was entitled to his costs, under the 15 & 16 Vict. c. 54, s. 4.

This was an action brought by the plaintiff to recover from the defendant the sum of 15l. 3s. 3d. alleged to be due to him for wages as butler. The defendant [799] had paid 5l. into court: and at the trial before the sheriff of Middlesex a verdict was found for the plaintiff for 10l. 3s. 3d. beyond the sum so paid in. An application was made to the undersheriff at the trial for a certificate that the cause was proper to be tried in the superior court, but was refused.

Upon an affidavit of the plaintiff stating that, “at the time of the commencement of the action, the plaintiff dwelt at No. 11 Wilton Terrace, Wilton Road, Pimlico, in the county of Middlesex, and the defendant at the time of the commencement of the action dwelt at Mersham Hatch, near Ashford, Kent, and that their respective dwellings were then and still are more than twenty miles apart from each other, and also an affidavit of his attorney stating that, on the 4th of January, he received a letter from the defendant, dated Mersham Hatch, January 3rd, 1865, stating that he would instruct his attorneys in London to accept service of process for him, and that the writ of summons issued on the 5th, and an undertaking was on that day given to appear.”

B. T. Williams moved for an order under the 15 & 16 Vict. c. 54, s. 4, that the plaintiff should have his costs of the action. The affidavits in opposition to the rule state that the defendant dwells at No. 3 Chesham Place, Belgrave Square, London

(a) See Addison on Contracts, 4th edit. 633, where the law seems to be laid down with remarkable precision,—“It is not every affirmation and representation which will be binding upon the principal. If the fact concerning which the representation is made lies as much within the knowledge of the one party as the other, or even if its correctness or incorrectness may be ascertained by the party interested in knowing the truth, by the exercise of ordinary inquiry and diligence, and the agent making the statement merely says what he believes to be true, and expresses his opinion in an ordinary conversation about the matter, leaving the party dealing with him to test the accuracy of his statement by more extended inquiries (he having the means of so doing within his reach), there is no warranty on the part of the agent of the truth of what he states: it is understood only, under such circumstances, that he does not wilfully state that which he knows to be false, either to mislead or to lull to sleep the vigilance of the other contracting party.”

(which is less than twenty miles from the plaintiff's residence), as well as at Mersham Hatch, Ashford, Kent; that he keeps an establishment at No. 3 Chesham Place, and is frequently there during the year, and for long periods at a time; that the plaintiff's hiring as a butler was made by Lady Knatchbull at No. 3 Chesham Place; that the writ in this action was issued on the 5th of January, 1865; and that the defendant was then at his residence No. 3 Chesham Place. Where [800] the plaintiff has two permanent places of residence at the time of the commencement of the action, either of which is distant more than twenty miles from the defendant's dwelling, it is a case of concurrent jurisdiction within the 128th section of the County-Court Act, 9 & 10 Vict. c. 95, and he is entitled to costs under the 15 & 16 Vict. c. 54, s. 4. This court so decided, after time taken to consider, in *Butler v. Ablewhite*, 6 C. B. (N. S.) 740; and the court of Queen's Bench adopted that decision in *Kerr v. Haynes*, 29 Law J., Q. B. 70. [Byles, J. In the latter case, the court held that the plaintiff dwelt at Margate, and not in London.] In giving judgment in *Butler v. Ablewhite*, Cockburn, C. J., refers to an earlier case of *Macdonnell v. Paterson*, 11 C. B. 755, where the question was brought under the consideration of this court. "It became, indeed," says his Lordship, "unnecessary to decide it; but the inclination of the opinion of the court would appear to have been in favour of the concurrent jurisdiction. Jervis, C. J., in delivering the judgment of the court, says, 'The defendant contended that, at the time of the action brought, the plaintiff dwelt in two places,—in Scotland, and in Golden Square; and, perhaps, even if this had been the case, this court would have had concurrent jurisdiction, because it could not in that case have been suggested on the roll that the plaintiff did not dwell more than twenty miles from the defendant.' And, in the course of the argument, Mr. Justice Maule made this observation, 'Assuming that a man may have a dwelling-house in two places at the same time, he may, as I read the act, have the rights which belong to a man who dwells more than twenty miles off, and also those which belong to a man who dwells less than twenty miles off. There are no negative words in the act.' The impression of that learned judge, therefore, seems [801] to have been that, if the plaintiff has two permanent residences, one more and one less than twenty miles off, whether he be actually occupying the one or the other at the time of action brought, there is concurrent jurisdiction."

Marshall Griffiths, shewed cause. *Bailey v. Bryant*, 1 Ellis & Ellis, 340, is directly in favour of the defendant, and is not to be distinguished from *Butler v. Ablewhite*. There, an action having been brought in the Queen's Bench, by two joint plaintiffs, upon a cause arising within the jurisdiction of the London (City) Small Debts Extension Act, 15 & 16 Vict. c. lxxvii.(a), on contract, and a verdict of less than 50l. having been found, the defendant applied to deprive the plaintiffs of costs, on affidavit that the defendant carried on business in the city of London at the times of the cause of action arising and of the commencement of the action; that the plaintiffs carried on business at Southwark, within twenty miles of the residence and place of business of the defendant, and did not, as the deponent believed, at the time of action brought, dwell more than twenty miles from the defendant. No place of residence or business was more particularly described. It was held that this affidavit was sufficiently precise to call for an answer. In answer it [802] was deposed that one of the plaintiffs had three residences, two more than twenty miles distant from the defendant's place of business, and that the deponent did not know of the defendant's residence unless it was such place of business; that the same plaintiff had also a dwelling-house in Westminster, within such twenty miles, which he occupied for three or four months only in the year, for the purpose of attending in parliament, of which he was a member; and that he was resident in one of the two residences first mentioned at the time when the action was brought. It was held that this did not answer the defen-

(a) By the 118th section of which it is enacted that all actions which before the act might have been brought in the superior courts, where the plaintiff dwells more than twenty miles from the defendant, may be brought in the superior court, at the election of the party suing (with some exceptions). And by s. 119, that, in other cases for which a plaint might have been entered under the act, the plaintiff is to have no costs if the verdict be not for more than 50l., if the action be founded on contract, unless the judge certify that the action was fit to be brought in the superior court.

dant's affidavit, within the meaning of s. 118. "It is clear," said Lord Campbell, C. J., "that the plaintiff Bailey has a permanent residence at Westminster: his house there is not a mere lodging: it belongs to him all the year round, though he does not use it so much as his other residences." In *Kerr v. Hughes*, an attempt was made to distinguish that case from *Butler v. Ablewhite*: but Cockburn, C. J., said it was impossible to distinguish them. [Montague Smith, J. To which of those two cases did the court adhere in *Kerr v. Hughes*?] It was not necessary to decide: for they held that the residence was in Margate only. There is this distinction between *Butler v. Ablewhite* and the present case,—There, at the time the action commenced, the plaintiff was actually residing in Warwickshire; whereas here the defendant was residing at that time at No. 3 Chesham Place. Besides, all the cases were cases where the party who had the two residences was the plaintiff: here it is the defendant. [Erle, C. J. What difference can that make? Byles, J. In either case,—or if both plaintiff and defendant have two dwellings—the plaintiff does in one sense dwell more than twenty miles from the defendant (a).] The words of the act are en-[803]-abling and not negative words: and it would manifestly be contrary to the policy of the act to allow a plaintiff to resort to the superior court in a case like this. In *Macdonnell v. Paterson*, the decision was that the party had not two residences. Can it be said here that the plaintiff does not, within the words of the 12th section, dwell within twenty miles of the defendant? So to hold will be to deprive the defendant of a right which the statute has given him, because he happens to possess a country-house.

Williams, in support of the rule. *Butler v. Ablewhite* is conclusive. The only distinction suggested between that case and the present is that there it was the plaintiff who had two residences, and the defendant here. [Byles, J. The court there lay some stress upon the fact that the plaintiff was actually residing with his family at his residence in Warwickshire at the time of the commencement of the action.] The affidavits in opposition to the motion do not shew that the defendant was dwelling at his London residence on the 5th of January, when the writ issued, but merely that he was seen there on that day. On the 3rd, he wrote from his residence in Kent, referring to his solicitors for an undertaking to appear. [Erle, C. J. The jurisdiction of the county-court rests upon the dwelling of the defendant: 9 & 10 Viet. c. 95 s. 60. If the plain-[804]-tiff has a dwelling more than twenty miles from the dwelling of the defendant, the authorities hold that the plaintiff may set up his more distant dwelling to sustain his right to sue in the superior court. The place of the defendant's dwelling must all along be assumed to be the matter to which the legislation relates. I am unable to make out a satisfactory distinction between the plaintiff's dwelling and that of the defendant.]

ERLE, C. J. I am always desirous of adhering to any rule I find laid down: and I agree with that laid down by this court in *Butler v. Ablewhite*, 6 C. B. (N. S.) 740. There, the plaintiff had two residences, one of which was within twenty miles of the defendant's residence, the other beyond that distance: and the court put their judgment upon the ground that the plaintiff's actual residence at the time the action was commenced was at the more distant place. I feel no hesitation in adhering to that case as it stands. The point there decided, however, is not precisely the point which is raised here; for, here the question arises in respect of the defendant having two residences. I am unable to find that this circumstance creates any real distinction between the two cases. I give my judgment according to the decision in *Butler v. Ablewhite*, because the fair result of the affidavits on both sides seems to be, that, although he was on that day seen at his London house, the actual place of residence of the defendant at the time the writ of summons was issued was Mersham Hatch, in the county of Kent, which is more than twenty miles distant from the plaintiff's

(a) *Gorslett v. Harris*, 29 Law Times, 75, was the case of a defendant. There, upon an application to deprive the plaintiff of costs, it appeared that the defendant was a builder who had been employed to fit up certain houses in the county-court district where a material part of the cause of action arose, and that, for the purpose of performing that contract, he had set up workshops and counting-houses there: and Lord Campbell said: "All this is only for the purpose of performing this particular contract, and is only to last whilst the job continues. That being so, he does not carry on his business there, within the meaning of the county-court act."

residence, and therefore the plaintiff had a right to resort to the superior court for the recovery of his demand. I therefore think the rule should be made absolute for the allowance of the plaintiff's [805] costs. As, however, cause in shewn in the first instance, the costs of the rule are in our discretion: and I think, under the circumstances, the plaintiff should not have those costs.

BYLES, J. I am of the same opinion. The case of *Butler v. Ablewhite* underwent much consideration. The decision there proceeded, and in my judgment correctly, upon a literal construction of the statute 9 & 10 Vict. c. 95, s. 128. By the Statute of Gloucester, 6 Ed. 1, c. 1, a plaintiff who obtains a verdict is entitled to costs, unless he is deprived of them by some subsequent legislative enactment. The plaintiff contends that the statute 9 & 10 Vict. c. 95, does not deprive him of his right to costs, because he brings himself within the concurrent jurisdiction clause, his residence being distant more than twenty miles from the residence of the defendant at the time of the commencement of the action. If that fact had been suggested upon the roll here, and issue taken upon it, it must have been found for the plaintiff. It seems to me that there is no real distinction in this respect between a plaintiff having two residences, one within and the other beyond the prescribed distance from the defendant's residence, and a defendant having two residences similarly circumstanced as to distance from the plaintiff's place of abode. I therefore think our decision is governed by the authority of one, if not by that of two cases in this court,—*Macdougall v. Paterson*, 11 C. B. 755, and *Butler v. Ablewhite*, 6 C. B. (N. S.) 740.

MONTAGUE SMITH, J. I am entirely of the same opinion.

Rule absolute, without costs.

[806] PRESTWICH AND ANOTHER v. POLEY. May 9th, 1865.

[S. C. 34 L. J. C. P. 189; 12 L. T. 390; 11 Jur. N. S. 583; 13 W. R. 753. Referred to, *Strauss v. Francis*, 1866, L. R. 1 Q. B. 382. See *Neale v. Gordon-Lennox*, [1902] 1 K. B. 843; [1902] A. C. 465. Principle approved and applied, *In re Newen*, [1903] 1 Ch. 812.]

1. An attorney has a general authority to compromise an action on behalf of his client,—provided he act *bonâ fide* and reasonably, and not in defiance of the direct and positive instructions of the client.—2. And this authority, it seems, extends to a managing-clerk having the general conduct of the business.—3. The plaintiffs employed A., an attorney, to sue B. for the price of a piano-forte sold and delivered. The cause having proceeded as far as the joinder of issue, A. finding B. unable to pay, agreed with him (by his managing-clerk), that the plaintiffs should take back the piano-forte, and that the costs should be paid by certain instalments. The plaintiffs on being informed of this arrangement, repudiated it, and A. gave notice of trial:—Held, upon a motion to stay the proceedings on the ground that the action was settled, that this compromise was within the general scope of the attorney's authority, and binding as between the plaintiffs and B.—4. Whether it would have been competent to the attorney to accept *any other goods* in satisfaction of his client's claim,—*quære?*

This was an action brought to recover the sum of 38l., the price of a piano-forte sold and delivered by the plaintiffs to the defendant.

The cause being at issue, and notice of trial having been given, the defendant's attorney called at the office of the plaintiff's attorney, and proposed to settle the action by returning the piano-forte and paying an agreed sum for costs; and ultimately the following terms were settled and reduced into writing, and signed by Swann, the managing-clerk of the plaintiffs' attorney, and by the defendant's attorneys:—

"London 6th April, 1865.

"*Prestwich and Another v. Poley.*

"This matter has been settled upon the following terms,—Piano to be given up in full discharge of the debt in this action, and costs, agreed at 9l., to be paid by the following instalments, 5l. to-morrow, and balance in a month from that date.

"THOMAS ANGELL, plaintiffs' attorney.

"PIKE & SON, defendant's attorneys."

An appointment was afterwards made for the plaintiffs to attend at the defendant's house on the following day to take away the piano-forte, and the defendant's attorneys sent Mr. Angell a cheque for 5l. on account of the costs. On the following day, April 7th, the plaintiffs' attorney, by his managing-clerk, Swann, wrote to the defendant's attorneys,—“My clients do not seem inclined to accept the terms proposed by [807] you;” and on the 8th the cheque was returned, and notice of trial given.

On the 24th of April, application was made to Keating, J., at Chambers, for an order to stay the proceedings in the action, on the ground that the matter had been settled. The learned judge thought the agreement ought to bind the parties; but, pressed by the case of *Swinfen v. Swinfen*, he declined to make the order, but without prejudice to an application to the court.

Needham, accordingly, on a former day in this term, obtained a rule nisi to the same effect. The affidavit upon which the motion was founded, after setting out the above facts, proceeded to allege that “Swann is the managing-clerk of the said Thomas Angell, and is a thoroughly competent and shrewd man,” and further that he was in the habit of transacting business for him as if he were principal.

Prentice now shewed cause, upon a joint affidavit by Angell and Swann, the latter of whom deposed that, upon Angell opening the letter inclosing the 5l. cheque, he informed him (Swann) that he had done wrong in giving the above memorandum to the defendant's attorneys, as the plaintiffs had declined to accept the return of the piano-forte, as proposed, and the former deposed that he had not at the time mentioned, nor had he at any time had, the authority of the plaintiffs to settle the action upon the terms stated, or upon any other terms than the payment of the debt and costs in the action. The attorney was employed to take proceedings in the ordinary way to recover the price of the piano-forte, not to make an arrangement for its return. That an attorney has no right to compromise a suit, was decided by the Master of the Rolls [808] in *Swinfen v. Swinfen*, 27 Law J., Ch. 35,—the client not having been aware of it, not having sanctioned it, and refusing to be bound by it: and that decision was affirmed by the Lords Justices,—see 2 De Gex & Jones, 381, 27 Law J., Ch. 491. “Between principal and agent,” says the Master of the Rolls, 27 Law J., Ch. 40, “the agent has full authority to do everything within the implied scope of his authority. If an attorney is employed to conduct a suit for a client, a compromise does not in terms come within the scope of his authority: it is not within the management of the cause. Upon what principle, therefore, can it be said that there is an implied authority for an attorney to compromise the suit which he is employed to conduct? Suppose an attorney is employed to recover an estate, does the authority extend to selling that to a stranger? Yet a compromise is nothing more than a sale from the plaintiff to the defendant upon certain terms. I should as little expect an attorney to have such an authority as I should expect a person employed to take horses to a particular place to feed and to break them in, to have an implied authority to sell or exchange them. A coachman drives my carriage, and I am liable for all the acts which he does whilst driving the carriage: but he has no authority to sell or exchange the carriage. Unless there is some different rule applicable to attorneys, it is impossible to say that an attorney has an implied authority to dispose of the subject-matter of the suit, instead of conducting the cause, which he is employed to do.” He then goes through the authorities, and comes to the conclusion that the compromise in that case was void. [Montague Smith, J. Might the attorney here have compromised by taking 5s. in the pound for the debt?] Clearly not. [Keating, J. Could he have consented to refer the matter to an arbitrator, who might award [809] that to be done?] The attorney as well as the counsel probably has authority to refer, but not in an unusual manner. Pollock, C. B., in delivering the judgment of the Exchequer Chamber in *Swinfen v. Lord Chelmsford*, 5 Hurlst. & N. 890, 922, says: We are of opinion that, although a counsel has complete authority over the suit, the mode of conducting it, and all that is incident to it,—such as withdrawing the record, withdrawing a junior, calling no witnesses, or selecting such as in his discretion he thinks ought to be called, and other matters which properly belong to the suit, and the management and conduct of the trial,—he has not, by virtue of his retainer in the suit, any power over matters that are collateral to it. For instance, we think, in an action for a nuisance, between the owners of adjoining land,—however desirable it may be that litigation should cease by one of the parties purchasing the property of the other, we think the counsel have no

authority to agree to such a sale, and bind the parties to the suit without their consent, and certainly not contrary to their instructions; and we think such an agreement would be void." If an attorney were to consent to a reference, giving the arbitrator power to order something out of the usual course of business, his act would not bind his client. "[Byles, J. Is not the question different where it arises between attorney and client, and where between party and party?] No doubt. [Byles, J. Lord Campbell, in *Fray v. Fowles*, 1 Ellis & Ellis, 839, 847, says: "An attorney retained to conduct a cause is entitled, in the exercise of his discretion, to enter into a compromise, if he does so reasonably, skilfully, and bonâ fide (as the defendant is to be taken as having done), provided always that his client has given him no express directions to the contrary: but, where these directions have been given, such a step, though perhaps binding as between him and [810] third parties, is ultra vires as between him and his client." What is the authority which is given by the client to his attorney when he instructs him to sue for a debt? Surely not to take back the goods, having secured his own costs! Besides, here the compromise took place with the attorney's clerk, whose authority was disclaimed by his employer. In *Bingham v. Allport*, 1 Nev. & M. 398,—where it was held that a tender made to the managing-clerk of the plaintiff's attorney, who at the time disclaimed authority from his master to receive the debt, was insufficient,—Littledale, J., said: "Although a party put his case into the hands of his attorney, who thereby becomes authorized to accept payment, it by no means follows that all the attorney's clerks have such an authority also." So, in *Pennell v. Stephens*, 7 C. B. 987, a notice of an act of bankruptcy given by one attorney's clerk to another attorney's clerk (not being shewn to be a managing clerk), was held to be insufficient: but the court did not decide that the notice would have been good if the person to whom it was given had been managing-clerk. [Erle, C. J. That must depend upon the circumstances. A managing-clerk is often put in the place of the attorney himself.]

Needham, in support of the rule. Whatever be the relative liability as between the attorney and his client, if the attorney, even without authority, or against the express command of his client, chooses to enter into a compromise, as between party and party the client is bound by it. The defendant or his attorney can only communicate in all matters relating to the suit with the attorney upon the record. There is nothing in the case of *Swinfen v. Swinfen*, in any of its stages, whether in equity or in the common law courts, which at all conflicts with that doctrine. The com-[811]-promise there was made by counsel, without the consent of the client, and in absolute defiance of the express and repeated opposition and remonstrance of the attorney. The ultimate result of that case is somewhat remarkable: the court of Common Pleas declined to enforce the arrangement by attachment,—1 C. B. (N. S.) 364; the court of Chancery refused to enforce it on a bill for a specific performance,—27 Law J., Chan. 35, 2 De Gex & Jones, 381, 21 Law J., Chan. 491; and a new trial of the issue was directed, at which a verdict was found for the plaintiff, and this verdict was upheld,—28 Law J., Chan. 849. In *Thomas v. Harris* 27 Law J., Exch. 353, upon a motion for a new trial on the ground that the damages were excessive, an offer having been made, which the plaintiff's counsel, in the absence of his client, hesitated to accept, Pollock, C. B., without eliciting any expression of dissent from the rest of the court, one of whom was Bramwell, B., said: "The plaintiff's counsel has authority to do so in the absence of his client. Let that be clearly understood. The late case of *Swinfen v. Swinfen* does not at all affect the ordinary authority of counsel. That was a case of something beyond the ordinary scope of their authority, and, as was alleged, against an express direction." [Erle, C. J. After verdict given, the plaintiff's counsel was pleased to say that the jury had been too liberal!] *Thomas v. Harris* was cited without disapprobation in *Fray v. Fowles*, 1 Ellis & Ellis, 839, where Lord Campbell says: "An attorney retained to conduct a cause is entitled, in the exercise of his discretion, to enter into a compromise, if he does so reasonably, skilfully, and bonâ fide, provided always that his client has given him no express directions to the contrary: but, where these directions have been given, such a step, though perhaps binding as between him and third parties, is ultra vires as be-[812]-tween him and his client. I do not agree with Mr. Kennedy that the attorney would be bound, in pursuance of his client's directions, to carry on the suit in a manner which he thought dangerous or absurd: but, if he chooses, after those directions, to carry it on at all, he is bound not to act contrary to those directions, and is guilty of a breach of duty

if he does. This is a question as to the relation between attorney and client: and my view of it must not be considered as affecting the question of the relation between counsel and client, or the relation between the client and the opposite party in the cause." That distinction was acted upon in this court in the recent case of *Chown v. Parrott*, 14 C. B. (N. S.) 74, where it was held that an attorney retained to defend an action is not guilty of actionable negligence if he enters into a compromise without the consent of his client, provided he acts *bonâ fide* and with reasonable care and skill, and the compromise is for the benefit of the client, and is not made in defiance of his express prohibition. Erle, C. J., there says: "I apprehend the rule of law is well established, that the general authority to conduct a cause gives the attorney authority to compromise. The reason why the compromise is held to be binding upon the client, is, because the attorney is his general agent for that purpose. I think that is established in *Fray v. Toulas*, 1 Ellis & Ellis, 839, where it was held that an attorney who makes a compromise in defiance of the express directions of his client not to do so, is guilty of a breach of duty. Two of the judges say that it depends upon the contract in each particular case, and hold (which was sufficient for the decision of that case) that the action lay against the attorney there, because he was prohibited: which would seem to imply that, if he had not been expressly prohibited from compromising, the compromise would have been a lawful act on his part."

[813] ERLE, C. J. I am of opinion that this rule should be made absolute. The action is brought to recover the price of a piano-forte sold and delivered by the plaintiffs to the defendant. The plaintiffs' attorney having agreed with the defendant's attorneys to settle the action by allowing the defendant to return the piano-forte and to pay the costs (agreed at 9l.) by certain instalments, the plaintiffs repudiate the arrangement, and now contend that their attorney had no authority to compromise the matter as he did. The defendant, on the other hand, insists that the attorney was warranted by the general authority he had as the attorney on the record, to settle in the way he judged most beneficial for his client. I do not limit my judgment to the consideration of the question as between the parties. It is clear that there was no express prohibition to the attorney to compromise: and the question for us to determine is, whether the general retainer as attorney gave authority to compromise the action in this way. It is conceded that the attorney on the record has a general control and authority over the procedure in the action, and that it is competent to him to settle the action by taking a less sum than that demanded by the plaintiff. But it is said he has no authority to take goods for money. I do not see why he should not. If the cause had proceeded to its natural result,—to judgment and a writ of *fi. fa.*,—for aught I know the sheriff might have taken this very piano in execution. I am unable, therefore, to say that the plaintiffs' attorney has in any respect gone out of the ordinary and proper course of his duty in the arrangement he has effected. The case of *Chown v. Parrott*, 14 C. B. (N. S.) 74, appears to me to lay down a proposition quite wide enough to authorize my judgment on this occasion. In *Fray v. Toulas*, 1 Ellis & Ellis, 839, the attorney was expressly directed by his [814] client not to enter into any compromise; and, though he was held to be liable to an action for having done so, as between the parties the arrangement was allowed to stand. *Swinfen v. Swinfen* was remarkable in all its circumstances, and in the course of litigation to which it gave rise. It can hardly be referred to as a decision which is to afford a guide in any case not similarly circumstanced. The judgment of the Master of the Rolls went very much upon the ground of the extraordinary departure from the usual course of events on the trial of an issue directed to inform the conscience of the court of Chancery. They are to my mind to be considered as applicable only to the peculiar state of facts disclosed throughout every stage of that eventful cause.

BYLES, J. I am of the same opinion. No authority has been cited before us to shew that an attorney, who has the legal management of the cause, has not power in the *bonâ fide* exercise of reasonable care and skill to compromise an action in any manner he may find to be for the interest of his client. In the first discussion of the question in this court in *Swinfen v. Swinfen*, 18 C. B. 485, as to the authority of the counsel to compromise, the then Chief Justice took no part: but Cresswell, J., Williams, J., and Willes, J., all agreed that counsel had such authority. Cresswell, J., thus expresses himself,—“It is said that the compromise which was entered into by the

counsel for the respective parties at Stafford was without the authority or consent of Mrs. Swinfen, the plaintiff. I think the court cannot for a moment listen to an objection of that sort; and I am glad to find that there is abundant authority for our holding that the client is absolutely and conclusively bound by what the counsel on her behalf assented to. I think it would be most fatal [815] to the due administration of justice, if we were to allow the authority of counsel to be thus questioned. And there is not any hardship or inconvenience in this: for, if the client or the attorney has reason to think that the counsel is taking a course that will prejudice his interests, he may withdraw his brief, and so put an end to his authority to represent the client before the court. But, if counsel, duly instructed, take upon himself to consent to a compromise which he in the exercise of a sound discretion judges to be for the interest of his client, the court will not inquire into the existence or the extent of his authority." Williams, J., says,—“Without pretending to define the precise limits of the authority of counsel, it is enough on the present occasion to say that I entirely concur with my Brother Cresswell in holding that Mrs. Swinfen is bound by the compact entered into on her behalf at the trial.” So Willes, J., says,—“As to the authority of counsel to bind the client by arrangements entered into in court, I agree entirely with what has fallen from my Brother Cresswell.” When the case afterwards came before the court on the motion for an attachment, Crowder, J., begins his judgment with saying,—“As I have the misfortune to differ from the opinion expressed by my learned Brothers when the former rule was discharged, *and to which opinion they still adhere*,” &c. So that, so far as the common-law courts are concerned, the rule seems to have been laid down in wider terms than are necessary here. I agree with my Lord that the opinions expressed by the Master of the Rolls and the Lords Justices were addressed to the peculiar circumstances of the case before them.

KEATING, J. I am quite of the same opinion. If the rule were not as we now lay it down, great inconvenience and much protracted litigation would be the [816] result. The attorney (for I take the act of the managing-clerk for this purpose to be the act of the attorney himself) here has compromised, not by taking other goods in satisfaction of the debt instead of money,—though I do not say that he might not even have done that,—but the very goods which were the subject of the action. It seems to me that that is within the most usual and limited notion of the authority of the attorney. I may take this opportunity of saying that the case of *Swinfen v. Swinfen*, so far as the decision in this court is concerned, has not been fully understood; because, not only the three judges (18 C. B. 485) adhered to the opinion they there expressed, but, further, the motion which was afterwards refused (1 C. B. N. S. 364), was for an attachment for disobeying a rule of court. The opinions of the majority were not allowed to prevail, because it was thought, and properly, that, if one member of the court entertained a doubt, it was not a proper case for the exercise of the summary coercive power of the court. There is no difficulty of that sort here. In the court of Chancery, the case of *Swinfen v. Swinfen* was treated as one resting on very peculiar grounds.

MONTAGUE SMITH, J. I am of the same opinion. The attorney is the general agent of the client in all matters which may reasonably be expected to arise for decision in the cause. Every one must reasonably expect that a cause may not be carried to its natural conclusion, and that it is proper and usual, and often necessary, to compromise. The authorities seem to me to establish clearly that the attorney has power to compromise the action in a fair and reasonable manner. The question is, whether the compromise here is fairly within the limits of the authority. I cannot conceive a case more clearly within it than this. Suppose the case proceeded to judgment in the ordinary [817] course, the plaintiffs would have had an execution against the defendant's goods, and the sheriff would have seized, amongst other things, perhaps this very piano-forte. In the exercise of his discretion, the attorney thought it better to accept the defendant's offer to restore the piano-forte, before any further expenses were incurred. I think it would be most unfortunate for clients as well as for attorneys, if the latter had not power to make compromises. There may be in the progress of a cause a moment when an opportunity to settle a matter advantageously for the client presents itself, which may not occur again, and so the advantage would be lost if the attorney delayed in order to consult his client's wishes upon the subject.

Upon principle, therefore, as well as upon authority, I am of opinion that this compromise must be upheld.

Rule absolute (a).

[818] FOWLER AND ANOTHER v. THE ENGLISH AND SCOTTISH MARINE INSURANCE COMPANY (LIMITED). April 25th, 1865.

[S. C. 34 L. J. C. P. 253; 12 L. T. 381; 11 Jur. N. S. 411; 13 W. R. 658.]

1. A policy was effected on a Prussian ship valued at 2500l., against such risks only as were excluded by the clause "warranted free from capture, seizure, and detention, or the consequences of any attempt thereof,"—with a stipulation that the insurers "should pay a total loss thirty days after receipt of official news of capture or embargo, without waiting for condemnation." The ship was detained by an embargo in a Danish port, after the breaking out of hostilities between that power and Germany:—Held, that the right of the assured to claim for a *total loss* became vested on the expiration of the thirty days, notwithstanding that the vessel had never been actually taken out of the possession of the captain, and was afterwards (and after action brought) restored, and arrived in safety in London.—2. Held also, that the entry of the fact of the embargo in Lloyd's "Loss-Book," however the intelligence might have been received, was sufficient to satisfy the term "official news" in the policy.

This was an action brought to recover for a total loss on a policy on ship.

The first count of the declaration stated that the plaintiffs caused to be made a policy of insurance purporting thereby and containing therein, that, it having been proposed to the defendants by the plaintiffs, as well in their own name as for and in the name or names of all and every other person or persons to whom the subject-matter of the said policy did, might, or should appertain in part or in all, to make with the defendants the insurance thereafter mentioned and described, the defendants did, in consideration of the said person or persons effecting the said policy promising to pay to the defendants the sum of 25l. as a premium at and after the rate of 1l. per cent. for such insurance, take upon themselves the burthen of such insurance to the amount of 2500l.; which insurance was thereby declared to be upon the ship or vessel called the "Ernst Jacob," valued at 2500l., lost or not lost, at or from Riga to London; and it was thereby agreed that the said insurance should be only against such risks as were excluded by the clause "warranted free from capture, seizure, and detention, or the consequences of any attempts thereof," and that the defendants should pay a total loss thirty days after receipt of official news of capture or embargo, without waiting for condemnation; and the defendants thereby agreed that it should be lawful for the said ship or vessel in the [819] voyage so insured as aforesaid to proceed and sail to and touch and stay at any ports or places whatsoever, without prejudice to the said insurance; and it was thereby further agreed that, in case of any loss or misfortune, it should be lawful to the assured, their factors, servants, and assigns, to sue, labour, &c., and it was thereby expressly agreed and declared that the acts of insurer or insured in recover-

(a) The attorney would, no doubt, in many cases exercise a sound discretion in accepting goods in satisfaction of the debt sued for: but it is difficult to see how it can be laid down as a rule of law that he has absolute authority to exercise such a discretion on the subject. The dictum is thrown out for the first time, and certainly requires much consideration. There would seem to be no real objection on the score of expediency to the attorney's taking a bill of exchange, or goods which are readily convertible into money: but it might be inconvenient if he could accept any description of goods,—an African lion, or a Bengal tiger, for instance,—and yet those who argue for the proposition here suggested must go this length, for it is not a question of degree. It is no argument, it is conceived, to say that these inconvenient animals might be the only available property to satisfy an execution. The sheriff has no discretion: he *must* seize *all* property, and convert it into money. Besides, if the goods seized by the sheriff should prove inadequate to satisfy the debt, the plaintiff has a further remedy for the balance: he may issue a *ca. sa.* But not so where the attorney makes a compromise which falls short of *complete* satisfaction.

ing, saving, or preserving the property insured, should not be considered a waiver or acceptance of abandonment; and it was thereby declared and agreed that the said ship should be and was warranted free from average under 3l. per cent., unless general, or the ship should be stranded, sunk, or burnt: Averment, that the plaintiffs paid to the defendants the said sum of 25l. accordingly, and the defendants thereupon became insurers to the plaintiffs of the said sum of 2500l. upon the terms aforesaid, in respect of the premises, and duly executed the said policy accordingly: that, before the happening of the loss thereafter mentioned, the said ship set sail and departed on the voyage mentioned in the said policy, and the plaintiffs were at the time of the making of the said policy, and at the commencement of the said risk, and thence continually until and at the time of the loss thereafter mentioned, interested in the subject-matter of the said insurance, to the value and amount of all moneys ever insured thereon, and that the said insurance was made for their use and benefit and on their account: that, after the commencement of the said risk, and during its continuance, and whilst the said policy was in full force, the said ship was seized and detained under an embargo by the King of Denmark, being one of the perils insured against by the said policy, and the plaintiffs thereby sustained a great loss, within the meaning of the said policy: that, before action brought thirty [820] days after receipt of official news of the said seizure and detention had elapsed, within the true intent and meaning of the said policy: and that, before action brought, all conditions and warranties were fulfilled, and all things were done and happened, and all times elapsed, necessary to entitle the plaintiffs to sue the defendants for the matters mentioned in this declaration, and to be paid by the defendants the said sum of 2500l. so insured by them, and interest thereon: Breach, that the defendants had not indemnified the plaintiffs against the said loss, or paid the said sum of 2500l. and interest, or any part thereof, and the same remained wholly unpaid and in arrear, contrary to and in violation of the terms and provisions of the said policy of insurance.

There was also a count for money lent, money received, interest, and money found due on accounts stated. Claim, 3000l.

The defendants pleaded,—first, as to the first count so far as related to the alleged total loss of the ship, a denial that the said ship was detained under an embargo by the King of Denmark until after the lapse of thirty days after the receipt of official news of the said seizure, and that the plaintiffs thereby sustained loss within the meaning of the said policy, and that before action brought thirty days after the receipt of official news of the said seizure and detention had elapsed, within the true intent and meaning of the said policy.

Secondly, as to the said first count so far as related to the alleged detention of the said ship until after the lapse of thirty days after the receipt of official news of the said seizure, and so far as related to the alleged total loss of the said ship, and the causes of action in respect thereof,—that, at the time of the alleged seizure and detention under the said embargo, the said ship was in the course of the said voyage lying in a Danish [821] Harbour, to wit, Elsinore, and was and still is a Prussian ship, and the property of certain persons subjects to the King of Prussia, and that war had broken out and was then being carried on between the King of Denmark and certain other powers, to wit, amongst others, with the King of Prussia, and that the said ship had been and was seized and detained under the said embargo by the King of Denmark as and being enemy's property, to wit, the property of the said subjects of the King of Prussia: that, after the alleged seizure and detention under the said embargo, and within the period of thirty days therefrom, and before thirty days after the receipt of official news of the said seizure and detention had elapsed, within the true intent and meaning of the said policy, and before action, to wit, within twelve days after the said seizure and detention, a decree was duly made in that behalf, and promulgated by the King of Denmark, to wit, on the 15th of February, 1864, a correct translation of which decree is in the words and of the tenor and effect as follows, that is to say,—“Decree respecting time to be allowed to the enemy's vessels now under embargo, for quitting Danish harbours. On a representation being made to the King, His Majesty resolved, under date of the 13th instant, that, until the 1st of April next, the enemy's vessels now lying under embargo in Danish harbours and fiords shall be permitted to depart unmolested, in ballast, or laden with the cargo with which they arrived, and furnished with a letter of safe conduct to any harbour which they shall themselves designate, provided it be not blockaded; under proviso of reciprocity on

the part of the governments interested. Ministry of Marine, Feb. 15th, 1864 : " that afterwards, and before thirty days after receipt of official news of the said seizure and detention had elapsed, within the true intent and mean-[822]-ing of the said policy, and before suit, all the conditions of the said decree were and had been complied with on the part of the government interested in the said decree and in the said ship, to wit, the government of Prussia, and the said embargo was by force of the said decree and such compliance with the conditions thereof as aforesaid taken off the said ship, and she was left at liberty to prosecute her said voyage, and could and might have obtained, and would on application have been furnished with, a letter of safe-conduct for that purpose,—of all which said premises the plaintiffs always had notice : and that the said ship afterwards in fact sailed upon her said voyage, and arrived in London and completed her said voyage in safety.

Thirdly, as to the first count except so far as related to the alleged detention of the said ship until after the lapse of thirty days after receipt of official intelligence of the said seizure, and except as to the alleged total loss of the said ship, the defendant brought into court 2l., and said that the same was sufficient to satisfy the plaintiffs' claim in respect of the matters therein pleaded to.

Fourthly, to the rest of the declaration, never indebted. Damages *ultra*, and issue.

The cause was tried before Erle, C. J., and a special jury, at the sittings in London after last Michaelmas Term, when the following facts appeared in evidence : The plaintiffs are merchants carrying on business in London, and also at Memel, in Prussia. In the month of November, 1863, the Prussian ship "Ernst Jacob," of which the plaintiff Henry Fowler, who is a Prussian subject, was the registered owner, sailed from Riga to London with a cargo of timber. She met with bad weather, and the captain was in consequence compelled to cut away the masts and to put into 'Elsinore' under heavy average. She arrived at that port on the [823] 4th of December, and the necessary repairs were forthwith commenced, and were in due course completed. The ship was already insured against the ordinary perils : but, war being at this time threatened between Denmark and the German powers, the plaintiffs were desirous of effecting a policy to cover all risks which might result from hostilities : and they accordingly gave instructions to Messrs. Bevington & Co., their brokers, to effect a policy, which they succeeded in doing with the defendants in the form and upon the terms mentioned in the first count of the declaration.

Annexed to the policy was the following memorandum :—

"Policy No. 4984 for £2500, by the 'Ernst Jacob,' Captain _____, from Memel to London. The annexed insurance is declared to be against all risks whatsoever, British as well as Foreign capture, seizure, and detention, included. Detention for the period of six months to be deemed equivalent to a condemnation.

"London, 15th December, 1863."

The material clause in the policy,—"to pay a total loss thirty days after receipt of official news of capture or embargo, without waiting for condemnation."—was inserted in pursuance of a practice which had recently sprung up, the period within which the underwriters are to pay after capture being matter of bargain in each particular case : but the principle intended to be established is always the same, viz. a positive engagement on the part of the underwriters to pay a total loss at the expiration of the specified time, without waiting the result of proceedings in a prize-court for condemnation of the vessel.

The repairs of the vessel proceeded at Elsinore : and by the end of January, 1864, they had so far progressed that the ship was in a position again to receive [824] her cargo, and the captain had commenced re-loading it, although the vessel was not quite fit to proceed to sea. In this state of things, war was declared between Denmark and Prussia ; and on the 3rd of February an embargo was laid on the "Ernst Jacob," at Elsinore, by the Danish government. *The plaintiffs' correspondents at Elsinore* immediately transmitted to them in London this information by telegram, as follows,—"Danish government has laid embargo on 'Ernst Jacob.' War with Germany commenced. Inform Fowler in Memel." On receipt of this telegram, the plaintiffs immediately took it to Lloyd's, and handed it to Bevington & Co., their brokers, who took it to the secretary's office.

The way in which losses and accidents are usually notified at Lloyd's is as follows :—In the underwriters' room there is a board called the "Notice-board," upon which

notices are affixed. There is also a book called the "Loss-book," in which entries of losses are made. The notices affixed on the notice-board are not confined to losses, but extend to all intelligence which may be deemed important to underwriters for the purposes of their business. No notice can be affixed on the board, and no entry can be made in the Loss-book, but by one of the clerks in the secretary's office: and it is the duty of one of the committee of Lloyd's to be in constant attendance, in order that he may be appealed to in case of difficulty upon any such point. If the information of a loss is not deemed sufficiently authentic to be inserted in the Loss-book, it is merely affixed to the notice-board: but, if it comes from one of Lloyd's agents, or the accuracy of the intelligence is otherwise made clear, it is at once entered in the Loss-book.

On the morning of the day following the receipt of the telegram by the plaintiffs, viz. on the 4th of February, a telegram was received at Lloyd's from their [825] agent at Elsinore, conveying information of the embargo upon the "Ernst Jacob," and thereupon the following entry was made by the secretary in the Loss-book, "The 'Ernst Jacob,' from Riga to London, has been laid under embargo at Elsinore."

On the 5th of February, the plaintiffs' brokers gave the defendants notice of abandonment.

The decree of the 15th of February, 1864, as set out in the second plea, was subject to reciprocity on the part of the governments interested. This act of reciprocity did not take place until the 13th of March, on which day the Prussian government formally assented to the terms of the decree of the Danish government. The embargo, however, was not taken off until the 17th of March. The "Ernst Jacob" did not sail from Elsinore until the 17th of April. She arrived in safety in London on the 29th of April, —the captain having procured the money for the repairs at Elsinore on bottomry.

After the arrival of the ship in London and the discharge of her cargo, she was sold by auction, for account of whom it might concern, and realized 1381l. 9s. 6d.

The writ in this action issued on the 21st of March, 1864.

The vessel had never in fact been taken out of the possession of the master and crew.

Two witnesses who were called for the plaintiffs stated that the news of the embargo, if entered in Lloyd's book, would be treated as "official," and as *primâ facie* evidence of a loss; but they disclaimed the notion that "official news" had any particular technical meaning. The jury adopted this view.

On the part of the defendants it was submitted that it was for the court to construe the meaning of the policy, and that, to make the news of the embargo [826] official, it must be authenticated as a matter of official duty at the place whence it came; that a communication from an agent of Lloyd's at Elsinore might be deemed official,—the object of the underwriters being that there might be some evidence of the loss beyond the bare statement of a party interested; and that the mere insertion of it in a book at Lloyd's could not make it official.

Under the direction of the Lord Chief Justice, a verdict was entered for the plaintiffs as for a total loss, subject to a motion.

Mellish, Q. C., accordingly, in Hilary Term last, obtained a rule calling upon the plaintiffs to shew cause why the verdict entered for them on the pleas relating to total loss should not be set aside, and instead thereof a verdict be entered thereon for the defendant, on the ground that the loss ceased to be total when the embargo was taken off,—the plaintiffs to be at liberty to contend, if necessary, at the time of shewing cause, that they were entitled to a verdict for "partial loss," if not for total loss. He also moved on the ground that the news of the loss was not "official" within the meaning of the policy: but upon this the rule was refused.

Lush, Q. C., and Sir G. Honyman, now shewed cause. The engagement in the policy is that "the insurers shall pay a total loss thirty days after receipt of official news of capture or embargo, without waiting for condemnation." Here the embargo was laid on the vessel on the 3rd of February, 1864, consequently the thirty days elapsed before the vessel by the reciprocation of the Prussian government (on the 13th of March) became free. The special words in this policy were inserted for the benefit of the assured. What would have been the rights [827] of the parties without those words? The authorities are clear that, on seizure or embargo, by which the owner is deprived of the benefit of his vessel, he may immediately abandon, and bring an action for a total loss: the underwriter must pay for a total loss, even though the vessel

should afterwards be restored. If the owner omits to give notice of abandonment, or delays bringing an action, and the vessel is restored in the meantime, he can only maintain an action for such damage as he has actually sustained. America and some other commercial countries give no effect to subsequent restoration. In 2 Arnould on Insurance, § 383, p. 1071, the subject of abandonment on capture is thus treated,—“The best general statement I have anywhere met with of the circumstances which confer on the assured on ship a *prima facie* right to give notice of abandonment, is contained in the following passage from the judgment of Mr. Justice Story in the American case of *Peck v. The Merchants' Insurance Company*, 3 Mason's Rep. 27: ‘The right of abandonment has been admitted to exist where there is a forcible dispossession or ouster of the owners of the ship, as in cases of *capture*, &c.,—where there is a restraint or detention which deprives the owner of the free use of his ship, as in cases of *embargoes*, blockades, and arrests,—where there is a total loss of the ship for the voyage, as in cases of shipwreck, so that the ship cannot be repaired in the port where the disaster happens,—where the injury is so extensive that by reason of it the ship is useless, and the making repairs would exceed her value.’ First, therefore, the assured on the ship has a right to give notice of abandonment immediately he hears that his ship has been forcibly taken out of his possession and control by capture; for, from the moment of capture, he is deprived of the free disposal of his vessel, at all events for a time, and perhaps for [828] ever. ‘The ship,’ as Lord Mansfield says, ‘is lost by the capture, though she be never condemned at all, nor carried into any port or fleet of the enemy’ (a). Immediately, therefore, the assured receives intelligence that his ship is captured, he has a right to give notice of abandonment: and he may insist on such notice, and recover as for a total loss, ‘provided the capture, and the total loss occasioned thereby, continue to the time of bringing the action’ (b). If, however, before action brought, the ship be re-captured, and restored to the possession or control of her owners, either in an undamaged or only partially damaged state, the assured cannot insist on his notice of abandonment, and recover as for a total loss, even though the loss was total at the time he gave such notice.” This rule gave rise to much inconvenience; and it is thus observed upon in 2 Kent's Commentaries, 10th edit. 437,—“The English rule is, that an abandonment, though rightly made, is not absolute, but it is liable to be controlled by subsequent events; and that, if the loss has ceased to be total before action, the abandonment becomes inoperative. The rule was suggested, but left undecided, in *Hamilton v. Mendes*, 2 Burr. 1198, but it was explicitly declared and settled in subsequent cases (c). The English rule, does not rest, however, without some distrust as to its solidity. It was much doubted in the House of Lords, by Lord Eldon, in *Smith v. Robertson*, 2 Dow, 474: every question as to the principle was expressly waived, and it has since been very much shaken” (d). But, in the United [829] States a different rule prevails: and it is well settled in American jurisprudence that an abandonment once rightfully made is binding and conclusive between the parties, and the rights flowing from it become vested rights, and are not to be divested by subsequent events. To escape the inconvenience of that rule, the parties here stipulate by their contract that the loss shall be paid for as a total loss thirty days after receipt of official news of capture or embargo. If the words had been,—“to pay a total loss on receipt of official news of capture or embargo,”—could any one have doubted that the right of action vested immediately on capture? As the clause stands, the assured are bound to wait the thirty days, at the expiration of which the right of action is vested. The underwriters seem to have been under an impression that they were conceding something by the words which follow,—“without waiting for condemnation.” The obvious intention was to secure to the assured something which otherwise they would not have, and to accelerate and secure the payment of a total loss irrespective of any proceeding of a prize-court. On the one hand, the clause binds the assured not to sue until the expiration of the thirty days; and, on the other, that the right of the assured shall be ascertained and fixed at the same period,—the obvious meaning of the parties

(a) Per Lord Mansfield in *Goss v. Withers*, 2 Burr. 694.

(b) Per Lord Mansfield in *Hamilton v. Mendes*, 2 Burr. 1212.

(c) *Bainbridge v. Neilson*, 10 East, 329, *Patterson v. Ritchie*, 4 M. & Selw. 393.

(d) See *Holdsworth v. Wise*, 7 B. & C. 794, 1 M. & R. 673, and *Naylor v. Taylor*, 9 B. & C. 718, 4 M. & R. 526.

being that, in order to render the underwriters liable, the embargo must continue in force for thirty days. Here, that event has happened, and the right of the assured to sue for a total loss was complete. The construction sought to be put upon the clause on the part of the defendants would make it a stipulation solely for the benefit of the assurers. It will be said that, as the ship was restored before the writ issued, the plaintiffs are in the same position as if this clause had not been inserted in the policy at all. [830] [Montague Smith, J. You say you had a vested right at the expiration of the thirty days, irrespective of what happened afterwards.] Precisely so. The object was to secure a certainty.

Mellish, Q. C., and Archibald, in support of the rule. The general rule of our insurance law unquestionably is that, if a vessel has been captured or detained, but before action brought she is restored, the loss ceases to be total, and becomes a partial loss only: the ground being, that insurance is a contract of indemnity, by which the assured is only entitled to be secured against the loss sustained at the time of action brought. The question is whether the words of this clause enure to alter that general rule of law, or whether they mean anything more than to indicate the time when a constructive loss is to become an absolute total loss. The construction contended for on the other side gives no meaning to the words "without waiting for condemnation." It is conceded that, if the ship had been restored *within* the thirty days, the loss would not have been total. Embargo is not, like capture, a total loss at the time it is put on. In Arnould, § 387, vol. 2, p. 1085, it is said: "The grounds of abandonment hitherto considered have been *capture*, *barratrous seizure* and *carrying away* of the ship by the crew (*Falkner v. Ritchie*, 2 M. & Selw. 290; *Brown v. Smith*, 1 Dow, 349), and *desertion* of the ship at sea by the crew, as the necessary and sole means of saving their lives (*Thornely v. Hebson*, 2 B. & Ald. 513; *Holdsworth v. Wise*, 7 B. & C. 794, 1 M. & R. 673): in all these cases we have seen that the assured has a vested right to give notice of abandonment on first hearing of the casualty, supposing the privation of his possession or control over the ship to have been once total; but that his right to recover as for a total loss [831] depends, in all cases alike, upon the state of the ship at the commencement of the action. Subject to the same limitations, there can be no doubt that *arrest*, *detention*, or *embargo* of the ship, whether by a hostile or friendly government, gives a *prima facie* right of abandonment in all cases where there is an apparent probability that the owner's loss of the free use and disposal of his ship, once total, by the arrest or embargo, may be of long, or at all events of very uncertain continuance. Thus, where the ships of an American merchant resident at the time of action brought in this country, had been seised and detained by the French government in their port of loading, it was held that, under a policy at and from such port, he might recover as for a total loss, upon due notice of abandonment, more especially as it appeared that the ships at the time of action brought were still detained, and had then been so for three years: *Rotch v. Edie*, 6 T. R. 413. Of course, if the arrest be only momentary in its duration, if it creates only a temporary obstruction of the voyage, without giving rise to any permanent loss of control over the ship, it cannot give any right to abandon." Here, the ship was never taken out of the possession of the captain. The repairs were going on all the time, and were not finished when the embargo was taken off. "Thus," continues Arnould, "where, on the occasion of a famine at Corfu, some Venetian cruisers, meeting at sea a Genoese ship laden with corn, carried her into Corfu, and, after taking out and paying for the corn, let the ship go free, this was decided in the Rota Court of Genoa to give no ground of abandonment to the assured on ship: *Roccus*, No. 60, cited by Emerigon, ch. xii., s. 30, vol. 1, p. 527 (edit. 1827): and see Boulay-Paty's Commentary, vol. 2, p. 219. So, where a British ship was detained eleven days by a British man-of-war, to prevent her [832] proceeding to a port where an embargo was laid on all British vessels, it was held that the assured on ship could not abandon on this ground: *Foster v. Christie*, 11 East, 205. In France, the assured is allowed to give notice of abandonment immediately after *capture*; but, in case of detention by arrest or *embargo*, he is obliged to wait before doing so for different periods fixed by the 187th article of the Code de Commerce. 'Other laws,' says Mr. Benecke (Principles of Indemnity, 349), 'make no distinction between capture and detention. Those of Prussia admit the abandonment when the liberation is uncertain or tedious. In Genoa and Leghorn, the assured may abandon when ship has been detained for three days. In Hamburg the assured cannot claim a total loss, until the ship or goods have been definitely condemned or irretriev-

ably lost: Benecke, 349. In this country no precise period is fixed: but *immediately* on hearing that his ship is detained by an embargo, the assured may give notice of abandonment, *subject, of course, as in all other like cases, to have his right to recover for a total loss defeated by the restoration of the ship before action brought.*" It is clear, therefore, that embargo is not like capture. The object of the special stipulation here is, to remove all uncertainty on that head: the intention was to treat the official intimation of capture or embargo as equivalent to a condemnation by a prize-court. In *Hamilton v. Mowles*, 2 Burr. 1210, Lord Mansfield says: "The plaintiff's demand is for an *indemnity*. His action, then, must be founded upon the *nature of his damnification*, as it really is at the time the action is brought. It is repugnant, upon a contract of *indemnity*, to recover as for a total loss, when the final event has decided that the damnification in truth is an *average*, or perhaps *no* loss at all. Whatever undoes the damnification, in whole or in part, must operate upon [833] the indemnity in the *same degree*. It is a contradiction in terms to bring an action for indemnity, when, upon the whole events, *no* damage has been sustained." In *Brotherton v. Barber*, 5 M. & Selw. 418, an insurance was effected on a ship from Rio de Janeiro to Liverpool, and the ship was captured, and afterwards recaptured, but, in the interval, the assured, having received intelligence of the capture, gave notice of abandonment, and after the re capture the ship arrived at Liverpool, having sustained a partial damage. In an action for a total loss, it was held that the assured could only recover for a partial loss. "The cases," said Lord Ellenborough, "which have been the subject of this day's observation have all taken root in the doctrine of Lord Mansfield in *Hamilton v. Mowles*, in which it is laid down that an assured can only demand an indemnity; and, consequently, his action must be founded upon the nature of his damnification as it really is at the time the action is brought. Now, if we inquire as to the nature of the injury sustained by this capture, followed by the re-capture, what was it at the time when this action was brought? It seems to me that the only injury was, a retardation of the voyage during the time the ship was in the enemy's custody, and was diverted from her course to Liverpool." Notwithstanding the special clause introduced into this policy, it is still a contract of indemnity only.

ERLE, C. J. I am of opinion that the plaintiffs are entitled to recover for a total loss. The only duty which is cast upon the court is that of putting a construction upon a few words in this policy. The risks intended to be covered by it are those which are excluded by the clause "warranted free from capture, seizure, and detention, or the consequences of any at-[834]-tempt thereof." Then comes the clause which we are called upon to construe,—“to pay a loss thirty days after receipt of official news of capture or embargo, without waiting for condemnation.” Leaving out the last four words “without waiting for condemnation,” the clause contains a clear and unambiguous stipulation that, when thirty days shall have elapsed after capture or embargo, the assured shall be entitled to claim for a total loss. Are we to reject the natural and proper construction, because we are unable to give any sensible meaning to the four words which follow? They may have been introduced out of abundant caution: but they cannot take away the clear effect of the other words. It seems that there was a particular risk: and, knowing the doubts which had been entertained as to the time for the commencement of the action, the parties contract that there shall be a vested right of action as for a total loss thirty days after the receipt of official news of capture or embargo. This was not a temporary embargo, but an embargo by reason of the declaration of war. I am clearly of opinion that, official news of the embargo having arrived more than thirty days, the plaintiffs were entitled to claim as for a total loss.

BYLES, J. I am of the same opinion. The words “to pay a total loss thirty days after receipt of official news of capture or embargo,” if they had stood alone, would have been perfectly clear. If any ambiguity or difficulty is created by the last four words of the clause, “without waiting for condemnation,” it is to be remembered that this is a policy against capture or embargo only. Mention is made of the sentence of a prize-court. But it still leaves the positive engagement that, after the expiration of thirty days, there shall be a total loss. In my opinion the contract is susceptible of no other construction.

[835] MONTAGUE SMITH, J. I am of the same opinion. We are bound to give a meaning to this special clause in the policy, “to pay a loss thirty days after receipt of official news of capture or embargo.” The proper construction seems to me to be,

that the assured had a vested right of action for a total loss upon the happening of the event contemplated. The event contemplated has happened. It is said that ambiguity is introduced by the last four words of the clause, "without waiting for condemnation." It may be that the parties intended to make the delay of thirty days equivalent to a condemnation. In any view the plaintiffs are clearly entitled to recover. The defendant's mode of reading the contract would deprive the plaintiffs of their right of action if the vessel should be restored. That would be a restriction of the rights of the assured which the parties have not expressed and clearly could not have intended. The best construction I can put upon the language of the policy is that the event has happened which was to entitle the plaintiffs to recover for a total loss.

Rule discharged.

FARNWORTH AND ANOTHER *v.* HYDE. Feb. 27th, 1865.

[S. C. in Exchequer Chamber, L. R. 2 C. P. 204.]

A vessel was stranded and frozen up in the St. Lawrence in the beginning of the Winter; and, on the breaking up of the ice in the Spring, she was found to be in imminent peril, and, after several surveys, both ship and cargo were sold under circumstances which the jury found to constitute a reasonable necessity for an immediate sale,—the expense of getting the ship afloat and repairing her, and of forwarding the cargo (timber) to its destination (Liverpool) being greater than their value when so respectively repaired and carried:—Held, that the underwriters on cargo were liable as for a total loss, without notice of abandonment; the information of the loss and of the sale having both reached the assured at the same time.

This was an action on a policy of insurance on timber per the ship "Avon" from Quebec to Liverpool. The plaintiffs claimed for a total loss.

[836] The cause was tried before Pigott, B., at the last Summer Assizes at Liverpool, when the following facts appeared in evidence:—The policy was effected on the 13th of November, 1861, and the ship sailed from Quebec, with a cargo of timber the value of which was 4300*l.*, on the 20th of November. On the 1st of December she anchored at Brandy-ports, on the river St. Lawrence. On the 2nd she took the ground and unshipped her rudder. Being in this disabled condition, the master telegraphed to Quebec for a steam-tug, but none was to be had. Eventually the ship settled on the rocks, and the ice closing round her she remained fast. On the 10th of December, the ship and cargo were surveyed by Coleman and Nesbitt, two surveyors, and again on the 16th of January, 1862, by the same persons. Finding the vessel much crushed and damaged, those gentlemen advised her sale for the benefit of all concerned. The surveys, however, being laid before Lloyd's surveyor at Quebec, he declared against the sale of the ship: consequently nothing was then done, except that the crew were discharged. The "Avon" lay in this state until the ice in the St. Lawrence began to break up. The ship and cargo were again surveyed on the 29th and 30th of April, and 1st and 2nd of May, when the surveyors advised the immediate sale of both. They were accordingly sold (separately) by auction on the 7th of May, and both ship and cargo were bought by the same persons, Messrs. Julien,—the former for 349*l.* 6*s.* 4*d.*, the latter for 550*l.* The cargo was afterwards taken out of her by the purchasers, and the ship got off and repaired: the former was ultimately sold for 1400*l.*; and latter (after being got off and repaired at an expense exceeding 3000*l.*) was sold at a considerable loss.

Notice to the assured of the sale and of the necessity for it reached them at the same time: consequently there was no notice of abandonment given.

[837] A great number of depositions were put in to shew the hopeless condition of the vessel at the time of the sale, and the impossibility by reason of the cost of rafting and carriage of getting the cargo forwarded profitably by any other vessel.

The defendant, who was an insurer for 150*l.*, had paid 34*l.* 10*s.* into court to cover an average loss estimated at 23 per cent.; and it was agreed that, if the loss was to be regarded as an average loss only, the amount should be settled by an average-stater out of court.

The following appeared upon the learned judge's notes as the estimate of the

expenses which would have been necessarily incurred in forwarding the cargo to its destination by another vessel :—

"Cost of landing	£350	0	0
Cost of rafting and conveyance to Quebec	700	0	0
Original freight to be re-incurred	1,556	0	0
Extra freight	700	0	0
Rising freight (a)	269	0	0
Deterioration, 12 per cent.	516	0	0
	<hr/> £4,091 0 0 <hr/>		

Deducting this sum of 4091l. from the estimated value of the cargo when arrived at Liverpool, 4300l., there remained a balance of 209l. on the cargo.

The learned judge put two questions to the jury,—first, whether the sale of the ship was justifiable. This, he told them, depended upon whether or not a prudent owner uninsured, being on the spot, would have sold her: as to which his judgment would be governed by the consideration whether if he got her off and repaired her, her value when repaired would [838] exceed the cost of the repairs. The second question was, whether or not it was right to sell the cargo. This, the learned Baron said would depend on whether or not the cargo could have been practically (to be understood in a commercial sense) carried to its destination: which, again, he said, would depend on whether, under all the circumstances, the cost of carrying the cargo, added to the amount of depreciation, would have left any appreciable margin of profit to the owners. As to the 209l., the learned judge said the jury might say whether anything was to be deducted for loss of quantity.

The jury answered the two questions above mentioned in the affirmative: and a verdict was thereupon entered for the plaintiffs, subject to leave reserved to the defendant to move to enter the verdict for him, or to reduce the damages.

E. James, Q. C., accordingly, in Michaelmas Term last, obtained a rule nisi to enter a verdict for the defendant, or a nonsuit, on the grounds, first, that there was no evidence of a total loss.—secondly, that there was no evidence of partial loss exceeding the sum paid into court: or to reduce the damages to the sum actually due as for a partial loss. He submitted that, the cargo remaining in specie, if it could be carried to its destination, the master was bound to forward it, and could not justify treating the loss as total, and selling the goods. He referred to *Knight v. Faith*, 15 Q. B. 649, and *The Great Indian Peninsula Railway Company v. Saunders*, 1 Best & Smith, 41, in error 2 Best & Smith, 266.

Brett, Q. C., Mellish, Q. C., and C. Russell, shewed cause. There was abundant evidence to shew that the ship was a total loss, and that the ship and cargo were [839] necessarily and properly sold: and, the property having passed by the sale to the purchasers, there was nothing that could be the subject of abandonment. In *Rosetto v. Gurney*, 11 C. B. 176, a cargo consisting of 3700 quarters of wheat, valued at 6400l., was insured on a voyage from Odessa to Liverpool. Shortly after she sailed, the vessel received sea-damage, and was compelled to put back to re-fit. The repairs and expenses amounted to 1800l., to raise which the master hypothecated the ship and cargo for 1850l. by a bottomry-bond payable ten days after the ship's arrival at the port of delivery. The ship again sailed, and, before her arrival, was wrecked, and carried into Cork by salvors, where the cargo being found to be considerably damaged, and the vessel not worth repairing, both were sold. The jury found that about one half of the wheat might have been dried, and conveyed from Cork to Liverpool, at a cost less than its value on its arrival at Liverpool. The vessel and cargo were taken possession of by the court of Admiralty (who directed their sale), by whom 450l. and costs were awarded to the salvors, and 1811l. and costs to the holders of the bottomry-bond. It was held that the evidence disclosed a partial loss only: that, in ascertaining whether or not it was practicable to send the whole or any part of the cargo to its port of destination in a marketable state, the jury were bound to take into considera-

(a) Which was explained to mean the difference in consequence of the rise in freights between the time of loading the "Avon" in November, 1861, and the re-opening of the navigation in the Spring of 1862.

tion the cost of unshipping the cargo, the cost of drying and warehousing it, the cost of transshipping it into a new bottom, and the cost of the difference of transit, if it could only be effected at a higher than the original rate of freight,—adding the salvage allowed in proportion to the value of the cargo saved; but not the debt and costs paid to the holders of the bottomry-bond: and that the loss would be total or partial as the aggregate of these exceeded or fell short [840] of the value of the cargo when delivered at the port of discharge. Jervis, C. J., in delivering the judgment of the court, lays down the law in conformity with all the modern cases, thus,—“As a general rule, where the whole or any part of a cargo is practically capable of being sent in a marketable state to its port of destination, the master cannot sell, nor can the assured recover as for a total loss. Whether the cargo can practically be forwarded to its port of destination, involves a consideration of all the circumstances of each particular case: and this word ‘practically,’ as explained by my Brother Maule, in *Moss v. Smith*, 9 C. B. 94, comprehends the condition upon which the difference between a total and partial loss depends. ‘In matters of business,’ says that learned judge, ‘a thing is commonly treated as *impossible*, when it is impracticable, and as *impracticable*, when it cannot be done without laying out more money than the thing is worth.’ Thus, if goods are reduced to such a state, by sea-damage, as to be worth nothing if sent on, the master may sell them, and the owner may recover as for a constructive total loss: *Parry v. Aberdeen*, 9 B. & C. 411, 4 M. & R. 343. So, if from sea-damage the goods cease to retain their original character, for instance, from the progress of putrefaction, the master is justified in selling, and the assured may recover a total loss: *Rowe v. Salvador*, 3 N. C. 266, 4 Scott, 1. On the other hand, if the damage is reparable, the loss is total or partial according to circumstances. If the damage cannot be repaired without laying out more money than the thing is worth, the reparation is impracticable, and therefore, as between the underwriters and the assured, impossible. If it can, the cargo is then practically capable of being sent in a marketable state to its port of destination, the master cannot sell it, and the assured cannot recover [841] as for a constructive total loss.” In the case of a ship, the test is whether a prudent owner uninsured, if on the spot, would have repaired her. In the case of goods, it would depend on the state of the market at the place where the misfortune happens. In all other respects, the question as to ship and cargo is exactly the same. *Twinner v. Ringrose*, 6 Exch. 263, is also an authority to shew that the loss would be total, if the timber was placed in such circumstances that, when brought home, it could not have been sold for an amount exceeding the expense of securing it and sending it to Liverpool. The question was put to the jury very much in the terms of *Rosetto v. Gurney*; and the direction is not now complained of. It may be that, if the assured had received in England information as to the position of the vessel and her danger, and the advice given by the surveyors on the spot, they would have been bound to give the underwriters notice of abandonment. But, when they received the information, there was nothing to abandon. The notice of the sale of the ship and cargo were received by them at the same time that they received notice of the situation of the ship. If the sale of the cargo was necessary and right at the time, it is a total loss. The only question is, was there any evidence for the jury that the sale was justifiable? It is clear that, to constitute a total loss, it is not necessary that there should be a total annihilation of either ship or cargo: *Cambridge v. Anderton*, 2 B. & C. 691, 4 D. & R. 203. [Erle, C. J. An urgent necessity for immediate sale dispenses with notice of abandonment.] In *1 Arnould on Insurance*, 241, it is said that, “where the original ship is disabled, and there exist no means of transshipment, or hope of any,—as, where the ship is cast away on some desolate and unfrequented coast,—the master might possibly be held impowered to sell the cargo if he had [842] the opportunity, even though it were neither sea-damaged nor of a perishable nature:” per Bayley, J., in *Hunt v. The Royal Exchange Assurance Company*, 5 M. & Selw. 56, 57. And see *Idle v. The Royal Exchange Assurance Company*, 8 Taunt. 755, 3 J. B. Moore, 114: see also 3 Brod. & Bingh. 151 (d). The question arose in *King v. Walker, in Error*, 3 Hurlst. & Colt. 209, where Willes, J., in delivering the judgment of the Exchequer Chamber, says: “The vessel set sail upon a voyage from Moulmein to Falmouth, and by perils of the seas was so much strained and seriously damaged, that she was compelled to put into Simon’s Bay, where she was surveyed, and it was ascertained that without an expenditure clearly beyond her value when repaired, she could not be made seaworthy or capable of continuing the voyage with cargo or in ballast; and it was doubtful, in

consequence of the prevalent swell, whether she would bear heaving down in the course of repair. The master took the opinion of the Attorney-General of the Cape, and acting under his advice to abandon and sell, sold the ship for the best price that could be obtained for her, 280l. gross.—124l. 7s 7d. net. In making this sale the master appears to have acted with perfect honesty, and in such a manner as a prudent owner uninsured would have acted. The plaintiffs further insisted that the sale was a necessary act, at least in this sense that, as expenses were running on, it was necessary to do something, and that no other rational course for the master to pursue can be suggested: see *Somes v. Sugruu*, 4 C. & P. 276; *Hunter v. Parker*, 7 M. & W. 322; and upon this the plaintiffs relied as shewing an actual total loss, of course with benefit of salvage, but without any necessity for abandonment; and they relied upon *Cambridge v. Anderton*, 2 B. & C. 691, 4 D. & R. 203, the judgments in *Moss v. Smith*, 9 C. B. 94 and that part of [843] the judgment in *Knight v. Faith*, 15 Q. B. 649, in which Lord Campbell excepted the case of a bona fide sale by the master: to which may be added the statement in Marshall on Insurance (by Serjt. Shee), p. 450. And it may not be easy to understand why notice of abandonment should be required in a case where the vessel cannot be made to sail except at an expense for repair which no rational man would incur, and is therefore properly and in a sense necessarily sold for the old materials, and the case of a sunken vessel, of which some portion of the materials may be recovered, but which cannot be raised except by an extravagant expenditure such as no rational man would incur."

Then, if this was not a total loss, there is abundant evidence of a partial loss greatly exceeding 23 per cent. The mode of ascertaining an average loss on goods when arrived is well fixed (a). But the question here is, what is the rule where the goods are justifiably sold at an intermediate port. It is submitted that it makes it at once a salvage loss, and that the correct rule is, to pay the value in the policy, less the salvage: see Benecke Pr. of Indemnity, 435; Stevens on Average, 5th edit. 83-85; Arnould on Insurance, vol. 2, § 360. In 2 Phillips on Insurance, § 1463, it is said,— "In case of a salvage loss, that is, in one where the insured damaged goods are sold at an intermediate port for the [844] benefit of the assured and his underwriter, the adjustment is precisely the same in respect of those goods as it is in a total loss. The voyage is broken up in respect of those goods, and the underwriter is liable to pay to the assured the amount at which they are insured, whether under an open or a valued policy, and the salvage, that is, the net proceeds of the goods, subject to all necessary charges, is to be credited to the underwriter." The sum paid into court here is only on the amount of deterioration. The plaintiffs claim to be entitled to all the expenses and the increased freight they must have paid to bring the goods on to their destination.

E. James, Q. C., and T. Jones, in support of the rule. The plaintiffs are not entitled to recover either in respect of a total loss, or of an average loss beyond the sum paid into court. It is not denied on the part of the plaintiffs that notice of abandonment is necessary in the case of a constructive total loss whether of ship or of goods: *Fleming v. Smith*, 1 House of Lords Cases, 513. No notice of abandonment was given here. If there could be a total loss, it was clearly constructive only, and therefore the underwriters were entitled to notice. There was no actual total loss of the ship: and, even if there was, it does not follow that there was an actual total loss of the cargo. Assuming that the master is justified in selling the cargo, where the ship is wrecked and the goods cannot in a mercantile sense be forwarded to their port of destination, the evidence here failed to establish that state of things. The goods being imperishable, they must be sent on if it be possible. It appears that the vessel took the ground in December, 1861. On the face of the surveys then made, there is nothing to shew an actual total loss. Indeed, the plaintiffs themselves did not so treat [845] it. There may be said to be an actual total loss of the ship, when she founders or goes

(a) "A particular average on goods delivered at the port of destination, is adjusted on the gross proceeds or market value there, and is the same proportion of the value of the goods in the policy, whether open or valued, as the deficiency of the gross market value of the damaged goods compared to those of the sound is of the gross market value of the latter. That is to say, if the invoice-price of the damaged goods in an open policy, or their value in a valued policy, is \$1000, and they are sold at \$6000 at the port of destination, and the same goods sound would have been worth there \$1200, the loss is one half, or \$500."

on shore, and by the violence of the winds and waves is broken up, or (as in *Cambridge v. Auberton*, 2 B. & C 691, 4 D. & R. 203) where she is upon a rock incapable of being got off and repaired. But, if the vessel retains the form and character of a ship, and is capable of being repaired, then arises the question whether or not the expense of the repairs will exceed the value of the ship when repaired. If she be repairable, there is no actual total loss: and, if repairable only at an expense exceeding her value when repaired, there is a constructive total loss: but there must be notice of abandonment, if only for form's sake. It was because the surveyors here found the vessel in such a state that the cost of getting her afloat and repairing her would exceed her value, that they recommended a sale. But that applied to the ship only. All the evidence points to a constructive total loss. The thing remaining in specie, capable of being carried on, it was the duty of the assured to give the underwriters notice of abandonment, so that they might exercise their own judgment. [Byles, J. There is a great difference between the case of a vessel constructively lost, in this sense that she is incapable of being repaired save at an expense which would exceed her value when repaired, and that of a vessel sold, and justifiably sold: may not the latter be a case of actual total loss?] It has never been so laid down. It has always been understood that abandonment is necessary to vest in the underwriters all the property which before was in the assured. "The underwriter," says Lord Abinger, in delivering the judgment of the court of error in *Roux v. Salvador*, 4 Scott, 1, 32, 3 N. C 266, 285, "engages that the object of the assurance shall arrive in safety at its destined termination. If, in the progress of the [846] voyage, it becomes totally destroyed or annihilated, or if it be placed, by reason of the perils against which he insures, in such a position that it is wholly out of the power of the assured or of the underwriter to procure its arrival, he is bound by the very letter of his contract to pay the sum insured. But there are intermediate cases. There may be a capture, which, though *prima facie* a total loss, may be followed by a re-capture, which would re-vest the property in the assured. There may be a forcible detention (a), which may speedily terminate, or may last so long as to end in the impossibility of bringing the ship or the goods to their destination. There may be some other peril which renders the ship unavigable, without any reasonable hope of repair, or by which the goods are partly lost, or so damaged that they are not worth the expense of bringing them, or what remains of them, to their destination. In all these or any similar cases, if a prudent man not insured would decline any further expense in prosecuting an adventure the termination of which will probably never be successfully accomplished, a party insured may, for his own benefit, as well as for that of the underwriter, treat the case as one of a total loss, and demand the sum insured. But, if he elects to do this, as the thing insured, or a portion of it, still exists, and is vested in him, the very principle of the indemnity requires that he should make a cession of all his right to the recovery of it, and that too within a reasonable time after he receives the intelligence of the accident, that the underwriter may be entitled to all the benefit of what may still be of any value, and that he may if he pleases take measures, at his own cost, for realizing or increasing that value." To make an actual total loss of goods, the specific character of [847] the article must be gone. "If," says Lord Abinger, in the case above referred to, "the goods are of an imperishable nature, if the assured become possessed of or can have the control over them, if they still have an opportunity of sending them to their destination, the mere retardation of their arrival at their original port may be of no prejudice to them beyond the expense of re-shipment in another vessel. In such a case, the loss can be but a partial loss, and must be so deemed, even though the assured should, for some real or supposed advantage to themselves, elect to sell the goods where they have been landed, instead of taking measures to transmit them to their original destination. But, if the goods, once damaged by the perils of the sea, and necessarily landed before the termination of the voyage, are, by reason of that damage, in such a state, though the species be not utterly destroyed, that they cannot with safety be re-shipped into the same or any other vessel; if it be certain that, before the termination of the original voyage, the species itself would disappear, and the goods assume a new form, losing all their original character; if, though imperishable, they are in the hands of strangers, not under the control of the assured; if by any circumstances over which he has no control they can never, or within no assignable period, be brought to their original destination: in any of these cases, the

(a) See *Fowler v. The English and Scottish Marine Insurance Company*, ante, p. 818.

circumstance of their existing in specie at that forced determination of the risk is of no importance. The loss is in its nature total to him who has no means of recovering his goods, whether his inability arises from their annihilation or from any other insuperable obstacle." "In the case before us the jury have found that the hides were so far damaged by a peril of the sea, that they never could have arrived in the form of hides. By the process of fermentation and putrefaction which had com-[848]-menced, a total destruction of them before their arrival at their port of destination became as inevitable as if they had been cast into the sea or consumed by fire. Their destruction not being consummated at the time they were taken out of the vessel, they became in that state a salvage for the benefit of the party who was to sustain the loss, and were accordingly sold: and the facts of the loss and the sale were made known at the same time to the assured. Neither he nor the underwriters could at that time exercise any control over them, or by any interference alter the consequences. It appears to us, therefore, that this was not the case of what has been called a *constructive* loss, but of an absolute total loss of the goods; they never could arrive: and, at the same moment when the intelligence of the loss arrived, all speculation was at an end." The whole ground upon which it was held that no abandonment was necessary there was, that the goods were in such a state that if transhipped they must have lost the character of hides before they could have reached their destination. In *Tunno v. Edwards*, 12 East, 488, Lord Ellenborough asks,—“Is it not an established and familiar rule of insurance law that, where the *thing insured subsists in specie, and there is a chance of its recovery*, in order to make it a total loss there must be an abandonment?” The assured are bound to abandon as soon as they receive intelligence of a loss: *Allwood v. Henckell*, Marsh. Ins. (by Shee) 280, Park, Ins. (by Hildyard) 399. In *Hodgson v. Blakiston*, Marsh. Ins. (by Shee) 281, n., Park, Ins. (by Hildyard) 400 (k), it was held that a notice of abandonment was necessary, though the ship and cargo had been sold and converted into money when the notice of the loss was received. All the authorities are considered in *Knight v. Faith*, 15 Q. B. 649. There, a ship insured for 1000l. for a year ending the 23rd of September, was stranded, got [849] off, and brought into the harbour of Santa Cruz on the 16th of September. She remained there with her crew on board till the middle of October, and, during that time, was pumped, and her cargo was discharged into other vessels. Being then beached and surveyed, she was found so much damaged by the accident that the necessary repairs could not be done at Santa Cruz, there being no dock-yard, workmen, or materials there; nor could she be taken to any port where she could prudently have been repaired. Afterwards, in October, the master (who was a part-owner and interested in the policy) sold her for the benefit of those whom it might concern; and she fetched 72l. No notice of abandonment was given. A special case, in an action against the underwriters, set forth these facts, stating also that the vessel “received her death blow” by the said perils of the sea on the 16th of September, but that the damage was not ascertained till the 24th. It was held that the sale by the master did not, nor did the other facts, constitute an actual total loss; and that, if there was a constructive total loss which would have entitled the assured to abandon, they could not recover for such loss, not having given notice of abandonment. [Keating, J. Does not Lord Campbell in that case except the case of a lawful sale from the necessity of a notice of abandonment?] His Lordship is referring to a totally different subject: he was dealing with the case of the sale of a ship by the master, who was also part owner. “Whether,” he says, “notice of abandonment may be dispensed with where there has lawfully been a sale by the master, we are not now called upon to decide. Where she is reduced to a mere wreck, the solution of this question may be clear enough. Where she still retains the character of a ship, it may be attended with difficulty: but here we are of opinion that, as against the insurers, the sale is [850] not shewn to be lawful. It must be borne in mind that she remained in the character of a ship, capable of being repaired if there had been the means of repairing her at Santa Cruz; and that she might have been sent to other places where she might have been repaired, although not prudently. Could the master, who is a part-owner, one of the assured, and a plaintiff on this record, under these circumstances sell the ship, and, without notice of abandonment, render the insurers liable for a total loss? The master’s right to sell arises only in a case of necessity, which must be clearly shewn, with full proof that everything was done *optimâ fide*, and for the real benefit of all concerned: case of *The Fanny and*

Elmira, Edwards Adm. R. 117, *Cannan v. Meaburn*, 1 Bingh. 243, 8 J. B. Moore, 127. In *Idle v. The Royal Exchange Assurance Company*, 8 Taunt. 755, 3 J. B. Moore, 115, where the jury found that the master, in selling the ship, had acted 'fairly and bonâ fide for the benefit of all concerned, and that the sale was honestly, fairly, and properly conducted,' this court, upon a writ of error from the court of Common Pleas (see 3 Brod. & B 151, n.), held that the necessity and legality of the sale was not to be inferred from this finding. In *Robertson v. Clarke*, 1 Bingh. 445, 8 J. B. Moore, 622, where a sale by the master was upheld, Lord Gifford said: 'This principle may be clearly laid down, that a sale can only be permitted in case of urgent necessity, that it must be bonâ fide for the benefit of all concerned, and must be strictly watched.'" The substance of the decision in *Knight v. Faith* is that, unless the ship is at the bottom of the sea, or in a like irrecoverable condition, or that the goods are irreclaimably gone, notice of abandonment must be given. Here, the goods existed in specie, and were likely so to remain. Speaking of the right of the master to sell [851] the ship where her repair is impracticable or to be affected only at a cost exceeding her value when repaired, Mr. Arnould says,—vol. 2, p. 1090 (2nd edit.),—"It must, however, in all these cases, be most carefully borne in mind that the sole point to be attended to in ascertaining whether the circumstances are such as to entitle the assured to abandon and recover as for a total loss is, *not the mere fact of a sale by the master, but the state to which the ship was reduced by the perils insured against, which justified that sale on the ground of necessity.* The mere fact of sale itself, irrespective of the state of the ship, which made it necessary, can give the assured no right to abandon: 'there is no such head of insurance law as loss by sale,'—per Bayley, J., in *Gardner v. Salvador*, 1 M. & Rob. 117. The assured in fact abandons, as it is well expressed by Mr. Phillips, 'not because the sale has given the right, but because the events which induced the sale had occasioned a total loss:' 2 Phillips on Insurance, p. 296." At p. 1034, Mr. Arnould refers to *Bell v. Nixon*, Holt, N. P. C 423. "A ship, after sailing sea-worthy on her voyage from Hull to Quebec, was overtaken by bad weather, and obliged to run into Limerick, which then had no docks fit for taking in or repairing a ship of her size. On survey, she appeared much damaged, and, as the agents of the assured there conceived it to be impossible to remove her to any other port for repairs, they had her re-surveyed, condemned, and broken up where she lay, as the best course for all concerned. No notice of abandonment having been given, it was held that the assured could not recover as for a total loss. Dallas, C. J., after admitting that there were cases in which the assured may claim a total loss without abandonment, added, 'But, if the case be doubtful, the assured ought not to take upon himself to determine for the underwriters, to break up the ship, and call [852] upon them for a total loss. The ship is proved to have been in that condition that it was necessary to have a survey. *She was not a wreck: her timbers were together: she existed as a ship specifically, both when she was surveyed and when she was sold.*' Mr. Phillips, remarking on this case (vol. 2, p. 234), observes, 'The formal abandonment of a ship that has been broken up, and the pieces sold as mere materials or fuel, seems about as idle ceremony as can be well conceived.' But the decision seems correct in principle, when the circumstances of the case are attended to: *the ship remained a ship till broken up by the assured: her destruction as a ship was, therefore, not immediately caused by the perils insured against; it was the work, not of the winds and waves, but of the assured himself, who ought, by notice of abandonment, to have given the underwriters the option of taking to the ship as she stood before being broken up, and making what they could of her.*" At p. 1046, the learned author says: "*It must very carefully be borne in mind that no degree of loss in bulk, deterioration in quality, or depreciation in value, will entitle the assured to put an end to the adventure, and recover a total loss, without notice of abandonment, on goods warranted free of average, unless such damages involves their total destruction in specie either actual or inevitable.* If the commodity can be forwarded to its port of destination with any reasonable prospect of arriving there *in specie, however damaged*, the assured who has failed to send it on, or sold it at an intermediate port, cannot recover as for a total loss, at all events without notice of abandonment:"—and he refers to *Anderson v. The Royal Exchange Assurance Company*, 7 East, 58. If that be a correct exposition of the rule,—and there seems no reason to doubt it,—there is no ground for saying that the timber here was totally lost. Although the vessel [853] might have been totally lost, the timber still existed in specie, and might have been sent on at a cost less than its value, and, if so, it was the duty of the master to send it on, and the expense incurred

in so doing would be an average loss. The assured are entitled to expenses actually incurred, not to contingent expenses: see *Stewart v. Steele*, 5 Scott, N. R. 927; *The Great Indian Peninsula Railway Company v. Saunders*, 1 Best & Smith, 41, (in error) 2 Best & Smith, 266, cited in *Booth v. Gair*, 15 C. B. (N. S.) 296.

Cur. adv. vult.

MONTAGUE SMITH, J., now delivered the judgment of the majority of the court (a), as follows:—

This action was on a policy on timber in the ship “Avon” from Quebec to Liverpool. The “Avon” was frozen up in her passage down the St. Lawrence; and, after survey, the ship and the cargo were sold by the master to one purchaser, by separate sales.

At the trial, the jury found in effect,—first, that the sale of the ship was justified on the ground that the cost of the repairs would have been greater than the value of the ship when repaired, and, secondly, that it was right to sell the cargo, because it was not practically possible in a mercantile sense to have carried it to its destination, that is to say, because the cost of bringing the cargo, added to the amount of depreciation, would not have left any appreciable margin of profit to the owners.

Upon these findings, the verdict was entered for the plaintiffs for a total loss: and the rule nisi to alter that verdict, and enter it for a partial loss, on the ground that there was no evidence on which the finding of the total loss could be supported, is now to be disposed of.

[854] Upon the first question, relating to the ship, we have to say whether there was evidence to support the finding that the sale was justifiable: and our answer is in the affirmative.

We do not propose to state the evidence at length: but, taking the report of the surveyors on the 2nd of May, and the statement of Julien, who purchased on the 7th of May, we think there was evidence for the jury that the ship was in imminent danger of destruction, and that a sale appeared to afford the only reasonable hope of saving any part of her value.

Then, upon the second question, relating to the cargo, we have to say whether there was evidence to support the finding that it was right to sell it, because the cost of bringing the whole or any part of it to its destination would have exceeded the value thereof there: and our answer is again in the affirmative.

We are not called on to say on which side in our opinion the balance of evidence inclines. If there was reasonable evidence for the jury, the verdict is to stand: and we think there was.

We have been embarrassed with the estimate appended in sequel to the judge's notes, by which it appears that a comparison of the supposed cost of carrying the timber to its destination with the supposed value thereof there, shewed a possible profit of 209l. That estimate, taken alone, seems at first sight inconsistent with the finding in respect of the cargo: but, as this estimate is followed by the note that the jury might say if anything is to be deducted for loss of quantity, we consider that there was evidence to the effect that, in the process of saving the timber, there would probably be a loss of 25 per cent. in quantity; and, although it might follow that, in the case of a diminution of the quantity of timber, a deduction should be made from some of the estimated expenses, [855] such as freight, in the like proportion, yet some of the expenses might be a constant quantity, subject to no deduction, such as the expense of bringing labourers to make rafts. All this was for the jury: and we cannot say that there was not evidence to support the verdict.

Then, upon the facts so found by the jury, is the plaintiff entitled to recover for a total loss? As the cost of carrying the cargo to its destination would have been greater than its value on arrival, it is not disputed that there would have been a constructive total loss, if notice of abandonment had been given: see *Rosetto v. Gurney*, 11 C. B. 176; *Reimer v. Ringrose*, 6 Exch. 263. But no such notice was given; and we are therefore to say what is the legal effect of this sale so found by the jury to have been right and necessary. We answer that such sale supervening on the existing state of things was an actual total loss. A right sale passes the property; and, when the property is passed from the assured by reason and in consequence of a peril insured against, the cargo is actually lost to him, as much as if it was destroyed. We are

(a) The case was argued before Erle, C. J., Byles, J., Keating, J., and Montague Smith, J.

aware that the interest of the underwriter may at times be sacrificed by a sale where the ship or the cargo might have been saved wholly or partially if notice of abandonment had been given. But we are also aware that, if a right sale, such as was here proved, is not held to be an actual total loss, it would be for the interest of the assured, where a notice of abandonment would make a constructive total loss, to give a notice of abandonment, and leave the ship or cargo to perish unsold, and so the benefit of salvage from a sale would be lost by reason of the delay required for notice of abandonment. It must rest with the tribunal that has to deal with the questions of fact to guard against fraud and wrong: and the sale by the master ought not to be [856] found right or valid, unless it was the best that could be done for the interest of those concerned, with reference to all the circumstances, including the time and manner of sale, and so in a mercantile sense necessary.

The opposing considerations for and against requiring notice of abandonment where the property insured exists in specie, are stated in *Roux v. Salvador*, 3 N. C. 266, 4 Scott, 1, and *Knight v. Faith*, 15 Q. B. 649, 657. In *Roux v. Salvador*, the policy was on hides from Valparaiso to Bourdeaux. The ship was forced into Rio, and decomposition of the hides began by reason of a peril of the sea; and, because it was found not to be practicable to carry them to their destination, on account of the expected progress of decomposition, they were sold at Rio; and the loss was held to be total, although there was no notice of abandonment. The judgment is that of a court of error. It is powerful in reasoning and in learning: and, although it relates to a cargo of perishable goods in the course of decomposition, yet it extends to all cases where the adventure is brought to an end by a peril, and the goods are taken out of the power of the assured in the course of their voyage either by physical laws working decomposition, or by political laws working detention and sale by a court, or by circumstances of distress and danger creating what may be described as a mercantile necessity for a sale.

The present case is an example of such circumstances where a stranded ship was in danger of falling to pieces, and the expense and risk of rafting the timber and re-loading it on transshipment, and carrying it to its destination, was supposed to exceed the value of the cargo when there. Such a case seems expressly included in the part of the judgment in *Roux v. Salvador* (3 N. C. p. 279), where it is said that, "If goods [857] damaged by the perils of the sea, and necessarily landed before the termination of the voyage, are, in the case of perishable goods, in such a state that they cannot in safety be re-shipped: if, though imperishable, they are in the hands of strangers, not under the control of the assured; if, by any circumstances over which he has no control, they *can* never be brought to their original destination,—in any of these cases, the circumstances of their existing in specie at that forced termination of the risk, is of no importance: the loss is in its nature total to him who has no means of recovering his goods, whether his inability arises from their annihilation or other insuperable necessity."

The judgment in *Knight v. Faith*, 15 Q. B. 657, accords with *Roux v. Salvador* in holding that there may be a total loss, without abandonment, when there has been a right sale caused by urgent necessity, with full proof that everything was done *optimâ fide* and for the real benefit of all concerned.

There is an apparent difference of opinion in these two decisions as to the degree of imminent danger which should be held to be such urgent necessity as would justify a sale. But the sufficiency of the degree of danger is within the province of the jury; and it is useless to attempt to define a degree without a standard for measure. Lord Campbell observes on the danger of fraud; but those observations are relevant to the caution required from the jury, not to the law of the case, when the necessity for the sale has been properly found. In *King v. Walker*, 33 Law J., Exch. 327, it was not necessary to decide that a valid sale from necessity was an actual total loss, without any notice of abandonment, because it was there held that there *was* notice of abandonment. But the court clearly sanctioned the rational principles respecting [858] the effect of a valid sale from necessity laid down in *Roux v. Salvador*, saying, "it may not be easy to understand why notice of abandonment should be required in a case where the vessel cannot be made to sail except at an expense for repair which no reasonable man would incur, and is therefore properly, and in a sense necessarily, sold for the old materials."

In these three cases, all the authorities relating to abandonment are fully reviewed;

and no useful object would be gained in repeating the review. We consider that we act upon the principles laid down in *Roux v. Salvador*, in holding that the jury finding that the sale was right under the circumstances in evidence before them, found that there was an actual total loss, with benefit of salvage, although the cargo existed in specie at the time of the sale, and there was no notice of abandonment.

The above is the judgment of the Chief Justice and my Brother Keating and myself. My Brother Byles assents to it, subject to the remarks upon the preliminary point, which I am about to read.

BYLES, J. I agree with my Lord and the rest of the court that, if the cargo had been sold by the captain of the vessel, because the expense of forwarding it to its destination would have *exceeded* its value when so forwarded, it was rightly sold, that a sale under such circumstances would have changed the property, and that there would then have been not merely a *constructive* but an *actual* total loss of the timber. I also agree that, in the case of such an *actual* total loss, no notice of abandonment is necessary. But, in all cases of alleged constructive loss, where the captain takes upon himself to sell the ship, and still more so where he sells the cargo, the necessity of so doing ought to be strictly proved, and the jury are not at liberty to act on conjecture.

[859] It is plain, on the figures appended to the report of the learned judge, that the expenses of bringing the cargo to Liverpool would not have equalled the value of the cargo, when brought there in its integrity, by the sum of £09l. The jury have found that there would have been a diminution of the *quantity* of the timber to this extent, and therefore that the expenses would have equalled the value of the diminished cargo which alone could have been actually brought home. But I can find no evidence on the judge's notes to support this amount of deduction from the original quantity of the cargo. It may be that there would be some deduction, but it may also be that, if any, there would be a very much smaller deduction.

Again, on the assumption that such a diminution of quantity was proved, the expenses of bringing home the cargo should be calculated on the diminished quantity: but they are all calculated on the larger quantity of timber contained in the whole original cargo. It is possible (but I see no evidence to prove it) that the expenses of landing and rafting would be the same, whether any portion of the cargo were lost or not. This might depend on the period at which the loss of quantity took place, of which there is no evidence that I am aware of. But, assuming the landing and rafting to be constant quantities, yet the freight both original and additional is at so much per load, and is calculated by the assured on the quantity contained in the entire cargo. But the freight actually payable for sending a smaller quantity would be less. Therefore, in calculating the expense of sending the diminished cargo home, too much is charged for freight. But any deduction from the charge for freight makes the sale unlawful, and indeed destroys the claim for a constructive total loss: for it does not appear on the figures that, even if the freight could be [860] charged on the original quantity, it would do more than bring the expenses of sending home the cargo up to the value of the cargo so sent home: no excess of charge beyond the value of the cargo is shewn.

I much regret that, on this preliminary question, I am unable to concur with the rest of the court. But, though I fear I must be in error, I do not feel at liberty to yield my opinion: for, if it be correct, the plaintiff will still be entitled to hold his verdict to the extent of a partial loss, the amount of which loss is by agreement to be settled by component parties. And, on a careful consideration of the evidence, I feel strongly that this result would be more likely to advance the real justice of the case than the verdict as it now stands.

Rule discharged (a).

(a) An appeal is pending, which will in all probability be heard at the sittings in error after Michaelmas Term next.

COMMON BENCH REPORTS. New Series. CASES
 ARGUED and DETERMINED in the COURT of
 COMMON PLEAS, and in the EXCHEQUER
 CHAMBER, in Trinity Term and Vacation, 1865.
 By JOHN SCOTT, Esq., of the Inner Temple,
 Barrister-at-Law. Vol. XIX. London, 1866.

[1] CASES ARGUED AND DETERMINED IN THE COURT OF COMMON PLEAS, IN
 EASTER TERM, IN THE TWENTY-EIGHTH YEAR OF THE REIGN OF VICTORIA.

The Judges who usually sat in banco in this term, were,—Erle, C. J., Willes, J.,
 Byles, J., and Montague Smith, J.

HEARD AND ANOTHER *v.* HOLMAN AND ANOTHER. May 2nd, 1865.

[S. C. 34 L. J. C. P. 239 ; 12 L. T. 455 ; 11 Jur. N. S. 544 ; 13 W. R. 745. Referred
 to, *The Argentino*, 1888-89, 13 P. D. 203 ; 14 App. Cas. 519.]

The ship A, insured in a club (of which the defendants were managers) by one of
 the conditions of which it was provided that, "in case of damage or loss by contact
 which any ship in this association may do to others, this society shall be liable to
 contribute its proportion, but not beyond the sum insured, and also law costs given
 in any suit or action defended by the previous consent in writing of the managers
 upon this policy," ran into and damaged the plaintiffs' ship B. The owners of
 the injured vessel caused the ship A. to be arrested under process from the
 Admiralty court ; whereupon her owner and the defendants, in order to procure her
 release, agreed that they or one of them would pay them "the amount of damage
 which *the said ship B.* has received from the said collision, and also the costs of
 the proceedings in the court of Admiralty against the ship,"—to be ascertained, in
 case of dispute, by Mr. Richards, the average-stater :—Held, that "the ship B."
 meant "the owners of the ship B.," and that the plaintiffs were entitled to recover
 the same measure of damages under the agreement that they would have been entitled
 to in the proceedings in the Admiralty court, viz. the expenses of repairing their
 vessel, the costs incurred in the arrest and detention of the A., and the loss of freight
 during the time the B.'s repairs were going on.

This was an action for the breach of an agreement.

The first count of the declaration stated that, before and at the time of the making
 of the agreement thereafter mentioned, the plaintiffs were the owners of a certain
 ship or vessel called the "Westward Ho!" and that one C. T. Mitcheson was the
 owner of a certain [2] other ship or vessel called the "Grenfells," and the said C. T.
 Mitcheson had effected with the defendants, as representing the Western Insurance
 Club of Topsham, and also with the Sunderland Insurance Club, represented by
 the said C. T. Mitcheson himself, insurances upon the said ship the "Grenfells,"
 including the usual collision clause, whereby the said insurance clubs became insurers
 to the said C. T. Mitcheson against the damages which he might become liable to
 by reason of the said ship the "Grenfells" running down and coming into collision

with and injuring any other ship: That the said ship the "Grenfells" had during the continuance of the said insurance run down and come into collision with and injured the said ship of the plaintiffs called the "Westward Ho!" and the said ship of the plaintiffs called the "Grenfells" had been thereupon arrested, and then continued under arrest at the suit of the plaintiffs, by process out of the high court of Admiralty: That an agreement was thereupon mutually entered into between the plaintiffs and the defendants and the said C. T. Mitcheson in the words and figures following, that is to say, "An agreement made the 13th day of March, 1863, between George Heard, of Biddeford, in the county of Devon, ship-owner, on behalf of himself and William Heard, his co-partner (under the firm of Heard, Brothers), of the first part, Charles Turner Mitcheson, of Sunderland, in the county of Durham, ship-owner, of the second part, John Holman & Sons, of Topsham, in the said county of Devon, merchants, on behalf of the Western Insurance Club of Topsham aforesaid, of the third part, and Charles Turner Mitcheson, of Sunderland aforesaid, on behalf of the Sunderland Insurance Club, of the fourth part: Whereas, the said Heard, Brothers, are the owners of the ship "Westward Ho!" and the said C. T. Mitcheson the owner of the ship "Grenfells": and, the said ship "Grenfells" [3] having run into and injured the said ship "Westward Ho!" the said ship "Grenfells" has been arrested and now continues under arrest: And whereas, on the application of the said parties of the second, third, and fourth parts, the said Messrs. Heard, Brothers, have agreed to release the said ship "Grenfells" on the terms and conditions hereinafter appearing: Now, these presents witness, and the parties to these presents mutually agree with each other, as follows,—the said Messrs. Heard, Brothers, shall forthwith release the said ship "Grenfells" from the said arrest, and, in consideration thereof, the said parties of the second, third, and fourth parts, some or one of them, shall forthwith pay or cause to be paid to the said Messrs. Heard, Brothers, *the amount of damage which the said ship "Westward Ho!" has received from the said collision*, and that the whole of the said parties of the second, third, and fourth parts shall be and are hereby declared to be, in proportion to their respective interests, liable to pay the same amount of damages, and also the costs of the proceedings in the court of Admiralty against the ship: And it is further agreed between the said several parties hereto, that, if any dispute or difference shall arise between the said Messrs. Heard, Brothers, and the said other parties hereto, or any or either of them, with respect to the amount of damages claimed by the said Messrs. Heard, Brothers, by reason of the said collision, the said amount shall be referred to the award and determination of W. Richards, Esq., of New City Chambers, Bishopsgate Street, London, whose decision shall be final and conclusive between the parties: and any party hereto may make these presents a rule of any one of Her Majesty's courts at Westminster:" Averment that, afterwards the said plaintiffs did release the said ship the "Grenfells," according to the said agreement: and that a dispute then arose [4] between the plaintiffs and the defendants and the said other party, as to the amount of damages claimed by the plaintiffs by reason of the said collision, and thereupon the said amount was referred, according to the terms of the said agreement, to the award and determination of the said William Richards, who thereupon, after entertaining the said matter so referred to him, and hearing the various allegations and evidence of the parties, duly made and published his award of and concerning the matter so referred to him, according to the terms of the said agreement, and thereupon awarded and determined that the amount of damages which the plaintiffs were entitled to be paid by reason of the said collision within the true intent and meaning of the said agreement was a certain large sum of money to wit, the sum of 2073l. 0s. 10d.: That the said costs of the proceedings in the court of Admiralty amounted to a large sum of money, to wit, the sum of 14l. 15s. 1d.: That all conditions precedent were performed and fulfilled necessary to entitle the plaintiffs to be paid by the defendants a large sum of money, being a proportionate part of the said several sums of money for which the defendants were liable in proportion to their said interests, and according to the terms of the said agreement, amounting in the whole to the sum of 2092l. 15s. 11d.: and that, although the defendants had paid to the plaintiffs part of the said sum, yet they had neglected to pay the said residue, amounting to 519l. 1s. 2d., which still remained due and unpaid.

There was also a count for money had and received, and money found due upon accounts stated.

The cause was tried before Erle, C. J., at the sittings in London after Michaelmas

Term last. The facts were as follows:—The plaintiffs were the owners of a ship called the “Westward Ho!” The defendants were [5] the managers of an insurance club at Topsham, in the county of Devon, in which a vessel called the “Grenfells,” owned by one C. T. Mitcheson, was insured for 2000*l.* by a policy dated the 30th of March, 1862, subject, amongst others, to the following condition:—

“XVII. That, in case of damage or loss by contact which any ship in this association may do to others, this society shall be liable to contribute its proportion, but not beyond the sum insured, and also law costs given in any suit or action defended by the previous consent in writing of the managers upon this policy; but in no case shall this society pay for loss or damage to one or both ships more than the sum insured on this policy.”

Mitcheson's vessel the “Grenfells,” on the 21st of February, 1863, ran down the plaintiffs' vessel “Westward Ho!” off Beachey Head, whilst on a voyage to Bourdeaux. The former vessel was compelled to put back; and the owners of the “Westward Ho!” hearing of the collision, caused the “Grenfells” to be arrested on process out of the Admiralty court. If the “Grenfells” was liable for this collision, the defendants, by the terms of his policy, were bound to recoup Mitcheson, her owner. Accordingly, Mitcheson, being desirous of procuring the release of the “Grenfells,” called upon the defendants to make some arrangement with the plaintiffs for that purpose: and in the result the agreement of the 13th of March, 1863, set out in the declaration, was entered into; and at the request of Mitcheson a sum of 1500*l.* was paid by the defendants to the plaintiffs, without prejudice to the rights of the respective parties. The plaintiffs claiming to be entitled, in addition to the cost of repairs rendered necessary by the collision, to damages for the loss of the use of their ship whilst the repairs were going on, and the defendants and Mitcheson disputing their right thereto, the [6] matter was pursuant to the stipulation in the agreement referred to Mr. Richards, who on the 24th of March made his award, finding that 1337*l.* 13*s.* 6*d.* was the amount of the damage which the said ship “Westward Ho!” had received from the said collision; and, reciting in his award that the said Messrs. Heard, Brothers, having, in addition to the claim for damages which the said ship “Westward Ho!” had received from the said collision, made a claim for further damages by reason of such collision, such further damages being in respect of the detention of the “Westward Ho!” during the time the damages sustained by the said ship by the collision were being repaired, and otherwise by reason of the said collision,—such further damages not being any portion of the aforesaid damages which the said ship “Westward Ho!” had received from the said collision,—he further awarded that the sum of 735*l.* 7*s.* 4*d.* was the amount of such further damages so sustained by the said Messrs. Heard, Brothers, by reason of the said collision.

The plaintiffs had incurred costs in the Admiralty court in respect of the detention of the “Grenfells” to the amount of 19*l.* 15*s.* 1*d.* The defendants refusing to pay either the sum awarded or these costs, the present action was brought.

A verdict was taken for the plaintiff for 519*l.* 15*s.* 1*d.*, leave being reserved to the defendants to move.

Mellish, Q. C., accordingly, in Hilary Term last, obtained a rule nisi to enter a verdict for the defendants, or a nonsuit, on the ground that the defendants were only liable for the damage which the “Westward Ho!” had sustained by the collision, and not for the further damage sustained by the plaintiffs in respect of her detention.

Lush, Q. C., and Watkin Williams, now shewed cause. [7] The question is whether the plaintiffs' claim under the agreement of the 13th of March, 1863, is to be limited to the sum necessary to repair the damage sustained by their vessel in the collision, or whether they are not entitled to such damages as they would have recovered in the Admiralty court or by an action in this court, viz. loss of the freight whilst the repairs were going on. That they would have recovered in the Admiralty court that which they now claim, is clear. The rule is stated in *MacLachlan on Shipping*, 285,—“The measure of damages to be given in these cases is, the amount of the injury sustained, subject to no deduction for new work in repairs, such as the law of insurance recognizes (*a*), but calculated, for actual loss, upon the principle of furnishing to the

(*a*) The insurance rule is, to assess the damage at two thirds of the value of the new work: *Da Costa v. Newnham*, 2 T. R. 407; *Poingdestre v. Royal Exchange Assurance Company*, R. & M. 378; 2 *Arnould on Insurance*, 2nd edit. p. 996.

party a complete indemnification: *The Gazelle*, 2 W. Rob. Ad. 279; *The Matchless*, 10 Jurist, 1017. He is not entitled, however, to a new ship for an old one, or a sum equal to the gross freight which was at the time being earned, or to a supposititious claim of so much per day during her detention for repairs, made on a mere assumption that contingencies during all that time would have been certainties both as to employment and hire: *The Gazelle*, 2 W. Rob. Ad. 279; *The Clarence*, 3 W. Rob. Ad. 283. But, where a smack was run down whilst rendering salvage services to a foreign ship, the value of these, as if they had been prosperously completed, was allowed in addition to the other compensation: *The Betsey Cairnes*, 2 Hagg. 28. Consequential damage, when it naturally arises out of the same collision, as proximate cause thereto, is recoverable at common law, or in the court of Admiralty in the same proceedings. Where a fishing-[8]-smack, on a voyage to Norway for a cargo of lobsters, was disabled by a collision, the freight of the substitute vessel was allowed also: *The Yorkshireman*, 2 Hagg. 30, n. A collier from Newcastle for West Cowes was struck by the "Mellona" when off Newarp Sand: she afterwards, the same night, became unmanageable, missed stays, and stranded, becoming a total wreck; and the owners of the "Mellona" were condemned in the full value of the vessel, the presumption of law being, in the absence of proof to the contrary, that the collier became unmanageable in consequence of the prior collision: *The Mellona*, 3 W. Rob. Ad. 7. The "Blenheim," on a dark, squally, and tempestuous night, ran foul of the "Union," the crew of which, thinking she could not live, abandoned her for the "Blenheim"; but the "Union" was afterwards found at sea, and brought into port, and the sum of 420l. paid to the salvors was recovered from the owners of the "Blenheim": *The Blenheim*, 1 Eccl. & Adm. R. 285. Whether the costs of defending a salvage suit be recoverable, as consequential damage, depends on the reasonableness of taking that course, which at common law is a question for the jury,—*Tindal v. Bell*, 11 M. & W. 228: and in the Admiralty court for the judge,—*The Legatus*, 1 Swab. Ad. 168. It never could have been intended by this compromise to abandon any advantage which the plaintiffs had: the only object of Mitcheson and the defendants was, to free the "Grenfells" from the arrest. They now rely on the words at the commencement of the agreement of the 13th of March, "the amount of damage which the said ship 'Westward Ho!' has received from the said collision." That, however, obviously means the damage which her owners have sustained from the collision.

Mellish, Q. C., and T. Jones, in support of the rule. [9] The 17th article of the association is incorporated into the agreement. The simple question is, for what the defendants have agreed to be bound. That depends upon the words of the guarantie, which limit the claimants to the damage which "the said ship 'Westward Ho!' has received from the said collision." They now claim to be entitled, in addition, to consequential damage arising from the detention of the ship while under repair. This they clearly cannot be under this agreement. There is a remarkable resemblance between the language of the agreement and that of the 17th rule of the club, shewing an intention to limit the damages recoverable against the defendants to the direct and immediate consequences of the contact. There is nothing in the agreement to contravene the sense in which the words are used in the condition.

ERLE, C. J. The question in this case is, whether the plaintiffs are entitled to recover under the agreement of the 13th of March the same amount of damages which they would have been entitled to recover in the court of Admiralty, by which court the ship had been detained, provided the amount do not exceed the sum of 2000l. insured by the association, represented by the defendants upon the ship "Grenfells." I am of opinion that they are,—that is, that they are entitled to recover the expenses of repairs rendered necessary by the collision, and also compensation for the loss of the profits they would have made from the use of their vessel if the collision had not occurred. The agreement recites that the plaintiffs are the owners of the "Westward Ho!" that the ship "Grenfells" (which was insured in the defendants' club), having run into and injured the said ship "Westward Ho!" the said ship "Grenfells" had been arrested and remained under arrest, and that, on the application of (amongst others) [10] the defendants, the plaintiffs had agreed to release her on the terms thereafter mentioned. If the plaintiffs have given up anything, there is ample consideration for the defendants' promise. Have the plaintiffs, by releasing the ship, given up their right to recover by the proceedings in the Admiralty court damages for the loss of freight? It is contended that they have, because the agree-

ment is that the parties of the second, third, and fourth part, some or one of them, will pay them "the amount of damage which the said ship 'Westward Ho!' has received from the said collision." It is urged on the part of the defendants that this is confined to the injury done to the frame of the ship. I am, however, of opinion that, without straining the language of the agreement, it may properly be held to mean any amount of damage or injury which the owner of the vessel have sustained by or in consequence of the collision. The amount of damage is, the money required to recoup the plaintiffs. I think the instrument is fairly capable of that construction. When we refer to the policy on the "Grenfells," we find that the defendants contracted upon the terms mentioned in the 17th article of the club regulations, the words of which are, that, "in case of *damage or loss by contact* which any ship in this association may do to others, this society shall be liable to contribute its proportion, but not beyond the sum insured, and also law costs given in any suit or action defended by the previous consent in writing of the managers upon this policy." The defendants are to pay in case of any damage which the "Grenfells" may do to any other ship: that may be by collision: and they are also to pay for any loss by contact of the "Grenfells" with any other ship. Loss by contact is, amongst other things, loss of the freight which the ship would have earned if she had not been crippled by the collision. I agree with Mr. [11] Mellish that the defendants were placed in a position of difficulty: and I hope that, having by this judgment paid all that they are liable for to these plaintiffs, they may be held harmless elsewhere.

BYLES, J. I am of the same opinion. The question is, what is the meaning of the word "ship" in this agreement. Are we to give it its strict and literal meaning? or, are we to construe it as the parties evidently intended it should be construed? The consequence of the former construction would be, that the plaintiffs are to receive the amount of the actual damage done to the frame of the ship, and the costs incurred in the Admiralty court, but are to get nothing for the consequential damage arising from the ship's detention. Looking at the recitals and at the operative part of the agreement, I think we shall best carry out the real intention of the parties by construing "ship" to mean "the owners." The poverty of our language compels us frequently to use expressions which do not with precise accuracy define what we mean. Hence the use of many elliptical phrases: for instance, when we speak of "the Cabinet," we mean the members who sit there: so, when we speak of "the Bar," we mean the members of that body who occupy places whether within or behind the bar. I cannot entertain any doubt.

KEATING, J. I am entirely of the same opinion. The meaning of the agreement is plain, when regard is had to the circumstances existing at the time it was entered into. The plaintiffs had the security of the "Grenfells." In the proceeding in the Admiralty court they would have recovered all they are now claiming. They gave up the security of the ship on the faith of the undertaking by the other parties to [12] the agreement to pay them all the damages their ship had sustained by the collision. It is scarcely conceivable that the plaintiffs should have intended to part with the security they held, without getting the same amount of compensation that they would have received by retaining the "Grenfells" under arrest. If the agreement is fairly susceptible of a construction which will carry that intention into effect, I think we are bound to place that construction upon it.

MONTAGUE SMITH, J. I am of the same opinion. Reading this agreement according to the most legitimate mode of construction, and having regard to the surrounding circumstances, I have no hesitation in coming to the conclusion that by "ship" the parties meant "the owners of the ship." It was, no doubt, the intention of the parties that the plaintiffs should recover under the agreement all the damages which he would have recovered by the proceedings in the Admiralty court, and that the amount only should be referred to Mr. Richards, in case they differed. The greatest injustice would be done in this as in many cases by adhering strictly to the mere letter.

Rule discharged.

[13] HUNT AND ANOTHER v. HARRIS. April 25th, 1865.

[S. C. 34 L. J. C. P. 249 : 12 L. T. 421 : 11 Jur. N. S. 485 : 13 W. R. 742. Explained and discussed, *Fillingham v. Wood*, [1891] 1 Ch. 51.]

1. A. was lessee for ninety-nine years of premises in the city of London, the whole of which were underlet by him for improved rents to persons who took each an interest in his portion of them greater than that of a tenant from year to year:—Held, that A. was, nevertheless, liable, as an “adjoining owner,” to contribute to the expense of repairing or rebuilding a party-wall by his neighbour, under the Metropolitan Building Act, 18 & 19 Vict. c. 122.—2. Whether he had any remedy over against his under-tenants, *quære?*

This was an action brought to recover contribution to a party-structure under the Metropolitan Building Act, 1855, 18 & 19 Vict. c. 122.

The first count of the declaration stated that the plaintiffs and the defendant were severally owners of a certain party-wall and structure within the meaning of the Metropolitan Building Act, 1855, and situate within the city of London, the said party-wall or structure being a party-wall, and situate on the west side of the premises of the plaintiffs, being No. 37 Eastcheap, and on the east side of the premises of the plaintiffs being No. 38 Eastcheap, in the city of London, which said party-wall or structure then was in a dangerous state, and defective and out of repair; and the commissioners of sewers of the city of London then caused a survey of the said party-wall and structure to be made by a competent surveyor, who duly surveyed the same, and, upon the completion of his survey, certified to the said commissioners his opinion as to the state of such party-wall and structure, to the effect that the same was in a dangerous state: that afterwards the commissioners gave and served, and caused to be given and served upon the plaintiffs and the defendant, then being such owners as aforesaid, a notice in writing in the words and figures following, that is to say,—

“Metropolitan Building Act, 1855.

“Dangerous party-structures.

“To the owners and occupiers of the party-structure, being a party-wall, and situate on the west side of premises No. 37 Eastcheap, and on the east side of premises No. 38 Eastcheap, in the city of London, and whomsoever else it may concern:

[14] “In pursuance of the provisions of the said act, I hereby, as the principal clerk and for and on behalf of the commissioners of sewers of the city of London, give you and each and every of you notice, that, it having been made known to the said commissioners that the party-structure as aforesaid is in a dangerous state, the said commissioners require* a survey of the same to be made by a competent surveyor, who, having certified that the said party wall is in a dangerous state, the said commissioners require you forthwith to pull down the upper portion thereof where overhanging, and for the distance downwards of about six feet below the parapet: also cut away and make good with brick-work in cement—the defective portions next the street to the extent of recess in wall, the defective portion at back of premises from the girder upwards, and extending about twelve feet north therefrom, and the cracked and defective portions of the remainder of the wall: and also, as the said wall has been built without proper footings, to underpin the same with brick-work in cement, and form proper sets-off as required by the Metropolitan Building Act:

“And I further give you and each and every of you notice, that, if for the space of six days from the service hereof you fail to comply with the requisitions of this notice, the said commissioners will make complaint thereof before a justice of the peace, and take such other proceedings in relation to the said party-structure as are authorized by the said act, and as may be necessary or expedient. Dated this 16th day of June, 1863.”

(Signed) “JOSEPH DAW.

“Sewers Office, Guildhall, London.

“N.B.—This notice does not supersede the necessity of your giving the usual

* Sic.

notice to the district-surveyor two days before commencing the work of re-[15]-building, &c., agreeably to the 38th section of the 18 & 19 Vict. c. 122, and Part I."

That the plaintiffs, after receiving such notice, and within a reasonable time in that behalf, and while the plaintiffs and the defendant continued such owners as aforesaid, did and caused to be done the works in the said notice specified, the same being necessary works to be done in respect of the then dangerous state of the said party-wall and structure, and of the same being defective and out of repair: that, in the doing of the said works, the plaintiffs were necessarily obliged to repair, restore, and make good the internal works and finishings of and upon No. 37 Eastcheap aforesaid, then being such premises of the defendant as aforesaid, which said internal works and finishings were necessarily damaged and destroyed by the doing of the first-mentioned works: that the plaintiffs and the defendant always made equal use of the said party-wall and structure, and that the defendant alone made use of the said internal works and finishings: that the plaintiffs were *building-owners*, and the defendant was *adjoining-owner*, within the meaning of the said act, and the plaintiffs, as such building-owners as aforesaid, within one month after the completion of the said works, delivered to the defendant, as such adjoining-owner as aforesaid, an account in writing duly made out of the expense of the said several works, duly valued; and the defendant did not within one month after the delivery of such account declare his dissatisfaction to the party delivering the same, by notice in writing given by the defendant or his agent, and specifying his objections thereto: Averment, that all things had been done, and all times had elapsed, and all conditions had been fulfilled, necessary to entitle the plaintiffs to have and recover from the defendant, under the provisions of the said Metropolitan Building [16] Act, 1855, one moiety of the expense of doing the first above-mentioned works,—the said moiety being 52l. 15s. 8d.,—and the whole of the expense of repairing, restoring, and making good the said internal works and finishings,—the same being 33l. 14s. 1d., and to maintain this action for the recovery thereof: Breach, that the defendant had not paid either of the said sums, although duly demanded.

There were also counts for work and materials, money paid, and money found due on accounts stated.

The defendant pleaded to the first count, -1. That he was not owner of the said party-wall or structure, as alleged,—2. That the said party-wall or structure was not dangerous, as alleged,—3. That it was not made known to the commissioners of sewers of the city of London that the said structure was in a dangerous state,—4. That the said commissioners did not require or cause to be made a survey of the said party-wall or structure, as alleged,—5. That the said party-structure was not surveyed, as alleged,—6. That the surveyor did not certify to the said commissioners his opinion to the effect that the said party-wall or structure was in a dangerous state, as alleged,—7. That, at the said times when, &c. in the first count mentioned, the said party-wall or structure had been and was made dangerous by the plaintiffs, and that, having so made the same dangerous, they of their own wrong made known the same to the said commissioners, and caused and procured the said commissioners to require the same to be surveyed, and caused the said survey, certificate, and the said notice to be given by the said commissioners, and they wrongfully caused the proceedings of the said commissioners for the purpose of throwing on the defendant part of the expense of repairing the damage done to the said party-wall or structure by themselves the plaintiffs,—8. That the [17] said commissioners did not give or serve, or cause to be given or served, the notice in the first count mentioned, as therein alleged,—9. That the said works were not done or caused to be done by the plaintiffs after receiving the said notice, or within a reasonable time in that behalf, as alleged,—10. That the defendant did not make use of the said party-wall or structure, internal walls, and finishings, as alleged,—11. That the plaintiffs did not, within one month after the completion of the said works, deliver to the defendant an account in writing of the expense of the said several works, as alleged,—12. That he did, within one month after the delivery of the said account, being dissatisfied therewith, express his dissatisfaction to the plaintiffs by notice in writing given by his agent, and specifying his objections thereto,—13. That payment of the said account was not demanded of him, as alleged,—and to the common counts,—14. Never indebted. Issue thereon.

The cause was tried before Erle, C. J., at the sittings in London after Michaelmas

Term, when the following facts appeared in evidence :—The plaintiffs, Messrs. Hunt & Crombie, were merchants carrying on business at Nos. 38 and 39 Eastcheap, in the city of London, of which premises they were lessees. The defendant was the lessee for the term of ninety-nine years of No. 37. The ground-floor and basement he had let to one Collins for a term of twenty-one years: the second and third floors he had demised to one Berridge, under an agreement not under seal, for four years and a half and a half-quarter: as to the first floor, no account was given: but it was assumed that it also was let to some other person at a rent (a)¹.

[18] In the course of making some improvements upon their premises, the plaintiffs found that the party-wall between Nos. 37 and 38 was in a dangerous state: and they accordingly gave the defendant the notice required by the 85th section of the Metropolitan Building Act, 1855. The commissioners of sewers having caused a survey to be made, also gave notice to both plaintiffs and defendant, under s. 72, that the party-wall was in a dangerous state, and requiring them or one of them to repair or take it down. In compliance with this notice, the plaintiffs took down and re-built the party-wall, and brought this action against the defendant as “adjoining-owner” to recover the proportion of the expenses payable by him.

On the part of the defendant, it was submitted that he was not an “owner” within the meaning of the statute, inasmuch as he had parted with all his estate in the premises for an interest greater than a tenancy from year to year, and consequently that the [19] persons to whom he had so parted with his interest were the persons liable (a)².

For the plaintiffs it was insisted that, inasmuch as the tenancy under the parol agreement amounted to no more than a tenancy from year to year, the defendant was at all events “owner” of part of the premises, and therefore liable.

Under the direction of his Lordship, the jury returned a verdict for the plaintiffs for the amount claimed, reserving leave to the defendant to move to enter the verdict for him if the court should be of opinion that under the circumstances he was not liable.

Hoggins, Q. C., in Hilary Term last, obtained a rule nisi to enter a verdict for the defendant, or a nonsuit, on the grounds,—first, that the defendant was not liable, because he had underlet all the premises for a greater term than a tenancy from year to year, secondly, that the plaintiff could not recover, not having followed the directions of the Metropolitan Building Act, in case of a ruinous wall, as directed by ss. 72, 73 (b). He submitted that, having demised the premises to persons having a larger interest than that of tenant from year to year, the defendant had ceased to be “the owner,” within the Metropolitan Building Act, 1855: and he referred to *Momilgan*,

(a)¹ Collins's lease was dated the 18th of February, 1860. It demised to him “All that the ground-floor of the messuage, &c., and the cellars under the same (as shewn in a plan in the margin), together with the use of the water-closet on the first-floor of the said premises, and the right of way or passage to the same, as now used.” Habendum for twenty-one years (wanting one day) from the 25th of December, 1859, at the yearly rent of 80*l.* with (amongst others) a covenant by Collins, his executors, administrators, or assigns, to keep the demised premises in repair (damage or destruction by means of fire excepted), and also all such fixtures, improvements, and additions, as at any time during the term should be erected and made in and upon and to the premises.

Berridge's agreement was dated the 26th of November, 1861. It purported to demise to him “All those the second and third floors forming part of the dwelling-house situate, &c.,” from the 11th of November then instant for four years and a half and a half quarter thence next ensuing, at the yearly rent of 25*l.* And Berridge agreed to keep the said second and third floors and the water-closet on the first floor in good tenantable repair, and to deliver up the same at the end of the term in as good condition as the same then were.

(a)² The interpretation-clause, s. 3, enacts that “owner” shall apply to “every person in possession or receipt either of the whole or of any part of the rent or profits of any land or tenement, or in the occupation of such land or tenement other than as a tenant from year to year or for any less term, or as a tenant at will.”

(b) This latter point not having been taken at the trial, the rule as to it was abandoned on the argument.

App., Labalmondiere, Resp., 1 Ellis & Ellis, 533, *Cowen v. Phillips*, 33 Beavan, 18, and *Ex parte Saffron Hill*, 24 Law J., M. C. 56.

[20] Coleridge, Q. C., and Day, now shewed cause. The question is whether the defendant is "owner" of the adjoining premises within the 3rd section of the Metropolitan Building Act, 1855, or whether he has ceased to be owner by reason of his having parted with his interest to undertenants for a greater length of tenancy than from year to year. But for the case of *Mourilyan, App., Labalmondiere, Resp.*, 1 Ellis & Ellis, 533, it would have been confidently submitted that "owner" meant either one who is in possession of the rents and profits of the premises, or one having a tenancy larger than a tenancy from year to year. By s. 72 of the act, the commissioners (of police, or, in the city of London, of sewers,) may, upon the report of their surveyor that a structure is in a dangerous state, give written notice "to the owner or occupier of such structure," "to take down, secure, or repair the same." By s. 73, "if the owner or occupier to whom notice is given as last aforesaid, fails to comply with the requisition of such notice," a justice may, upon complaint by the commissioners, "order the owner, or, on his default, the occupier," to take down, repair, or secure the structure; and, if it is not so taken down, repaired, or secured within the time named in such order, the commissioners may execute the repairs, "and all expenses incurred by the commissioners in so doing shall be paid by the owner of such structure, but without prejudice to his right to recover the same from any lessee or other person liable to the expenses of repairs." In the case referred to, the appellants, the owners in fee of premises part of which was used as a chapel, demised them for twenty-one years to one Neill, who entered into possession. The chapel was shut up and unoccupied except when used (on Sundays) for Divine Service. The appellants having failed to comply with a notice to them by the commissioners to repair and secure the wall of the chapel, and also with an order [21] of a justice, made upon complaint by the commissioners, requiring the appellants to comply with the requisition of such notice, the commissioners executed the repairs; and, on their complaint, a justice made an order on the appellants for payment of the expenses so incurred by the commissioners. On a case stated under the 20 & 21 Vict. c. 43, the court of Queen's Bench held that Neill was the owner of the premises within the meaning of the statute, and as such, was primarily liable for the expenses in question; and that the order for payment was bad for being directed to the appellants, instead of to Neill. The plaintiffs here, upon the requisition of the commissioners, who had given them notice that the party-wall between their premises and the premises adjoining, of which the defendant was lessee for a long term, have done the required repairs, and now call upon the defendant to contribute his proportion. The defendant had demised part of his premises to one tenant for twenty-one years, and other part to another tenant, under a parol agreement, for four years and a half. [Byles, J. Giving him a right in equity to call for a lease.] A court of law cannot recognize equitable interests. [Montague Smith, J. The construction of a statute must be the same in all courts. Other part was let to a third tenant, upon terms which did not appear. If the matter had been res integra, it would have been contended that the plaintiffs had their election to proceed either against the defendant or against any one of the tenants, leaving him to obtain contribution from the others. The case of *Evelyn, App., Whicheord, Resp.*, Ellis, B. & E. 126, is virtually a decision at variance with that of *Mourilyan, App., Labalmondiere, Resp.* It was there held that, under s. 51 of the Metropolitan Buildings Act, 1855, an owner of land in fee-simple, who lets it [22] on a building lease at a peppercorn-rent, is not liable, as owner, to the surveyor for fees in respect of buildings afterwards erected on such land,—a peppercorn-rent not being within the meaning of the words "of the whole or of any part of the rents or profits of any land or tenement," in the interpretation-clause. Crompton, J., there says: "I am not satisfied that the appellant here was in possession of the rents and profits. It is difficult to say that the act does not point to either an actual occupation or a beneficial possession of rents and profits. Clearly the appellant was not in occupation. Was he, then, in possession of any part of the rents or profits? I think that the legislature meant that a person should be understood to be in such possession, who, by himself or his tenant, received either the rent or the profits. A peppercorn-rent cannot be either rent or profits." The latter part of s. 73 provides that the payment by the owner shall not prejudice his right to recover the expenses from any lessee or other person liable for the same. Lessee" and "owner," therefore, are not convertible terms. [Erle, C. J. As far as

I can at present see, the case of *Moorishan, App., Labalmondiere, Resp.*, is directly in point. However much impressed by your argument, we must adhere to it.] The case is perhaps distinguishable. There, there was one demise co-extensive with the whole premises. Here, there are several persons in occupation of different parts under separate demises. The act only contemplates one notice: and the defendant is in receipt of the rents and profits of the entire premises, and he consequently is the only person the plaintiffs could look to. Suppose a large building with a hall and staircase in the centre, and the rooms on either side demised to several tenants, — would the tenants of the rooms on the one side be liable to contribute to the repairs of the party-wall at [23] the other side? [Byles, J. How, if the premises were mortgaged, and the mortgagee was in possession of the rents and profits?] It is not a question of legal or equitable estate: but who is in possession of “the rents and profits” of the premises. [Erle, C. J. The 81st and 82nd sections seem to contemplate an entirety of interest. No case has decided that a lessee of one floor for a longer period than from year to year is an adjoining owner within the statute.] Then, was Berridge in possession of the second and third floors other than as tenant from year to year? The instrument under which he held could not operate as a demise: 8 & 9 Vict. c. 106, s. 3. It only created a tenancy from year to year: *Tress v. Savage*, 4 Ellis & B. 36; *Stratton v. Pettit*, 16 C. B. 420. It may be that he would be entitled in equity to enforce something more. [Byles, J. Was he by the agreement to repair?] It must be assumed he was. *Croon v. Phillips*, 33 Beavan, 18, has but little application: the sole purport of the decision there was, to protect a person having an equitable interest. It may well be that, where a man has an interest of that sort, a court of equity would say that that interest should not be affected without notice to him. [Byles, J. That proceeds upon the ground that a court of equity considers that to be done which is contracted to be done.]

Hoggins, Q. C., and McIntyre, in support of the rule. The defendant has parted with all his interest in the premises for a longer period of time than is described in the 3rd section of the Metropolitan Buildings Act, 1855, as constituting an “owner.” Upon the decided cases, therefore, he is clearly not liable to contribute to the expenses of the party-wall in question. The definition of “owner” in s. 3 is “every person in possession or receipt either of the whole or of any [24] part of the rents or profits of any land or tenement, or in the occupation of such land or tenement other than as a tenant from year to year or for any less term, or as a tenant at will.” The language of the interpretation-clause of the former Metropolitan Building Act, 7 & 8 Vict. c. 84, was similar. A house occupied by a tenant under a lease for twenty-one years was during the term accidentally burnt, and, being ruinous, was pulled down under the provisions of that act. By the lease, the tenant was exempted from the payment of rent for the time that the house was untenanted by reason of an accidental fire. It was held in *Ex parte the Overseers of Saffron Hill*, 24 Law J., M. C. 56, that the expenses thereby incurred could not be recovered from the landlord (tenant for life of the reversion) under s. 42 of the act, which cast the burthen upon “the owner of every such building, being the person entitled to the immediate possession thereof.” “Though Packerham’s rent may have ceased,” said Crompton, J., “his occupation continues. If there were crops on the premises, he might enter and take them. I concur in the opinion of the magistrate, and I think that the words in s. 42, ‘being entitled to immediate possession,’ were introduced expressly to meet a case of this kind.” The judgment of the court of Queen’s Bench in *Moorishan, App., Labalmondiere, Resp.*, is also decisive as to the party liable. Cockburn, C. J., there says: “I think the appellants are not the owners of the premises, within the meaning of ss. 72, 73, and are not therefore the parties primarily liable for these expenses. They have let the premises to Neill for a term of twenty-one years: and I think the appellants are right in contending that, construing ss. 72, 73 according to s. 3, the interpretation-clause, Neill is to be considered as the owner for the purposes of the statute. He is, in the language of [25] s. 3, ‘in the occupation of the tenement other than as a tenant from year to year or for any less term, or as a tenant at will.’ He certainly took possession of the premises, and continues in possession: and there is nothing to shew that he does not occupy them, so far as premises of that kind can be occupied, or that there is any other occupier than he. He is therefore within the meaning of the word ‘owner,’ as defined by s. 3, and the order under s. 73 ought to have been directed to him.” Crompton, J., says: “The question turns on the construction of s. 73, as

explained by s. 3, the interpretation-clause. Who is the statutable 'owner' upon whom the order under s. 73 is to be made? Section 3 enacts that 'owner shall apply to every person in possession or receipt either of the whole or of any part of the rents or profits of any land or tenement, or in the occupation of such land or tenement other than as a tenant from year to year or for any less term, or as a tenant at will.' *It seems to me that the statute contemplated that where, as in this case, there is both a first owner, in receipt of the rents and profits, and a second statutable owner, by virtue of occupation for a longer term than from year to year, such last owner is to be the party liable for these expenses.* One strong ground for this view is, that no other party would have the right to enter the premises and pull down such part as was ruinous. *Neill is such second owner: and I therefore think that the order should have been directed to him, and not to the appellants.*" And Hill, J., expressed himself in similar terms. Is there a "statutable owner" here? Yes: the person in actual occupation; one of the persons residing on the premises. The defendant would have no right to go upon the premises and do the work. It never could have been the intention of the statute to give an election, as suggested on the other side. [Byles, J. A., the owner of [26] the fee, demises to B.; B. underleases to C.; and C. lets the premises to a tenant for a period longer than from year to year. Why should one of the three be preferred to the others?] That is not this case. The court cannot discharge this rule, without overruling *Mourilyan, App., Labalmondiere, Resp.* [Montague Smith, J. Against whom do you say the action should have been brought?] Against Collins, who had the largest interest in the premises; leaving him to resort to any others who might be liable to contribute. In the course of the argument of the case of *Mourilyan, App., Labalmondiere, Resp.*, Wightman, J., is reported (in 30 Law J., M. C. 97) to have said: "I think s. 3 means that a lessee for twenty-one years should be the 'owner'; not that, where there is such a lease as we have here, there should be two persons in the position of 'owner,' the lessor and the lessee." And Cockburn, C. J., suggests this case,—"Suppose a lease granted, and several subsequent sub-leases, the last being for twenty-one years, do you say that an order could be obtained upon the former lessees or upon the lessor?" To which the counsel for the respondent answers,—“Yes: the object of the statute was, to give a double remedy: and it could not have been given more clearly.” Wightman, J., thereupon observes,—“Section 97 would seem to remove all difficulty.” [Byles, J. Section 97 certainly seems to be a very important section (a).] That sec-[27]-tion contemplates that each party benefited by the work

(a) "Where it is hereby declared that expenses are to be borne by the owner of any premises (including in the term 'owner' the adjoining and building-owner respectively), the following rules shall be observed with respect to the payment of such expenses:—

"(1.) The owner immediately entitled in possession to such premises, or the occupier thereof, shall in the first instance pay such expenses, with this limitation, that no occupier shall be liable to pay any sum not exceeding in amount the rent due or that will thereafter accrue due from him in respect of such premises during the period of his occupancy:

"(2.) If there are more owners than one, every owner shall be liable to contribute to such expenses in proportion to his interest:

"(3.) If any difference arises as to the amount of contribution, such difference shall be decided by arbitration, to be conducted in manner directed by the Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16): and for that purpose the clauses of the said act with respect to the settlement of disputes by arbitration shall be incorporated with this act:

"(4.) If some of the owners liable to contribution cannot be found, the deficiency so arising shall be divided amongst the parties that can be found:

"(5.) Any occupier of premises who has paid any expenses under this act may deduct the amount so paid from any rent payable by him to any owner of the same premises: and any owner of premises who has paid more than his due proportion of any expenses may deduct the amount so overpaid from any rent that may be payable by him to any other owner of the same premises:

"(6.) If default is made by any owner or occupier in payment of any expenses hereby made payable by him in the first instance, or if default is made by any owner in payment of any other expenses or moneys due from him by way of contribution or

shall contribute in proportion to the advantage he derives from it. The present defendant derives no benefit from the re-building of this party-wall. [Byles, J. Did any part of this party-wall pass by the demise either to Collins or to Berridge, or were the demises to them mere demises of the rooms with the right of access thereto? Suppose a demise for eighteen months of a single room: would the tenant be an "owner" within the statute? Does it not mean a person having [28] an estate or interest in the whole of the premises? Does it mean an estate in a room, or a closet?] It is submitted that the person to be charged under this statute must be in possession: he must be a person having power to do the repairs himself.

Then, as to the second point,—whether an agreement for a lease for seven years gives the tenant a greater interest than that of a tenant from year to year. *Stratton v. Pettit*, 16 C. B. 420, is virtually overruled by *Tidley v. Mollett*, 16 C. B. (N. S.) 298, where it was held that an instrument which is void as a lease, by reason of the provision in the 8 & 9 Vict. c. 106, s. 3, may nevertheless enure as an agreement. Byles, J., there says,—“There is only one point upon which I wish to make an observation, viz. the construction of instruments of this sort. It appears that, first in the Queen’s Bench (in *Bond v. Rolston*, 1 Best & Smith, 371), and then in the Exchequer (in *Rollason v. Leon*, 7 Hurlst. & N. 73), and afterwards in the court of Chancery (in *Parker v. Taswell*, 27 Law J., Ch. 812), and also in this court during the present term, in a case of *Hague v. Cummings*, 16 C. B. (N. S.) 421, the error which this court fell into in *Stratton v. Pettit* has now been corrected; and it is settled that, though void as a lease, by reason of the 8 & 9 Vict. c. 106, s. 3, not being by deed, these instruments may still be held good as agreements for a tenancy.” *Cowen v. Phillips*, 33 Beavan, 18, is a strong authority to the same effect. By a memorandum of agreement, signed, but not under seal, one Baker agreed to let Cowen and Davis a shop and parlour on the ground-floor and two kitchens on the basement, being part of No. 3 Bruton Street, Bond Street—the remainder of the house being in Baker’s own occupation. The defendants, who were the occupiers of the adjoining house, being desirous of re-building the party-wall between their premises and [29] No. 3 Bruton Street, gave notice under the act to Baker on the 18th of July, 1862. Baker not having appointed a surveyer to act for him, one was appointed for him by the defendants, under the act. The surveyors on the 2nd of August made an award settling how the works were to be done, and awarding that they should “be commenced at once.” No notice was given by the defendants to the plaintiffs (Cowen and Davis): but, on the 21st of August, the defendants’ workmen commenced operations, and knocked holes through the party-wall, thus exposing the plaintiffs’ shop. The plaintiffs thereupon filed a bill praying an injunction. An interlocutory injunction having been granted, and the cause coming on for hearing, the Master of the Rolls said,—“I think the plaintiffs have a right to a decree. The real question is, whether the plaintiffs, as the adjoining owners, were entitled to receive any notice from the defendants. The plaintiffs have been in occupation under the agreement set forth in the bill, by which Mr. Baker, who had power to grant an underlease, says, in consideration of 50l., I hereby let you the shop, parlour, and kitchen, for three years, at the yearly rent of 105l. It is not under seal, and therefore, under the act, it is not a lease: but, although it is void as a lease, the question is whether it is not valid as an agreement. I have no doubt that it is a valid contract, and that this court would specifically enforce it.” It is clear, therefore, that an agreement (not under seal) for a tenancy for four years is a valid instrument at law as well as in equity, notwithstanding the statute prevents it from enuring in all respects according to the intention of the parties.

ERLE, C. J. This is an action by the building owner against the adjoining owner to recover compensation due in respect of a party-wall. The wall in question [30] was found to be in a dangerous state, and was ordered by the commissioners of sewers, acting under the provisions of the Metropolitan Building Act, 1855, to be in part pulled down and re-built. For the purpose of the present rule, it must be

otherwise in pursuance of this act, then, in addition to any other remedies hereby provided, such expenses and moneys, if arising in respect of any matter within the provisions of the third part of this act, may be recovered as a debt due, in course of law, but, if arising in respect of any other matter under this act, may be recovered in a summary manner.”

taken that the plaintiffs had done all that was required by the statute to be done by them to entitle them to call upon Harris to pay his proportion of the expenses incurred. It appears that Harris held the premises upon a long lease, probably at a ground-rent, and was making the usual profit by the improved rents, having let the second floor and attics on lease for twenty-one years to one Collins, the ground-floor and basement to one Berridge under an executory agreement for four years and a half, and the first floor we may assume to have been occupied by some person unknown, upon terms which did not appear. We may take it, according to the dictum of the Master of the Rolls in *Crown v. Phillips*, 33 Beavan, 18, that Berridge took an estate or interest under his agreement though ineffectual as a lease. Harris being the "owner" in receipt of the rents and profits in the way I have mentioned, the claim is made on him as such. It seems to me, on the plain words of the interpretation clause of the Metropolitan Building Act, 1855, that he is the adjoining owner, and therefore liable. That clause provides that "owner shall apply to every person in possession or receipt either of the whole or of any part of the rents or profits of any land or tenement, or in the occupation of such land or tenement other than as a tenant from year to year or for any less term, or as a tenant at will." Harris is the person who is in receipt of the whole of the rents and profits, and in my opinion the "owner" within the meaning of that section. He contends that he is not the owner, because the premises are not in his immediate occupation, but in that of Collins and [31] Berridge and the unknown person before mentioned. Is that an answer to the plaintiffs' action against Harris? As I read the statute, I think the action is properly brought against Harris. The 73rd section is that which gives the building owner who has pulled down and re-built a dangerous structure a right to demand repayment of the expenses incurred: the words of the latter part of that section are,—“and all expenses incurred by the said commissioners,”—or by the building owner,—“in respect of any dangerous structure by virtue of the second part of this act, shall be paid by the owner of such structure, but without prejudice to his right to recover the same from any lessee or other person liable to the expenses of repairs” (a). It is clear that the duty is cast upon the [32] “owner,” as defined in s. 3,—a person having a beneficial lease, and receiving the improved rent; but it is to be without prejudice to his right to recover the amount from any person who by contract with him is bound to do the repairs. The owner of a long term is [33]

(a) This 73rd section applies to expenses incurred by the commissioners (of police or sewers) in the removal of “dangerous structures,” not to expenses incurred by a “building owner” in the repair of a defective “party structure.” The words are, “If the owner or occupier to whom notice is given as last aforesaid” (notice under s. 72, that the structure is in a dangerous state, and that it must be taken down, secured, or repaired, as the case may require) “fails to comply, as speedily as the nature of the case permits, with the requisition of such notice, the said commissioners may make complaint thereof before a justice of the peace; and it shall be lawful for such justice to order the owner, or, on his default, the occupier of any such structure to take down, repair, or otherwise secure, to the satisfaction of the surveyor who made such survey as aforesaid, or of such other surveyor as the said commissioners may appoint, such structure or such part thereof as appears to him to be in a dangerous state, within a time to be fixed by such justice; and, in case the same is not taken down, repaired, or otherwise secured within the time so limited, the said commissioners may with all convenient speed cause all or so much of such structure as is in a dangerous condition to be taken down, repaired, or otherwise secured, in such manner as may be requisite: and all expenses incurred by the said commissioners in respect of any dangerous structure by virtue of the second part of this act, shall be paid by the owner of such structure, but without prejudice to his right to recover the same from any lessee or other person liable to the expenses of repairs.” This would seem to apply only to a dangerous dwelling-house or building.

The provisions as to party-walls are contained in parts of ss. 82, 83, 84, 85, and 88, and ss. 89, 90, and 91.

Section 82 provides that, “in the construction of the following provisions relating to party-structures, such one of the owners of the premises separated by or adjoining to any party-structure as is desirous of executing any work in respect to such party-

supposed to have paid a premium for his interest, and to recoup himself out of the larger sum which he receives for the improved rent. That seems to me to be a strong argument to shew that in this case Harris is the person primarily liable to pay these expenses. [34] There is a manifest convenience in allowing the building owner to have recourse to the person who like this defendant receives the whole of the rents and profits of the premises, so that he may have one certain [35] owner from whom one payment may be claimed, instead of the inconvenience of having to call upon several sub-lessees or tenants, of whose arrangements with their lessor he can have no knowledge. In the present case one of the tenants has a term of four years and a half only: it would be manifest injustice to make him pay the expense of the party-wall adjoining his floor. I think the statute contemplated the adjoining-owner for this purpose as being one having a permanent interest in the premises to be benefited by the work, because the 84th section provides that, "whenever the building-owner purposes to exercise any of the foregoing rights,"—the rights given to him by s. 83,— "with respect to any party-structure, the adjoining-owner may require the building-owner to build on any such party-structure certain chimney-jambs, breasts, or flues, or certain piers or recesses, or any other like works, for the convenience of the adjoining owner: and it shall be the duty of the building-owner to comply with such requisition in all cases where the execution of the required works will not be injurious to the building-owner, or cause to him unnecessary inconvenience or unnecessary delay in the exercise of his right." It would seem to be more reasonable to give that right to

structure shall be called the *building-owner*, and the owner of the other premises shall be called the *adjoining-owner*."

Section 83. "The building-owner shall have the following rights in relation to party-structures, that is to say (among others),—

"(1.) A right to make good or repair any party-structure that is defective or out of repair:

"(2.) A right to pull down and re-build any party structure that is so far defective or out of repair as to make it necessary or desirable to pull down the same."

Section 84. "Whenever the building-owner purposes to exercise any of the foregoing rights with respect to party-structures, the adjoining owner may require the building-owner to build on any such party-structure certain chimney-jambs, breasts, or flues, or certain piers or recesses, or any other like works for the convenience of such adjoining-owner: and it shall be the duty of the building-owner to comply with such requisition in all cases where the execution of the required works will not be injurious to the building-owner, or cause to him unnecessary inconvenience or unnecessary delay in the exercise of his right: and any difference that arises between any building-owner and adjoining owner in respect of the execution of such works as aforesaid shall be determined in manner in which differences between building-owners and adjoining-owners are hereinafter (s. 85) directed to be determined."

Section 85. "The following rules shall be observed with respect to the exercise by building-owners and adjoining-owners of their respective rights,"—amongst others,—

"(1.) No building-owner shall, except with the consent of the adjoining owner, or in cases where any party-structure is dangerous, in which cases the provisions hereby made as to dangerous structures (part ii.) shall apply, exercise any right hereby given in respect of any party-structure, unless he has given at the least three months' previous notice to the adjoining-owner, by delivering the same to him personally or by sending it by post in a registered letter addressed to such owner at his last known place of abode:

"(2.) The notice so given shall be in writing or printed, and shall state the nature of the proposed work, and the time at which such work is proposed to be commenced:

"(4.) Upon the receipt of such notice, the adjoining owner may require the building-owner to build, or may himself build on any such party-structure any works to the construction of which he is hereinbefore (s. 84) mentioned to be entitled."

Then follow provisions for what shall be done in case of differences arising between the parties.

Section 88. "The following rules shall be observed as to expenses in respect of any party-structure, that is to say (amongst others),—

"As to expenses to be borne jointly by the building-owner and adjoining-owner,—
 "(1.) If any party-structure is defective or out of repair, the expense of making

an owner having a permanent interest in the premises, than to give it to the occupier of each separate floor, who might require different lines of flues, &c. The person pointed at evidently is a lessee for a long term, who is in receipt of the rents and profits of the whole premises. This construction is supported by the language of the 97th section, which provides that, where it is by the act declared that expenses are to be borne by the owner of any premises (including in the term "owner" the adjoining and building-owner respectively), the following rules shall be observed with respect to the payment of such ex-[36]penses,—amongst others,—1. "The owner immediately entitled in possession to such premises, or the occupier thereof, shall in the first instance pay such expenses, with this limitation, that no occupier shall be liable to pay any sum exceeding in amount the rent due or that will thereafter accrue due from him in respect of such premises during the period of his tenancy." 2. "If there are more owners than one, every owner shall be liable to contribute to such expenses during the period of his occupancy." 4. "If some of the owners liable to contribution cannot be found, the deficiency so arising shall be divided amongst the parties that can be found." The "owner immediately entitled in possession to such premises," *prima facie* imports the tenant in fee in possession: but we are referred back to the definition of "owner" in s. 3,—"every person in possession or receipt either of the whole or of any part of the rents or profits of the land or tenement," in contradistinction to the occupier living on the premises. If in this case Harris could not be found, or was unable to pay, and the plaintiffs, as building-owners, had gone against Collins and Berridge, their remedy against each of them would be limited to the amount of the rent due or that would thereafter accrue due from him in respect of such premises during the period of his occupancy. Some confirmation is given to this view by the 74th section, which enacts that, "if such owner cannot be found, or if, on demand, he refuses or neglects to pay the aforesaid expenses, the said commissioners, after giving three months' notice of their intention to do so, by posting a

good or repairing the same shall be borne by the building-owner and adjoining-owner in due proportion, regard being had to the use that each owner makes of such structure:

"(2.) If any party-structure is pulled down and re-built, by reason of its being so far defective or out of repair as to make it necessary or desirable to pull down the same, the expense of such pulling down and re-building shall be borne by the building-owner and adjoining-owner in due proportion, regard being had to the use that each owner makes of such structure."

Section 89. "Within one month after the completion of any work which any building-owner is by this act authorized or required to execute, and the expense of which is in whole or in part to be borne by an adjoining-owner, such building-owner shall deliver to the adjoining-owner an account in writing of the expense of the work, specifying any deduction to which such adjoining-owner or other person may be entitled in respect of old materials or in other respects; and every such work as aforesaid shall be estimated and valued at fair average rates and prices according to the nature of the work and the locality, and the market-price of materials and labour at the time."

Section 90. "At any time within one month after the delivery of such account, the adjoining-owner, if dissatisfied therewith, may declare his dissatisfaction to the party delivering the same, by notice in writing given by himself or his agent, and specifying his objections thereto; and upon such notice having been given a difference shall be deemed to have arisen between the parties, and such difference shall be determined in manner hereinbefore (s. 85) provided for the determination of differences between building and adjoining-owners."

Section 91. "If within such period of one month as aforesaid the party receiving such account does not declare in manner aforesaid his dissatisfaction therewith, he shall be deemed to have accepted the same, and shall pay the same, on demand, to the party delivering the account, and, if he fails to do so, the amount so due may be recovered as a debt."

This last is the only provision in the act giving the *building-owner* a right of action against the *adjoining-owner*.

The provisions for *contribution* and recovery thereof are contained in s. 97, referred to ante, p. 26.

printed or written notice in a conspicuous place on the structure in respect of which or of part of which they have incurred expense, or on the land whereon it stands, *may sell such structure*, and they shall, after deducting from the proceeds of such sale [37] the amount of all expenses incurred by them, restore the surplus (if any) to the owner." What that means I do not pretend to say. But, when the time comes for a building-owner to exercise such a right, it will behove him to be very wary, and not to attempt to sell more than the interest of the person in default. I do not go into that: but I must say it would be a very strange thing if the interest of the owner of the fee could be sold in consequence of the default of a sub-lessee who, as here, may have an interest extending only to four or five years. According to the best interpretation I can put upon the statute, the building-owner has a right to call upon the person who holds the entire premises for a long term, and is substantially in possession of all the rents and profits. I do not mean to say that the owner of the fee-simple may not also be liable. But I can see my way clearly to the conclusion that the owner of a long term, who is in receipt of the rents and profits, is liable.

The cases which have been adverted to do not throw much light upon the subject. In *Evelyn, App., Whichcord, Resp.*, Ellis, B. & E. 126, Evelyn, the owner of the fee, had let the land in question to one Searle for eighty-one years, at a pepper corn rent for the first year, 6l. for the second year, and 12l. per annum for the remainder of the term; Searle covenanting to build six houses on the land. Whichcord, the district-surveyor, —Searle having built the houses, and then became bankrupt without having paid the surveyor's fees, under the 51st section of the act, which entitles the surveyor to recover the amount of fees due to him from "the builder employed in erecting such building, or in doing such work, or in doing any matter in respect of which any special service has been performed by the surveyor, or from *the owner* or occupier of the building so erected or in respect of which such work [38] has been done or service performed,"—claimed those fees from the appellant, as owner of the fee. The judgment of the court was that the owner of the fee-simple was not "owner" within the definition given in s. 3, because, as Crompton, J., says, he was neither in possession of the rents and profits, nor in the occupation of the premises. "He is not," said Lord Campbell, "an owner within the definition in s. 3. Certainly he is not occupier: and he can be charged as owner only in respect of his being in receipt of part of the rents and profits: but it seems to me that he is not in such receipt within the meaning of the clause. No rent really comes to him: he has only a peppercorn-rent, but receives no profits. We could not hold him liable, unless everybody who grants a building-lease is to be liable to the surveyor, in respect of his ultimate reversion. To impose such a liability would be oppressive and unjust, and entirely unnecessary." I am reported to have said that, under the peculiar circumstances of that case, I read the statute as my Lord did. What I meant was, that the fee in question was a fee which the builder was bound to pay to the district-surveyor, and that the surveyor had no right to wait until the builder had become bankrupt, and then come upon the owner of the fee, whose interest was only that of a reversioner. It was clear to my mind that it was the duty of the court to consider well before they shifted the burthen from the builder to the owner of the fee, who had no immediate interest in the matter. So stands that judgment. The question there had nothing whatever to do with rights and liabilities created by proximity between the building-owner and the adjoining-owner in respect of a party-wall. It was an original liability as between the district-surveyor and the builder. The same observation applies to the case of *Mourilyan, App., Labalmoudiere, Resp.*, 1 Ellis [39] & Ellis, 533. There, a chapel had been let by the appellant on lease for twenty-one years to one Neill; Neill covenanting to keep the premises in repair. No question arose there as to the relative rights of building and adjoining owner. The commissioners of police, finding upon a survey that the structure was in a dangerous state, caused a notice to be affixed to the building, addressed to the owner and occupier, requiring them to take down the west wall and otherwise render secure the said structure. A complaint was afterwards made to a magistrate, and an order obtained directing the owner and occupier to do what was necessary. This order not having been obeyed, it became the duty of the commissioners to do the necessary work themselves, which they did, and subsequently obtained an order upon the appellant to pay the expenses. Upon appeal, the court of Queen's Bench came to the conclusion that Mourilyan, the owner of the fee, was not the person who ought to have been proceeded against in the first instance under the

73rd section of the act; there being an intermediate lessee or person entitled to the rents and profits, to whom recourse should have been had. Neill (who probably received pew-rents) was held to be the person liable to be called upon, for the same reason that I say Harris here was the person liable, as being the person in receipt of the rents and profits. There will be no inconvenience in holding that Harris is liable to be called upon to pay the whole: he may have recourse for contribution to his lessees or under-tenants who have covenanted with him to keep the premises in repair. I do not think we shall be contravening any of the decided cases in holding that the plaintiffs are entitled to recover.

BYLES, J. My Lord having gone so fully into the matter, it will only be necessary for me, in expressing [40] my concurrence, to add a very few words. I cannot conceive that any doubt can now remain. The cases of *Mowbray, App., Labatmondiere, Resp.*, 1 Ellis & Ellis, 533, *Evelyn, App., Whichcord, Resp.*, Ellis, B. & E 126, and *Cowen v. Phillips*, 33 Peavan, 18, were all rightly decided. In the first of those cases it was decided that one who held the premises on lease for twenty-one years, with a covenant to repair, was the party liable, and, further, that he was the *only* person liable, and that the lessee might have his remedy for contribution. It is unnecessary to discuss the reasons why I come to the conclusion that there is no ground for impeaching the soundness of that decision. In *Evelyn, App., Whichcord, Resp.*, it was held that an owner in fee-simple who lets the land on a building-lease at a peppercorn-rent, is not liable as owner for the district-surveyor's fee. In *Cowen v. Phillips*, the effect of the decision is that, though, in point of law, a person holding under such an agreement as existed there, may be only a tenant from year to year, yet, in a court of equity, if he has a contract for a longer term, he must be held to have a greater interest than that of tenant from year to year, because a court of equity assumes that to be done which is contracted to be done. The statute must receive the same construction in a court of equity as in a court of law. All those cases are consistent with our decision here. This is an action by the building-owner against the adjoining-owner for contribution to the expense of repairing the party-wall. *Prima facie* they are companions in ownership. They may be joint-tenants of the party-wall, or they may be tenants in common, or each may be the owner of one side of it, or of different portions of it in the case of parallel freeholds,—the ground-floor to one, and the upper floors to another. But one thing is plain, viz. that this defendant is "owner" within the [41] meaning of the term as fixed and defined by the act of parliament. It seems to me that he is more than that,—that he is occupier. It appears that the ground floor and basement were demised to one tenant, the second and third floors to a second, and the first floor was assumed also to be let to some person unknown. What is there to shew that these several demises carried any portion of the party-wall? If they do, the mere letting of lodgings or a single room might do so likewise. It seems to me that in this case the defendant is owner, and, as far as I can see, the occupying-owner, and that there is nothing to shew that any one else is. I do not find that he has demised any portion of the party-wall. A., taking rooms from B., would certainly be very much surprised if he were told it included a demise of a portion of the party-wall. I entirely agree with my Lord, and I cannot entertain any doubt.

KEATING, J., was engaged in another court.

MONTAGUE SMITH, J. I am of the same opinion. It may be difficult to put a definite construction upon this act of parliament. We must deal with each case as the occasion arises. For the reasons already given, I think this defendant answers the description of "owner" given in the interpretation-clause. He is the beneficial owner of the whole premises,—receiving the rents and profits of the whole. I am not satisfied by the evidence that there is any other person who answers that description. It may be that there are others who are liable to him for contribution. But, finding the defendant to be a person clearly answering the description of "owner," and seeing no other person who does so, I see no reason for disturbing the verdict. I also entirely agree that the 97th section of the act [42] materially assists the construction in favour of the maintenance of the present action. As to the second point, I agree with the decision of the Master of the Rolls in *Cowen v. Phillips*, 33 Peavan, 18. If the question had turned upon that, probably Mr. Hoggins's able argument would have been well founded. On the first point argued by Mr. Coleridge, the plaintiffs are entitled to keep their verdict.

Rule discharged.

LANGLEY v. HEADLAND. April 27th, 1865.

[S. C. 34 L. J. C. P. 183; 12 L. T. 385; 11 Jur. N. S. 431; 13 W. R. 752.]

It is competent to a plaintiff to discharge the defendant from custody under a *ca. sa.*, notwithstanding the claim of his attorney for the costs of the action are unsatisfied, and, by reason of the plaintiff's being an infant, are likely to remain so.

The plaintiff, who was an officer in the army, and not yet of full age, though he appeared to have represented to his attorney that he had attained his majority, sued the defendant for a sum of 180l. which he had entrusted to him for the purpose of paying an over-due bill, but which the defendant had not so applied, and recovered a judgment against him for the debt and 47l. 8s. 6d. costs, for which the defendant was taken in execution.

Whilst the defendant was in Whitecross Street prison, the father of the plaintiff, hearing that his son's affairs were very much involved, came to London and instructed his attorney, Mr. Wren, to endeavour to arrange them, and for this purpose Mr. Wren put himself in communication with the plaintiff's attorney, Mr. Wallinger. Mr. Wren was also in communication with the defendant, with a view to his discharge from custody upon terms: but of this no notice was given to Mr. Wallinger.

On the 12th of April, Wren wrote to the defendant,—“Your last letter to Mr. H. Langley has been sub-[43]-mitted to me by his father. If you hand over a duplicate for a diamond pin and diamond ear-rings pawned for 15l., and get delivered up to me the four bills for 500l., 500l., 200l., and 200l., I am authorized to give you your discharge.”

The defendant's attorney on the same day called on Wren, and explained to him the defendant's inability to procure the whole of the bills mentioned in Wren's letter, but offered to hand over the duplicate for the diamond pin and ear-rings, and one of the bills for 500l. To this Wren assented, and an appointment was made for the following day, when the defendant's attorney handed over to Wren the duplicate and bill, and received from him the following document:—

“In the Common Pleas.

“*Henry William Langley, Plaintiff. Henry Headland, Defendant.*

“I hereby consent that the above defendant be discharged from the custody of the sheriffs of London, and request you to take the necessary steps to effect his discharge.

“HENRY WILLIAM LANGLEY,
the above-named plaintiff.

“Witness, W. W. Wren.

“19th April, 1865.

“To Mr. Wallinger, plaintiff's attorney.”

This authority for the defendant's discharge was handed to Mr. Wallinger by the defendant's attorney on the 21st of April. That gentleman, however, declined to take any step in the matter, assigning his reasons in the following letter of the same date, addressed to the defendant's attorney,—

“I consider that your client is not entitled to his discharge until my lien on the judgment for the costs has been satisfied. The costs due amount to 47l. 8s. 6d. I do not think that this attempt to juggle me out of my legitimate costs will receive the support and countenance of the court.

[44] A summons was thereupon taken out at Chambers calling upon Mr. Wallinger to shew cause why the defendant should not be forthwith discharged out of custody in this action. The matter was referred to the court.

Mellor now moved for a rule in the same terms. He submitted that, in the absence of collusion between the parties, for which there was no pretence here, the plaintiff's attorney had no lien on the body of the defendant for his costs, and consequently no power to keep him in custody against the wish of the plaintiff. “The defendant cannot be detained if the plaintiff is satisfied:” *per curiam*, in *Martin v. Francis*, 2 B. & Ald. 402. In *Murr v. Smith*, 4 B. & Ald. 466, the plaintiff, after judgment recovered, settled the action with the defendant, and employed a new attorney

to enter up satisfaction on the record: and it was held that the defendant was entitled to be discharged out of custody, although the lien of the plaintiff's attorney on the costs had not been satisfied. Similar doctrine results from the case of *Barker v. St. Quintin*, 12 M. & W. 441. Parke, B., there says: "The *lien* which an attorney is said to have on a judgment (which is perhaps an incorrect expression), is merely a claim to the equitable interference of the court to have that judgment held as a security for his debt."

Bridge shewed cause in the first instance, upon an affidavit setting forth all the circumstances, and stating that the plaintiff, who was still a minor, was considerably indebted to Wallinger, and that, unless his lien on the judgment against the defendant for the costs of this action were retained and enforced, he would be in great danger of losing them. He submitted that the plaintiff's attorney could not be called upon to defeat [45] his own claim to costs by discharging the defendant from custody, that the summons did not call upon the plaintiff to shew cause, and that the plaintiff's letter was addressed to his attorney, and not to the sheriff.

After some discussion, the court proposed that the plaintiff's order for the defendant's discharge from custody should be handed over to Mellor, and that there should be no rule. This was assented to, and the order was handed over accordingly.

The order having been produced to the sheriffs of London, and they having declined to act upon it, on the ground that it was not directed to them,

Mellor on a subsequent day (May 1st) obtained a rule to shew cause why the defendant should not be forthwith discharged out of the custody of the sheriffs in this action; and by the direction of the court the rule was served upon the plaintiff and upon Mr. Wallinger, but the court intimating at the same time that Mr. Wallinger need not appear unless he thought proper. The plaintiff did not appear to shew cause; but

Bridge appeared on behalf of Wallinger, who submitted that his rights would be prejudiced by the defendant's discharge, and that he, as attorney for the plaintiff on the record, was entitled to appear (*a*). [Byles, J. Is not *Barker v. St. Quintin*, 12 M. & W. 441, conclusive to shew that the sheriff is bound to [46] discharge the defendant out of custody upon the direction of the plaintiff in the action?] That case was considered in *Ex parte Games, In re Williams v. Lloyd*, 3 Hurlst. & Colt. 294. There, a plaintiff who had obtained judgment for his costs, in collusion with the defendant, and in order to defeat the lien of the plaintiff's attorney, gave him and the sheriff notice not to execute any process, on pain of being treated as trespassers: and the court held that a judge had power, in the exercise of the equitable jurisdiction of the court, to order the plaintiff or the defendant to pay the attorney the costs. "I think," said Pollock, C. B., "that the court is bound to see that justice is done; and that they are not prevented from exercising their equitable interference in this manner, because no express authority has been cited in support of it. No doubt, in general, the court cannot, upon motion, order one man to pay over money to another, unless the former be an officer of the court, and the money was received by him in that character. But the court has entire control over the proceedings in a cause; and, notwithstanding judgment has been signed, they may, in the exercise of their equitable jurisdiction, set aside a release, or make any order consistent with the practice and procedure of the court, so as to suppress collusion and fraud." [Byles, J. If this question had arisen on a *fi. fa.*, no doubt your argument would be correct. But the rule laid down in *Barker v. St. Quintin* is, that the attorney cannot authorize the sheriff to arrest or detain the defendant on a *ca. sa.*, if the plaintiff in the action [47] consents to his discharge. Here, the plaintiff has consented, and he does not now appear to shew cause against this rule. The rule seems to be, that the court will not hold a

(*a*) In *Camp v. Pole*, 8 C. B. 375, the attorney for the plaintiff was allowed to oppose the defendant's release. There, the defendant was taken in execution upon a *ca. sa.* at the suit of the plaintiff, in June, 1841; in August in the same year, the plaintiff left England, and was shortly afterwards seen at St. Petersburg, but had never been heard of since. Upon an affidavit of these facts, and shewing reasonable ground to induce them to believe that the plaintiff was dead, and alleging that proper search had been made, and no trace of a will or grant of administration found,—the court (in 1849) ordered the defendant to be discharged from custody, without regard to any supposed lien of the attorney for costs.

defendant in custody merely for the purpose of enforcing the attorney's claim for costs. Suppose the plaintiff had appeared and said "I consent to the defendant's discharge," would we not be bound to act upon it? And, is not that what he does in effect say by his absence?] In *Marr v. Smith*, 4 B. & Ald. 466, satisfaction had been entered on the roll: the court were therefore bound to order the defendant's discharge. Here is but an agreement, which the court is called upon by virtue of its equitable jurisdiction to enforce. The court will not do that in defeasance of the equitable claim of the plaintiff's attorney (a)¹.

Mellor, in support of his rule. In the absence of collusion, —and none is suggested here,—the court will not enable the attorney to keep the defendant in custody for costs for which he has his remedy against his client, the plaintiff. [Keating, J. The order for the discharge of the defendant is addressed to the plaintiff's attorney instead of to the sheriffs, and therefore the sheriffs declined to act upon it, without the authority of the court. What is there to prevent the defendant from procuring from the plaintiff another order addressed to the sheriffs?] Having got all he could from the defendant, he refuses to give another order. The law is clear as to the right of the plaintiff to order the defendant's discharge: *Marr v. Smith*, 4 B. & Ald. 466; *Barker v. St. Quintin*, 12 M. W. 441. In *Marr v. Smith*, Holroyd, J., says: "The plaintiff's attorney has no lien on the person of the defendant. As soon as judgment is obtained, his power is at an end also. [48] It is true that he has a lien for his costs, and that the court will assist him to make the subject-matter recovered by the judgment available for that purpose: but they will go no further." In *Jordan v. Hunt*, 3 Dowl. P. C. 666, it was held that an attorney is not justified in proceeding with an action after it has been settled between the parties themselves, though it is known that costs have been incurred, and that the plaintiff himself is not in a condition to pay them: it must be shewn affirmatively that the settlement was come to for the purpose of cheating the attorney. Parke, B., treats the matter as beyond doubt. The case of a defendant in custody under a *ca. sa.* is altogether different from that of process under which the plaintiff's attorney may obtain some fruits. In the former case, the defendant is entitled to the benefit of the discharge, even though it be the result of collusion between the parties.

BYLES, J. (a)². This rule in substance calls upon the plaintiff to shew cause why the defendant should not be discharged out of the custody of the sheriffs of London. The plaintiff does not appear: but the court, on granting the rule, directed that notice should be given to the plaintiff's attorney, who has a claim for the costs of the action, lest injustice should be done. We must assume that the plaintiff consents to the rule being made absolute: and I do not see how he could have refused to consent. He signed an authority for the release of the defendant, directed to his own attorney: and the defendant has paid the consideration agreed upon, by restoring an acceptance of the plaintiff's for 50*l.* and a duplicate for a diamond pin and ear-rings. The order of discharge so signed by the plaintiff has [49] been handed to the plaintiff's attorney, in order that he might cause the defendant to be released, according to the plaintiff's intention. The attorney, however, declines to do anything upon it, because his costs are unpaid, and the plaintiff in this action being an infant, there is little prospect that they ever will be paid. On a former occasion, the court declined to compel the attorney to take any step towards procuring the defendant's release from custody: but, at their suggestion, the plaintiff's order for that purpose was handed over to the defendant. Upon that order being presented to the sheriffs, they very properly declined to act upon it, inasmuch as it was not addressed to them; and they desire to have the authority of the court before they discharge the defendant. The plaintiff's attorney has been heard in opposition to the rule. His claim of lien, as it is called, does not seem to have presented itself to the mind of Mr. Wren when he obtained the plaintiff's signature to the document. I do not think the defendant ought to be prejudiced by that. The plaintiff is bound to do what he bargained for. The simple question is, whether, when the plaintiff desires to discharge the defendant from custody under the *ca. sa.*, the attorney's lien for costs is any answer. The authorities referred

(a)¹ See the cases collected in 1 Ch. Archb. 136 et seq. 11th edit. See also Lush's Practice 224, 2nd edit.

(a)² Erle, C. J., and Montague-Smith, J., were attending the Court of Criminal Appeal.

to shew that it is not. I therefore think this rule should be made absolute, upon the terms of the defendant undertaking not to bring any action either against the sheriffs or against any other person for or by reason of his having been detained in custody at the suit of the plaintiff in the said action, and without prejudice to any remedy the plaintiff's attorney may have upon the judgment obtained in this cause.

KEATING, J. I am of the same opinion, though I must confess the arguments urged on the part of the [50] plaintiff's attorney for some time induced me to entertain some doubts as to how far the equitable jurisdiction of the court might under the circumstances be involved. When this matter was before the court in the earlier part of the term, and they directed that the order of discharge should be restored to the defendant, though they did not thereby bind themselves to give any particular effect to it, they did at the same time give a sort of intimation that the plaintiff was bound by the bargain made on his behalf and with his assent by Mr. Wren. I think under the circumstances we are justified in treating the document, coupled with his non-appearance to day to object, as a consent on the part of the plaintiff that the defendant shall be released from custody. Upon the conditions, therefore, which have been mentioned by my Brother Byles, I agree with him that this rule should be made absolute.

Rule absolute.

In the following term, Bridge, on behalf of Wallinger, moved for a rule calling upon the plaintiff and his father and his father's attorney (Wren) to shew cause why the diamond pin and ear-rings should not be given up to Wallinger in part satisfaction of his lien for the costs of the action. It appeared that Wren had offered to give them up, on Wallinger's paying him 22l. 15s. 3d., the sum which he had paid in order to redeem them; but, inasmuch, as Wren had paid that sum after notice of Wallinger's lien, the latter declined to pay it.

WILLES, J. You are coming to invoke the aid of the equitable jurisdiction of the court in your favour. You must therefore do equity.

The rest of the court concurring,

Rule refused.

[51] ROBINSON v. THE LONDON AND SOUTH WESTERN RAILWAY COMPANY.

May 1st, 1865.

[S. C. 34 L. J. C. P. 234; 12 L. T. 347; 11 Jur. N. S. 390; 13 W. R. 660. Discussed, *Hill v. London and North Western Railway Company*, 1880, 42 L. T. 514.]

1. By the 7th section of the Railway Traffic Act, 17 & 18 Vict. c. 31, a railway company is not liable for loss of or injury to a horse on the railway, beyond the value of 50l., unless the sender shall *at the time of delivering it to the company to be carried have declared* it to be of a higher value, in which case the company are empowered to charge a reasonable percentage for the increased risk and care thereby occasioned:—Held, that the declaration of value must be such as to convey a distinct intimation to the company that the sender intends to hold them responsible for the higher sum.—2. Where, therefore, a servant of a railway company, having casually learned that a mare tendered for carriage was worth 135l., refused to carry her unless insurance-money was paid beyond the usual charge for carriage:—Held, that the company were responsible for such refusal.—3. *Semble*, that the declaration of value need not be made at the moment of tendering the animal to be carried.

This was an action against the London and South Western Railway Company for refusing to carry a mare belonging to the plaintiff.

The first count of the declaration stated that, at the times thereafter referred to, the defendants were common carriers of horses by railway from their Liss station to their Waterloo station, London; that, before any of the said times, the defendants made and published certain conditions upon which alone they declared that they would receive, forward, and deliver horses, which conditions had not at any of the said times been rescinded or altered, and which conditions were so published as aforesaid, and were contained in a certain printed notice by the defendants published, which notice was as follows:—"Notice as to horses, cattle, &c. The London and

South Western Railway Company hereby give notice that they will receive, forward, and deliver horses, &c. solely on and subject to the following conditions:—The company will not be responsible for any loss or injury to any horse, &c. in the receiving, forwarding, or delivering, if such damage be occasioned by the kicking, plunging, or unruliness of the same. Declaration as to the conveyance of horses, cattle, &c. In pursuance of an act (17 & 18 Vict. c. 31), intituled, &c., it is provided in clause 7, in reference to the liability of railway and canal companies for loss or injury done to any horse, cattle, or other animals, that no greater damage shall be recov-[52]-ered for the loss of or for any injury done to such animals, beyond the sums hereinafter mentioned, that is to say,—for any horse, 50l., &c., &c., unless the person sending or delivering the same to such company shall, at the time of such delivery have declared them to be of respectively higher value than as above mentioned, in which case it shall be lawful for such company to demand and receive, by way of compensation for the increased risk and care thereby occasioned a reasonable per-centage upon the excess of the value so declared, above the sums so limited as aforesaid, and which shall be paid in addition to the ordinary rate of charge. Notice is therefore hereby given that, from and after the date hereof, a per-centage of 5l. per cent. will be charged, in addition to the usual charge for conveyance, by the London and South Western railway, upon any excess in the declared value of horses, cattle, or other animals, over and above the amount fixed by the act aforesaid, viz. for any horse, 50l., &c. And notice is hereby given that all declarations of the value of horses or other animals, where such value exceeds the above sums respectively, must be signed by the owner thereof, or by his agent, before they can be received by the company for transmission by the railway.” Averment, that the plaintiff, at a reasonable and proper time in that behalf, tendered to the defendants, at their Liss station aforesaid, a mare, to be by them carried from their Liss station aforesaid to their Waterloo station aforesaid, and there delivered for the plaintiff, according to the defendant’s duty in that behalf, under the circumstances aforesaid, for hire to the defendants in that behalf, and requested the defendants to receive, carry, and deliver the said mare as aforesaid, and did not declare or intend to declare the said mare to be of any higher value than 50l.: that the plaintiff was then ready and willing and offered to [53] pay to the defendants their reasonable hire in that behalf, whereof the defendants then had notice; and that the defendants then had sufficient time, means, and convenience to receive, carry, and deliver the said mare as aforesaid, and could and ought to have done so: Breach, that the defendants did not nor would receive, carry, and deliver the said mare for the plaintiff: special damage.

The fourth plea stated that, before and at the time of the tender and delivery of the said mare as alleged, the person sending the same had declared the said mare to be of higher value than 50l., that is to say, of the value of 135l., whereupon the defendants, under and by virtue of the said act mentioned in the said notice, demanded of the person so tendering the said mare as aforesaid, by way of compensation for the increased risk and care occasioned by the said higher value, a per-centage of 5l. per cent. in addition to the usual charges for conveyance upon the excess of the declared value of the said mare over and above the said sum of 50l., being the amount limited by the act aforesaid, the said per-centage being a reasonable per-centage upon the excess of the value so declared above the said sum so limited as aforesaid; that the person tendering the said mare as aforesaid refused to pay to the defendants the said per-centage, wherefore the defendants refused to receive and carry the said mare, as they lawfully might for the cause aforesaid: and that such per-centage or increased rate of charge was notified in the manner prescribed in the statute 11 G. 4 & 1 W. 4, c. 68.

The plaintiff joined issue upon the above and other pleas.

The cause was tried before Erle, C. J., at the sittings in London after last Michaelmas Term. The facts which appeared in evidence were as follows:—One [54] Ayling, who resided at Liss, in the county of Hants, having a mare to dispose of, the plaintiff commissioned a friend (Captain Mainwaring) to go to Liss to examine her. On his return to London, Captain Mainwaring, having communicated to the plaintiff his opinion of the animal, at his request telegraphed to Ayling at Liss, inquiring if he would take 135l. for her. In answer to this, Ayling telegraphed to Captain Mainwaring, “I will take 135l. for the mare, and will warrant her sound.” A few days afterwards Captain Mainwaring wrote to Ayling requesting him to forward the mare

by rail to London; and Ayling, who received this letter on the 31st of December, 1863, called on Wade, the station-master at Liss, and requested him to have a horse-box ready on the 2nd of January. It appeared that it was part of Wade's duty, as station-master, to work the telegraph; and, meeting Ayling on the 1st of January, he asked him if the horse he was about to send was the animal in reference to which the telegrams had passed: being told that it was, Wade said that, as he was aware that the value of the mare was 135l., he would not receive her unless he was paid insurance for the extra risk; and he demanded 17s. 6d. for the carriage of the mare, and 4l. 5s. for insurance. On the same day, Ayling received a letter from Wade embodying what he had told him, which letter he forwarded to Captain Mainwaring.

Captain Mainwaring had in the meantime written to inspector Norwood, at the Waterloo station (to whom he was known), requesting him to send a careful man down to Liss to bring up a valuable mare: and, on receipt of Ayling's letter, he again wrote to Norwood, as follows:—

“London, 4th January, 1864.

“Sir,—I am sorry to trouble you so much; but the receipt this morning of the two inclosed has placed me [55] in a fix, and I should be much obliged to you to give instructions to your station-master and to the man who goes down to fetch the mare from Liss. But the mare may be sent (by the man) to-morrow, as directed in my letter to you of yesterday, without insuring her, the expense being so great: and I must observe that I never heard of a case where a station-master has refused to load a horse unless insured. If, however, the man who goes for the mare finds that she is dangerous in the train, or if he finds that she has been in before and anything has happened to her through her own vice, then I think she ought to be insured, but not otherwise. Mr. Ayling, the man I bought her of, told me she had never been in a train in her life. I have had horses of 300l. or 400l. value often by train with nobody with them. I never insured a horse in my life, and never had an accident with one. It appears to me that your station-master at Liss is exceeding his powers. *The value of this animal is 135l.*”

No person was sent down by the company: and, on the 6th of January, Captain Mainwaring received a letter from the office of the superintendent at the Waterloo station, informing him that Mr. Scott, the traffic-manager, had informed Ayling of the terms on which the mare would be conveyed, and that a horse-box had been sent to Liss, but the horse had not been sent up.

A horse-box was sent down to Liss on the 14th of January, and Captain Mainwaring tendered the mare, offering to pay the ordinary charge for her conveyance to London; but the station-master refused to receive her. Captain Mainwaring then inquired of the station-master whether, if he paid the insurance-money, he would receive and forward the mare; upon which Wade said that he could not forward her that day. [56] Captain Mainwaring thereupon gave Wade a written notice that he would leave the mare at Ayling's at the company's risk and expense.

On the 16th of January, Mr. Scott, the defendants' traffic-manager, wrote to Captain Mainwaring, stating that, when notice was first given that the mare would be brought to Liss station, her value was declared to be 135l., which justified the station-master's demand; and asking whether he (the captain) desired to have the mare conveyed at his risk, subject only to the liability of the company for the conveyance of an ordinary animal the value of which was not declared, and whether the previously declared value was withdrawn, adding that, if so, he would at once order the mare to be received and conveyed from Liss to London. No answer was sent to this letter.

On the part of the defendants, it was submitted that the admission to the station-master at Liss, and Captain Mainwaring's letter of the 4th of January, 1864, amounted to a declaration of value within the meaning of the 7th section of the Railway and Canal Traffic Act, 1854, 17 & 18 Vict. c. 31 (*a*), and justified the re-[57]-fusal of the company to carry the mare unless she was insured.

(*a*) Which enacts that “every such company as aforesaid shall be liable for the loss of or injury done to any horses, cattle, or other animals, or to any articles, goods, or things, in the receiving, forwarding, or delivering thereof, occasioned by the neglect or default of such company or its servants, notwithstanding any notice, condition, or

For the plaintiffs it was insisted that the fair construction of the letter relied on, was that the sender declined to insure : and that neither the mention of the value at the end of the letter nor the admission made to the station master at Liss constituted a declaration of value within the statute.

His Lordship left it to the jury to say whether there had been a refusal on the part of the company to carry the mare uninsured, and whether the sum demanded by them for insurance (if the demand was under the circumstances justifiable) was a reasonable sum.

The jury answered both questions in the affirmative, and a verdict was entered for the plaintiff, which by arrangement was to be for 5l., with all proper certificates, subject to leave reserved to the defendants to move for a verdict or a nonsuit.

Ballantine, Serjt., accordingly, in Hilary Term last, obtained a rule nisi to enter a verdict for the defendants, on the grounds, —first, that there was no offer to pay extra for insurance,—secondly, that there was a declaration within the act.

Denman, Q. C., and Kingdon, now shewed cause. The real question is, whether there was such a declaration by or on behalf of the owner of the mare of [58] her value as to entitle the defendants to refuse to carry her unless insured. [Erle, C. J. Or whether the company were under any obligation to pay the 135l. if the mare had been carried by them and injured on the journey.] Under the 17 & 18 Vict. c. 31, the company's right to demand an extra sum for increased risk does not arise until the sender has declared the animal to be of a higher value than 50l. The information as to the value of this mare which the station-master at Liss had acquired by means of the telegrams clearly has nothing to do with the case. And Captain Mainwaring, acting for the plaintiff, throughout insisted upon his right to exercise his option to declare the value or not. The casual mention of the value of the mare in the letter of the 4th of January was not a declaration. To fix the company with liability, the declaration of value must be clear and distinct. In *Boss v. Pink*, 8 Car. & P. 361, it was held that the notice under the Carriers Act, 11 G. 4 & 1 W. 4, c. 68, must be an express and formal declaration of the value : mere knowledge on the part of the carrier would not do. The like was held in *Hart v. Barclay*, 6 Exch. 769. In *Peck v. The North Staffordshire Railway Company*, 32 Law J., Q. B. 241, the question was, whether the conditions imposed by the company were just and reasonable. What passed between the agent of the owner of the marbles and the company was neither intended by him nor received by them as a declaration of their value. [Erle, C. J., intimated that this question had been raised in the Queen's Bench with reference to the carriage of a dog.] That was a case of *Harrison v. The London, Brighton, and South Coast Railway Company*, 2 Best & Smith, 122. [Erle, C. J. That is not the case I meant to refer to.] The position assumed by the station-master here was clearly untenable.

[59] Ballantine, Serjt., and Wood, in support of the rule. If there has been a declaration of the value of the animal, the intention of the party sending it is wholly immaterial. Suppose this had been an action against the company for injury occasioned to the mare in the transit, could they in the face of the correspondence have contended for a moment that there had been no declaration of value? The important letter is that of the 4th of January, in which Captain Mainwaring, the plaintiff's agent, distinctly says, "The value of this animal is 135l." Setting aside the knowledge which Wade, the station-master at Liss, derived from the telegraphic communications, that letter amounts to a distinct declaration of the animal's value within the statute. Wightman, J., in delivering the judgment of the Exchequer

declaration made and given by such company contrary thereto, or in anywise limiting such liability : any such notice, condition, or declaration being hereby declared to be null and void : " Provided always that no greater damages shall be recovered for the loss of or for any injury done to any of such animals, beyond the sums hereinafter mentioned, that is to say, for any horse 50l., " &c. : " unless the person sending or delivering the same to such company shall at the time of such delivery have declared them to be respectively of higher value than as above mentioned : in which case it shall be lawful for such company to demand and receive by way of compensation for the increased risk and care thereby occasioned a reasonable per-centage upon the excess of the value so declared above the respective sums so limited as aforesaid, and which shall be paid in addition to the ordinary rate of charge."

Chamber in *The Great Northern Railway Company, App., Behrens, Resp.*, 7 Hurlst. & N. 950, says: "We think that the respondent having declared the value of the picture to the carman, who was the agent of the appellants, and who received the same to be carried by them, was entitled, upon the loss of it by the appellants, to recover its value, though he did not pay or offer to pay any increased rate in proportion to the value, no such payment having been required either at the time of delivery to the carman or at any other time before the loss. The case of *Hart v. Barndale*, 6 Exch. 769, decides that, in such a case as the present, the person delivering the goods to the carrier must, in the first instance, declare their value, in order to fix the carrier with responsibility, and the carrier may then require him to pay an increased rate of charge according to a tariff put up in the office; but there is nothing in the statute which protects him from liability, if, after the value is declared to be such as would entitle him to demand an increased rate of charge, he chooses to accept the goods to be carried, [60] without making any demand of such increased rate, or requiring it to be either paid or promised. The carrier is not bound to accept such goods for carriage without payment of such increased rate, if required; but, if he choose to do so, and the value is declared, he will not be protected by the act." That is a distinct authority to shew that the defendants here were justified in refusing to carry the plaintiff's mare uninsured. [Montague Smith, J. The court there assumed that there was a good declaration of the value.] The declaration of value here was never withdrawn. The letter of the traffic-manager, of the 16th of January, shews that. [Montague Smith, J. That letter was written after the company's officer had refused to forward the horse without payment of an increased charge by way of insurance.]

ERLE, C. J. I am of opinion that this rule should be discharged. The question is, whether the defendants have rendered themselves liable to an action for refusing to carry the plaintiff's mare from Liss to London, without being paid a sum for insurance beyond the charge for the carriage. It appears that they, by their servants, did so refuse, because the sender of the mare had (as they say) declared that the value of the animal exceeded 50l. The question turns upon whether or not there was evidence that the sender did declare the value to be above 50l.; for, unless there was such a declaration communicated to the company, they had no right to demand a sum for insurance. The 7th section of the Railway and Canal Traffic Act, 17 & 18 Vict. c. 31, for the protection of the company enacts that no greater sum than 50l. shall be recovered against them for the loss of or for any injury done to any horse, &c., "unless the person sending or delivering the same to such company shall at the time of such [61] delivery have declared them to be respectively of higher value than as above mentioned: in which case it shall be lawful for such company to demand and receive by way of compensation for the increased risk and care thereby occasioned a reasonable per-centage upon the excess of the value so declared above the respective sums so limited as aforesaid, and which shall be paid in addition to the ordinary rate of charge." Knowledge of the value of the animal not derived from the declaration of the sender cannot give the company a right to demand the increased rate. The evidence here shews that the company made the claim because the station-master at Liss, who had been just before employed in communicating messages between the plaintiff and Mr. Ayling, the former owner of the mare, with reference to the sale of her by the latter to the former, had casually learned that the mare was of the value of 135l. It is clear that that was no declaration by the sender. The strength of the defendants' case, if any, lay in Captain Mainwaring's letter to Inspector Norwood of the 4th of January, 1864. In that letter, the captain writes to request that the mare may be sent without insuring her. "If, however," he goes on, "the man who goes for the mare finds that she is dangerous in the train, or if he finds she has been in before and anything has happened to her through her own vice, then I think she ought to be insured, but not otherwise." And at the end he says "The value of the animal is 135l." Taking the whole of the letter together, in my judgment it amounts to this,—“I do not intend to insure the mare unless I am obliged: and in that case I mention her value.” I see nothing that amounts to a declaration such as was contemplated by the statute,—“I require you to carry my mare, and to guarantee her safe delivery in London, and I declare her value to be [62] 135l.” If such a declaration as that had been made, it would have created a liability on the part of the company to make good the loss of or any injury to the animal, and on the sender to pay the additional price which was to ensure him that guarantee. If the letter of

the traffic-manager, of the 16th of January, had been written immediately after Captain Mainwaring's letter of the 4th, and before the demand of the 13th, and the writer had said,—“We do not understand what has passed between you and our station master at Liss. Do you intend to have your mare carried as a valuable animal, or as an ordinary uninsured animal?” and the sender did not make it clear that he did not intend her to go at the company's risk for the higher value, I think the defendants would have been justified in demanding insurance. But that letter came too late. Upon the whole, I am of opinion that there was no such declaration of value as to entitle the defendants to refuse to carry the mare as an uninsured animal.

BYLES, J. I am of the same opinion. The two acts of parliament,—the Carriers Act, 11 G. 4 & 1 W. 4, c. 68, and the Railway Traffic Act, 17 & 18 Vict. c. 31,—are in *pari materia*, and must receive the same construction. The language is substantially the same in both. Each requires a declaration of the value, a declaration which must come from the sender, and which must be so express as to be understood by the carrier as a declaration of value, so as to constitute a contract between them. It is plain, in the events which have happened here, that what passed between the agent of the owner of the mare and the servants of the company, viz. the statement that the value of the animal was 135l., was neither intended nor understood as a declaration of her value within the statute. The case of *Behrens v. [63] The Great Northern Railway Company*, 6 Hurlst. & N. 366, is no authority in favour of the defendants here, because the pictures were delivered by the plaintiff to the company's carman, who gave a receipt for them in this form, —“Received of L. B. Behrens 1 case, containing two large valuable oil-paintings, directed, with great care, to Mr. L. Stover, Turk's Head Hotel, Grey Street, Newcastle-upon-Tyne. Per Great Northern Railway. Declared over the value of 110l.” That was a distinct declaration of the value which would have entitled the company to make an increased charge for the extra risk. For these reasons, I am of opinion that the plaintiff is entitled to recover.

MONTAGUE SMITH, J. I am of the same opinion. I think there was no such declaration of value within the meaning of the statute as to entitle the company to the higher freight for carrying the plaintiff's mare. I agree that the declaration must be made with an intention that it shall operate as a distinct intimation to the company that they are called upon to exercise such an extra degree of care in the conveyance of the animal as to entitle them to charge the higher sum authorized by the statute. But the evidence discloses no such intentional declaration on the part of the sender of the mare. The station-master at Liss had no more right to assume the value of the animal from the messages which had passed through his hands during the treaty of purchase between the plaintiff and Ayling, than if he had learned her value by overhearing a conversation between them in the street. Then, in writing to Inspector Norwood, Captain Mainwaring is writing to him very much in the character of his own agent. “The man,” he says, “may be sent to-morrow, as directed in my letter to you of yesterday, without insuring her, the expense being so great. If, [64] however, the man who goes for the mare finds that she is dangerous in the train, or if he finds she has been in before and anything has happened to her through her own vice (a), then I think she ought to be insured, but not otherwise.” Thus the person who is to determine whether or not the mare shall be insured is, the man who is to be sent down to take charge of her in the train. At the end, the writer says “The value of this animal is 135l.” That is if, in the exercise of his discretion, the person so sent to take charge of her thinks she ought to be insured, that is the price at which she is valued. This clearly was not intended, and could not have been understood, as a declaration of value within the Traffic Act. For these reasons, I am of opinion that the verdict for the plaintiff must stand for the sum agreed on.

KEATING, J. I have not heard the whole of the argument: but, so far as I have heard, I concur in the judgment of the rest of the court.

Rule accordingly.

(a) In the case of injury to the animal through her own vice, the insurance would seem to be no protection; for, the company's notice expressly declares that they will not be responsible “for any loss or injury to any horse, &c., in the receiving, forwarding, or delivering, if such damage be occasioned by the kicking, plunging, or unruliness of the same.”

[65] THE REV. W. WALKER, Clerk v. BROGDEN. May 5th, 1865.

[S. C. 12 L. T. 495; 11 Jur. N. S. 671; 13 W. R. 809.]

1. In an action for a libel contained in two letters published in a newspaper, the defendant pleaded, by way of justification, that the second letter (which in itself contained a distinct substantive libel) was a fair comment upon the facts stated in the first letter:—Held, *bad*.—2 To say of a clergyman that he came to the performance of Divine Service in a towering passion, and that his conduct was calculated to make infidels of his congregation, is libellous.

This was an action for a libel.

The declaration stated, that the defendant falsely and maliciously printed and published of the plaintiff, and of him as vicar of Bardney, which he then was, in a public newspaper called the "*Lincoln Gazette*," the words following, that is to say:—"Bardney. To the Editor. On Sunday morning last, accompanied by a few friends who were visiting with me, I attended our parish church. When I entered, there were only some eight or ten persons present; and, after having got comfortably seated, I saw our worthy Divine (meaning the plaintiff) escorting the school-mistress of Southrey up the aisle. After passing some twenty empty pews, his reverence (meaning the plaintiff) halted at the one he had appropriated to my use in consequence of some dispute which had occurred twelve months ago. I immediately rose, and requested him to shew the lady into another pew, explaining to him that there were plenty of empty pews, and that, had we another introduced into our pew, we should be inconveniently full. 'Shure,' says he (meaning the plaintiff), 'get in now; ye'll get in here,'—at the same time giving me a slight push. I remonstrated with him (meaning the plaintiff), telling him not to assault me in the church. 'Shure,' says he (meaning the plaintiff), 'I'll assault ye immediately.' I, not wishing for any disturbance with the gentleman (meaning the plaintiff), retired: but, before I had got three yards from the pew, he (meaning the plaintiff) had laid his hands upon one young lady, and pushed her completely out of one particular corner, although there was ample room where I had been sitting, after [66] I had left the pew. So thoroughly disgusted was I with his (meaning the plaintiff's) ungentlemanly and ridiculous conduct, that I left the church, as also did my friends. Surely there is some law to prevent such conduct to a churchwarden, or I shall use my best endeavours to obtain a sufficient sum of money to present him with something if he will resign, or at any rate make a tour and endeavour to find another specimen of humanity like unto himself; as it is a pity two places should be troubled with such a man. Let him (meaning the plaintiff) remain until we send for him again. John R. Maltby." "To the Editor. Our vicar (meaning the plaintiff) has committed a slight mistake in turning our churchwarden out of his pew last Sunday morning. I may be wrong: but I think he (meaning the plaintiff) did. I can hardly reconcile his practice with his profession. He (meaning the plaintiff) professes to be a follower of 'the great Example,' and a successor of his Apostles in a direct line: but I think there must have been a link broken in the chain which connects our divine (meaning the plaintiff) with an apostle. He (meaning the plaintiff) professes to be moved by the Holy Ghost to preach the Gospel; and there can be no doubt that he (meaning the plaintiff) was moved by 'the Spirit' when he came to the churchwarden, and turned him out of his place in a towering passion. Strange preparation for that solemn service!! Is not the inconsistent conduct of the professed followers of Christ enough to make infidels of us all? The Church in all ages has suffered most from her professed friends. What is the use of a bishop, if he cannot stop the vagaries of a divine? Churchwarden." Claim 500l.

The defendant pleaded, —first, not guilty, —secondly, to the first count (a), down to and inclusive of the words and letter "John R. Maltby," that, before he [67] (the defendant) did what is therein complained of, namely, on the Sunday morning in the said libel mentioned, to wit, Sunday, the 19th of June, 1864, one John R. Maltby, accompanied by a few friends who were visiting him, attended his parish church, being the church of the parish of Bardney, whereof the plaintiff then was and yet is vicar, and whereof the said Maltby then was churchwarden, as the plaintiff then well knew;

(a) The declaration was not so divided.

and that, when the said Maltby entered, there were only some eight or ten persons present; and that, after having got comfortably seated, the said Maltby saw the plaintiff escorting the school-mistress of Southrey up the aisle; and that, after passing some twenty empty pews, the plaintiff halted at the one he had appropriated to the said Maltby, in consequence of a dispute which had occurred some twelve months before the said time when, &c.; and that the said Maltby immediately rose, and requested the plaintiff to shew the lady into another pew, explaining to the plaintiff that there were plenty of empty pews, and further explaining to the plaintiff, that, had the said Maltby and his said friends another person introduced into their pew, they would be inconveniently full; and that thereupon the plaintiff addressed to the said lady the words following, that is to say, "Shure, get in now; ye'll get in here," and at the same time gave the said Maltby a slight push; and that the said Maltby remonstrated with the plaintiff, telling him not to assault him the said Maltby in the church; and that thereupon the plaintiff addressed to the said Maltby the words following, that is to say, "Shure, I'll assault ye immediately;" and that the said Maltby, not wishing for any disturbance with the plaintiff, retired; and that, before the said Maltby had got three yards from the pew, the plaintiff laid his hands upon a young lady, and pushed her completely out of one particular [68] corner in the said pew in which the said Maltby had been seated as aforesaid, although there was ample room where the said Maltby had been sitting, after the said Maltby left the pew; and that the said Maltby was so thoroughly disgusted with the plaintiff's aforesaid conduct, which the defendant alleges to have been ungentlemanly and ridiculous conduct, that the said Maltby left the church, as also did the said Maltby's said friends; and that the said Maltby was, and his said friends were, desirous of having the plaintiff cease to be vicar of Bardney,—Thirdly, as to so much of the declaration as is not pleaded to in the next proceeding plea, that the words which are mentioned in so much of the declaration as is herein pleaded to, were and are printed and published in the said newspaper in the declaration mentioned, in a distinct paragraph from the words to which the next preceding plea is pleaded; and that the said words were and are a fair and bonâ fide comment upon the several matters and premises contained and referred to in the words hereinbefore pleaded to, and upon the conduct of the plaintiff as and being such vicar as in the declaration mentioned, and were printed and published by the defendant as and for such comment, and without any malicious intent or motive whatever.

The plaintiff demurred to the second and third pleas, the grounds of demurrer stated in the margin being, —as to the second plea, "that it does not justify the part of the libel to which it is pleaded as a justification,"—and, as to the third plea, "that the alleged comment can only be justified by conduct of which this plea does not allege that the plaintiff is guilty." Joinder.

Simon, Serjt., in support of the demurrer (*a*). The [69] second plea professes to justify so much of the libel as relates to what passed in the church on the occasion in question: it professes to answer the whole, and in reality only answers part. The question, therefore, is whether the words not covered by the plea may be considered as a fair inference from the passages justified. The whole letter is libellous: it contains opprobrious and insulting remarks upon the conduct of the plaintiff as a clergyman and a gentleman. In *Mountney v. Watton*, 2 B. & Ad. 673, the declaration stated that the defendant, intending to cause it to be believed that the plaintiff was guilty of feloniously stealing a horse, published a libel concerning him. The libel, as set out, was headed "Horse-stealer," and then alleged that the plaintiff was taken up on suspicion of having stolen a horse, by a constable who was informed that "such a character" was at a certain public-house: it then went on to state circumstances of suspicion against the plaintiff, and ultimately that, having obtained permission to go out of the constable's sight, he made his escape, but was re-taken, and confined in gaol for examination: innuendo, that the plaintiff was guilty of feloniously stealing a horse. The defendant pleaded the general issue, and then a justification as to all parts of the libel except the word "horse-stealer," setting out in this latter plea the several circumstances related in the libel. It was held that, as the declaration alleged that the libel was intended to convey a charge of felony, and this intent was not denied by the plea,

(*a*) The points marked for argument on the part of the plaintiff were those stated in the margin of the demurrer.

the statement of circumstances of suspicion to excuse part of the libel, was not sufficient justification. Lord Tenderden, in giving judgment, said: "I am of opinion that this plea is not sufficient. The declaration states that the defendant published a libel with intent to cause it to be believed that the plaintiff had been guilty of feloniously stealing [70] a horse. If the words of the alleged libel did not amount to a charge of felony, the defendant, on a trial, would have succeeded upon the general issue, and without any justification. But, if the words declared upon do impute an actual felony, as the declaration charges, then a justification merely setting out that the plaintiff was, on certain grounds, suspected of stealing, cannot be any answer. I do not, however, mean to lay it down that, where an alleged libel is divisible, one part may not be justified separately from the rest, if a proper justification can be made out." Nothing can justify the vituperative remarks contained in the first letter here. [Byles, J. In *Mountney v. Watton*, the libel imputed felony: the justification set out circumstances of suspicion only.] In *Clarke v. Taylor*, 2 N. C. 654, 665, 3 Scott, 95, Tindal, C. J., says: "There can be no doubt that a man may justify part only of a libel containing several distinct charges. That was established in *Stiles v. Nokes*, 7 East, 493. But, if he omits to justify a part which contains libellous matter, he is liable in damages for that which he has so omitted to justify. So, in *Cooper v. Lawson*, 8 Ad. & E. 746, 1 P. & D. 15, a libel stated that the plaintiff, a tradesman in London, became surety for the petitioner on the Berwick election petition, and stated himself, on oath, to be sufficiently qualified in point of property, when he was not in fact qualified, nor able to pay his debts. It then asked why the plaintiff, being unconnected with the borough, should take so much trouble, and incur such an exposure of his embarrassments; and proceeded, "*There can be but one answer to these very natural and reasonable queries; he is hired for the occasion.*" The defendant justified, stating that the above-mentioned allegations in the libel (except the hiring, which was not specifically noticed) were true, and that the publication was a correct report of proceedings in a legal court, "*together with a fair and bona fide commentary thereon.*" It was held that this concluding observation in the libel, not being a mere inference from the previous statement, but introducing a substantive fact, required a distinct justification; and therefore that, on the trial of an issue on *de injuriâ*, it was properly left to the jury to say, not only whether the evidence made out the facts first alleged, but also whether the imputation that the plaintiff had been hired, was a fair comment. The jury having found that it was not, a new trial was refused. [Montague Smith, J. The question here is, whether the observations complained of, and not justified, are more than a fair inference from the previous statements.]

Then, as to the third plea,—a similar plea was held bad, and disallowed in *The Earl of Lucan v. Smith*, 1 Hurlst. & N. 481, 26 Law J., Exch. 94. Pollock, C. B., there said: "Whatever evidence would be admissible under the proposed plea, may be given under the general issue and a plea simply stating that the article was a fair comment." And Bramwell, B., said: "I think it is important to the defendants that this application should be refused; for, if it were necessary to allege by plea the facts which it is said make the article complained of a fair comment, it would be necessary to prove the truth of those facts in the report of the commissioners. That, however, is not necessary, if the object be merely to shew that the article is a fair comment." [Byles, J. Does not the third plea incorporate the words to which the second is pleaded?] It is submitted not.

Sir G. Honyman (with whom was Field, Q. C.) *contra* (a). As to the second plea,

(a) The points marked for argument on the part of the defendant were as follows:—

"1. That the second plea is good, as it justifies all that it professes to justify: and whether it does so or not, depends on a comparison of the contents of the libel with the averments in the plea:

"2. That the words in the libel are not to be construed as used ironically, without an innuendo to that effect; and therefore such an expression as 'worthy Divine,' is not to be understood as imputing unworthiness, but as a simple allegation that the plaintiff is in truth a worthy Divine:

"3. That the third plea is good, on the ground that substantially it denies malice:

"4. That the plea is sanctioned by the authority of *The Earl of Lucan v. Smith*, 1 Hurlst. & N. 481, 26 Law J., Exch. 94:

"5. That it amounts to the plea of not guilty, and as such is substantially good."

there seems to be [72] nothing to answer. [Erle, C. J. We are all agreed as to that.] The third plea is good. As to the case of *The Earl of Lucan v. Smith*, 1 Hurlst. & N. 481, which is relied on for the plaintiff, all it amounts to is this, that, in an action for a libel, the court refused to allow the defendant to plead a plea setting out facts to shew that the alleged libel was a fair comment,—saying that it amounted to the general issue. The demurrer here admits that the matter pleaded to is a fair comment. [Byles, J. If it *can* be a fair comment.] It is suggested that the plea does not in terms aver the truth of the matters. It clearly, however, does by implication. The first part of the libel is a statement of the plaintiff's conduct: the rest is a comment on what has gone before. [Montague Smith, J. It is confined by the introduction to so much of the declaration as is not pleaded to in the second plea.] If necessary, the court will, under the 222nd section of the Common Law Procedure Act, 1852, allow the defendant to amend, by pleading it as one plea to the whole declaration.

Simon, Serjt., was heard in reply.

[73] ERLE, C. J. The plaintiff in his declaration complains of the publication by the defendant of a libel upon him as vicar of the parish church of Bardney. The libel is contained in two letters, one signed "John R. Maltby," the other "Churchman," each of which letters was published by the defendant in the same newspaper. The first of these letters in effect charges that the plaintiff, being vicar of the parish church of Bardney, assaulted the churchwarden in the church, and turned his family out of his pew in an ungentlemanly and ridiculous manner. The second letter reiterates the charge of turning the churchwarden out of his pew, and makes certain comments on the plaintiff's alleged conduct. The second plea is pleaded to the letter signed "John R. Maltby," and asserts the truth of all the statements contained therein, but omits to justify the concluding part of that letter,—"Surely there is some law to prevent such conduct to a churchwarden, or I shall use my best endeavours to obtain a sufficient sum of money to present him with something if he will resign, or at any rate make a tour and endeavour to find another specimen of humanity like unto himself; as it is a pity two places should be troubled with such a man." I am at a loss to see what there is there to justify, or how it can be called part of the libel. I think the second plea good. The third plea is pleaded to the second letter, signed "Churchman," and alleges that the words pleaded to "were and are a fair and bona fide comment upon the several matters and premises contained and referred to in the words hereinbefore pleaded to, and upon the conduct of the plaintiff as and being such vicar as in the declaration mentioned, and were printed and published by the defendant as and for such comment, and without any malicious intent or motive whatever." The plea is extremely obscure in this respect: I am [74] unable to say what is meant by a "fair and bona fide comment upon the several matters and premises contained and referred to in the words hereinbefore pleaded to." I think the plea is bad. It is entirely untenable for a newspaper proprietor to publish a letter, and in the same paper to publish another letter from another correspondent, and then say that the second letter is a fair and bona fide comment on the facts alleged in the first letter (as I assume the plea to mean). It seems to me that the second letter contains a distinct substantive libel. "He (the plaintiff) professes to be moved by the Holy Ghost to preach the Gospel: and there can be no doubt that he was moved by 'the Spirit' when he came to the churchwarden and turned him out of his place in a towering passion. Strange preparation for that solemn service!! Is not the inconsistent conduct of the professed followers of Christ enough to make infidels of us all?" To say that the plaintiff was moved by *the Spirit* might mean that he was the worse for liquor. The jury, it seems, have negatived that (a). From the suggestion that the [75] plaintiff was in a "towering passion," the writer may have meant to insinuate that he was moved by the spirit of wrath. To say of a clergyman that he came to the performance of Divine Service in a towering passion, and that his conduct was calculated to make infidels of his con-

(a) The cause was tried before Martin, B., at the last Spring Assizes at Lincoln, where the jury returned a verdict for the defendant.

Hayes, Serjt., on a former day in this term, obtained a rule nisi for a new trial, on the ground of misdirection. The misdirection complained of was that the learned Baron told the jury that in his opinion the allegations in the libel and in the pleas, that Maltby was churchwarden (which in fact he was not), and that he had a right to the pew in question (which in fact he had not), were altogether unimportant and

gregation, clearly is libellous. Being a libel per se, that letter cannot be justifiable as being a fair and bona fide comment on the matter contained in the preceding letter. For these reasons, I have arrived at the conclusion that the second plea is good, and the third bad.

BYLES, J. I quite agree with my Lord as to the second plea: I think enough of the libel is justified. Whether, if the facts set out in the second plea had been repeated in the third plea, and then the plea had gone on to allege that the matter therein pleaded to was a fair and bona fide comment on the former matter, it would have been a good plea or not, I abstain from saying. It is enough to say that I agree in the conclusion to which the Lord Chief Justice has come.

KEATING, J., concurred.

MONTAGUE SMITH, J. I am of opinion that the second plea is good, for the reasons already given. That which is left unjustified of the first letter is no more than fair comment on the facts alleged. The third plea is pleaded to a separate and independent letter, which contains substantive allegations of fact which are libellous, and which are left unjustified. Upon the same ground on which we hold the second plea to be good, we must hold the third bad.

Judgment for the plaintiff on the demurrer to the third plea, and for the defendant on the demurrer to the second plea.

[76] BOALER AND ANOTHER v. JOSEPH MAYOR THE ELDER, AND JOSEPH MAYOR THE YOUNGER. May 8th, 1865.

[S C. 34 L. J. C P. 230; 12 L. T. 457; 11 Jur. N. S. 565; 13 W. R. 775. Referred to, *Commissioners of Stamps v. Hope*, [1891] A. C. 483. See *Westmoreland Green and Blue Slate Company*, [1891] 3 Ch. 26.]

1. To operate a merger of a simple-contract debt in a specialty, the specialty must be co-extensive with the simple contract debt, and between the same parties.—2. A transaction which would otherwise operate as a release of a surety,—such as, giving time to the principal debtor,—will not have that effect, either at law or in equity, if the remedy against the surety is expressly reserved.

This was an action by the payees against the makers of a joint and several promissory note. The declaration stated that, on the 7th of December, 1864, the defendants by their promissory note, then overdue, promised to pay to the plaintiffs, on demand, 150l., with interest thereon at 4l. 10s. per annum during the forbearance, but did not pay the same. Claim, 200l.

Pleas,—first, that the defendants did not make the note, as alleged,—secondly, payment,—thirdly, that the defendants made the note jointly with one Charles Mayor, and that, after making the said note, and before action, the said Charles Mayor satisfied the note, and the plaintiffs' claim thereon, by executing a deed whereby he secured to them and covenanted with the plaintiffs to pay them 650l. and interest, including the amount of the said note in account, and in satisfaction and discharge of the said note; which deed was executed by the said Charles Mayor at the request of the plaintiff, in full satisfaction and discharge of the plaintiffs' claim on the note; and that the plaintiffs' claim was thereby merged, extinguished, satisfied, and discharged,—fourthly, for a defence on equitable grounds, that the note was made by the defendants jointly with Charles Mayor, as surety to the plaintiffs for the said Charles Mayor, and in consideration of 150l. advanced by the plaintiff to the said Charles Mayor, whereof the plaintiffs had notice before and when they first received the said note, and they received and always held the same on the terms that the defendants should be liable to them on the said note as sureties only for the said Charles Mayor; [77] and that, after the making of the said note, and before action brought, the

immaterial, and that the only substantial charge and question in the case was, whether the plaintiff had assaulted two persons in the church.

Cause was shewn against this rule in Trinity Term, 1865, and in the result the rule was discharged.

On the motion, the case of *Helsham v. Blackwood*, 11 C. B. 111, and the statute 32 G. 3, c. 60, were referred to.

plaintiffs, without the consent of the defendants or either of them, for a good, valuable, and sufficient consideration in that behalf, agreed with the said Charles Mayor to give, and then gave him time for payment of the moneys in the said note specified, and thereby discharged the defendants from the said note.

Upon these pleas the plaintiffs joined issue.

The cause was tried before Erle, C. J., at the sittings at Guildhall after last Hilary Term. The facts were as follows:—The defendant Mayor the elder was in year 1863 carrying on the business of a green grocer in Oxford Street, London; and, being desirous of retiring, agreed to dispose of the lease and goodwill to his son Charles Mayor. Charles Mayor had no money of his own wherewith to embark in the business; but his wife had an interest in certain property under the will of her late father, over which she would on attaining the age of twenty-five have a power of appointment to the extent of a moiety in favour of her husband. Charles Mayor thereupon applied to an attorney named Whall, at Worksop, to raise 650*l.* for him upon this contingent interest. Whall endeavoured to procure the money from an insurance-office, but they declined to advance more than 500*l.* upon the proposed security, and to secure this they required besides a mortgage of the wife's interest an insurance on her life, or (as that turned out not to be insurable) that of her husband. Whall then induced the plaintiffs to advance the sum required, out of a fund which they held as executors of one Roper: but he required, in addition to the mortgage of the wife's interest in the property, and an assignment of the policy on Charles Mayor's life, the further security of a promissory note for 150*l.* with two sureties. According [78] to the evidence of Watson, one of the plaintiffs (which the jury believed), it was arranged that this note should be given as a collateral security. Accordingly, on the 7th of December, 1863, the note declared on was signed by Charles Mayor and the two defendants, his father and brother: and the 150*l.* was immediately advanced to Charles Mayor. And on the 22nd of December a deed was executed between Charles Mayor and his wife of the first part, one Warren of the second part, and the plaintiffs of the third part. This deed recited the will of the wife's father, describing the interest she took under it, the policy on the life of Charles Mayor, that the plaintiffs had agreed to advance 650*l.* to Charles Mayor and his wife upon having an assignment (subject to redemption) of the wife's interest and a deposit of the policy, and that, for the better securing the 650*l.* and interest, Charles Mayor, and Warren as his surety, had agreed to enter into certain covenants thereafter contained: and it was witnessed that, in consideration of 650*l.* paid by the parties of the third part to Charles Mayor and his wife, it was covenanted that the wife, on attaining the age of twenty-five, should exercise her power of appointment in favour of her husband. The deed also contained powers of sale, and a covenant by Charles Mayor and Warren for re-payment of the 650*l.*, with interest at 5 per cent., on the 22nd of June, 1864.

After the execution of this deed, Charles Mayor was adjudicated a bankrupt on his own petition: and, on the 9th of December, 1864, this action was brought.

On the part of the defendants it was submitted that the plaintiffs' claim in respect of the promissory note merged in the deed: and that, as the day of payment of the 650*l.* was by the deed postponed till the 22nd of June, 1864, that was a giving of time to the principal debtor which discharged the sureties.

[79] A verdict having under his Lordship's direction been found for the defendants, with leave to move,

Huddleston, Q. C., on a former day in this term obtained a rule nisi to enter a verdict for the plaintiffs for the amount of the note and interest, on the ground that the evidence did not prove the defendants' pleas, that the note was not merged in the deed, and that the defendants were not discharged by the time given by the deed to the principal debtor. He submitted that, to operate a merger, the specialty must be co-extensive with the simple-contract debt, and between the same parties: *Ansll v. Baker*, 15 Q. B. 20; *Savage v. Gibbs*, 16 C. B. (N. S.) 527: and that, as it was proved to have been part of the arrangement for the advance of the 650*l.*, that the promissory note should be given as a collateral security, the sureties were not discharged by the time given by the deed,—the case being brought within the rule laid down in *Byles on Bills*, 8th edit. 233, where it is said that "It has been repeatedly held, and is now well established, that a giving of time by the creditor to the principal debtor will not discharge the surety, if there be an agreement between the creditor and the principal that the surety shall not be thereby discharged, although the surety himself be no

party to the stipulation, or even have no notice of it:" for which the learned author cites *Burke's Case*, 6 Ves. 809, *Boulbee v. Stubbs*, 18 Ves. 20, *Ex parte Glendinning*, Buck, 517, *Ex parte Carstairs*, Buck, 560, *Harrison v. Courtauld*, 3 B. & Ad. 36, *Nichols v. Norris*, 3 B. & Ad. 41, n., *Couper v. Smith*, 4 M. & W. 519, *Smith v. Winter*, 4 M. & W. 454, *North v. Wakefield*, 13 Q. B. 536, *Owen v. Homan*, 4 House of Lords Cases, 997, and *Webb v. Hewitt*, 3 K. & J. 438.

Macaulay, Q. C., and Cave, now shewed cause. The [80] note was given as a temporary security for the 150l. advanced to Charles Mayor before the deed could be prepared. [Erle, C. J. Watson swore it was given as a collateral security; and the jury believed him.] *Ansell v. Baker* and *Sharpe v. Gibbs* are altogether inapplicable here. In the former, there could be no merger except as to Lake: and, in the latter, the deed was not executed by one of the parties. In *Price v. Moulton*, 10 C. B. 561, it was held that a bond or covenant given to secure an existing debt, irrespectively of the intention of the parties, operates in law as a merger of the remedy on the simple contract. "The policy of the law," says Maule, J., "is that there shall not be two subsisting remedies, one upon the covenant, and another upon the simple contract, by the same person against the same person for the same demand." In *King v. Howe*, 13 M. & W. 494, it was held that a judgment (without satisfaction) recovered against one of two joint debtors, is a bar to an action against the other: and for this reliance was placed on the judgment of Maule, J., in *Bell v. Banks*, 3 M. & G. 258, 3 Scott, N. R. 497. Then, the effect of the deed was to give time to the principal debtor until the 22nd of June, 1864. [Byles, J. Would a court of equity have allowed the creditors to pursue their remedy on the note against the principal debtor before the 22nd of June, 1864?] It is submitted not. In *Boulbee v. Stubbs*, 18 Ves. 20, a creditor having among other securities a bond with a surety, took a mortgage from the principal debtor, and agreed to receive the residue by instalments secured by warrant, &c., without prejudice to any security he already held: and the Lord Chancellor granted an injunction against suing the surety. Assuming that Charles Mayor might have been sued upon the note, the effect of the deed still would be to give time to the principal debtor. Where parties have [81] entered into a deed, the deed is the only evidence of the transaction. In *Ex parte Glendinning*, Buck, 517, it was held that, if a creditor execute a deed of compromise with the principal debtor, he thereby discharges the surety, — unless it is stipulated in the deed that the remedies against the sureties shall be reserved: and that parol evidence of the understanding of the parties to the deed that the remedies against the surety shall be reserved, cannot be admitted. The like was held in *Lewis v. Jones*, 4 B. & C. 506, 6 D. & R. 567.

Huddleston, Q. C., was stopped by the court.

ERLE, C. J. I am of opinion that the rule should be made absolute to enter a verdict for the plaintiffs. The action was on a joint and several promissory note for 150l. made by Charles Mayor as principal and the defendants as sureties. Charles Mayor had obtained a loan of 650l., upon the security of an assignment of his wife's interest in certain property under the will of her late father, and of a policy of insurance for 500l. on his own life: and it was agreed that the promissory note in question should be given for 150l. more. The note was given on the 7th of December, and the deed was executed on the 22nd. The question is, whether the debt created by the promissory note is merged in the deed. I think it is quite clear that it is not. The deed and the promissory note are between different persons, for different sums, involving different terms, and at different rates of interest. *Sharpe v. Gibbs*, 16 C. B. (N. S.) 527, and the case there cited, of *Ansell v. Baker*, 15 Q. B. 20, are sufficient authorities to shew that the simple-contract debt on the promissory note did not merge in the higher security of the specialty. [82] If the specialty is not co-extensive with the simple-contract debt, the two may co-exist. Then, was there time given to Charles Mayor, the principal debtor, so as to operate a discharge of the liability of the sureties? By the deed the mortgage-debt was covenanted to be paid on the 22nd of June: the promissory note was payable *on demand*. The covenant to pay in June operates so that no action shall be brought thereon until that time. But there is no engagement on the part of the plaintiffs that they will abstain from pursuing any other remedies until then. It seems to me therefore that the deed did not operate to give time to the principal. The cases cited by Mr. Cave as to the effect of mortgages, and to shew that the deed is conclusive evidence of the intent of the parties, were no doubt soundly

decided upon the facts then before the court. Effect must, if possible, be given to the intention of the parties. My judgment is giving effect to the intention. Parol evidence must be admissible to let in the whole truth: and indeed it must be admitted in order to raise the point on which Mr. Cave relies.

BYLES, J. I am of the same opinion, though I was at first somewhat struck by the argument urged on the part of the defendants. As to the question of merger, the rule is well established that, unless the two are strictly co-extensive, the simple-contract debt is not merged in the specialty. *Sharp v. Gibbs*, 16 C. B. (N. S.) 527, is a distinct authority to that effect. Watson's evidence, as reported by my Lord, clearly shews that it was intended that it should not. And the jury so found. The effect of giving time was recently under the consideration of Vice-Chancellor Page Wood in a case of *Webb v. Hewitt*, 3 K. & J. 438, where it was held that a creditor, upon giving time to [83] his debtor, may reserve any right against the surety, and this without communicating the arrangement to the surety. The learned Vice-Chancellor says: "As to giving time, the authorities, which are almost innumerable, have settled that, upon any giving of time to a principal debtor, if there be a reservation of rights against the surety, the surety is not discharged: for, when the right is reserved, the principal debtor cannot say it is inconsistent with giving him time that the creditor should be at liberty to proceed against the sureties, and that they should turn round upon the principal debtor, notwithstanding the time so given him: for, he was a party to the agreement by which that right was reserved to the creditors, and the question whether or not the surety is informed of the arrangement, is wholly immaterial." Here, if Watson's evidence was true,—and the jury gave credit to it,—there was assent to what was done, both on the part of the principal debtor and of the sureties.

KEATING, J. For the reasons already given, I concur with my Lord and my Brother Byles. Mr. Cave relied mainly upon *Prior v. Moulton*, 10 C. B. 561, to shew that this was a case of merger. That case, however, does not sustain the argument: it does not lay it down as a general proposition that, wherever there is a security by specialty, the simple-contract debt is merged. The question there arose on demurrer: it was admitted therefore on the record that the identical debt sued for was the subject-matter of the mortgage security. But, in the course of the argument, Williams, J., put the following question to my Brother Willes, who was counsel for the plaintiff,—"Would this deed operate as a merger, if it had been expressly stipulated that it should be a collateral security only?" [84] And the learned counsel declined to affirm that. At first I was inclined to adopt Mr. Cave's argument, and to think that the non-communication of the arrangement protected the sureties. But the authorities are clearly the other way. I see no reason for holding that the principal debtor might not have been sued on the note immediately.

MONTAGUE SMITH, J. I am of the same opinion. Upon the evidence of Watson, which the jury have affirmed, the note was a collateral and additional security. It is said that the force of the deed which was subsequently executed was, to merge the remedy on the promissory note. *Ansell v. Baker*, 15 Q. B. 20, and *Sharp v. Gibbs*, 16 C. B. (N. S.) 527, however, are clear and distinct authorities against that argument. Then, was the arrangement such that, because the principal debtor could not be sued on the note until the 22nd of June, 1864, the sureties were discharged? We are to decide this case upon legal grounds: but I should have been very much surprised to find the rule of law at variance with that of equity on the subject. The case of *Wicks v. Rogers*, 1 De Gex, M. & G. 408, shews that it is not. There, A. B. entered into a bond as a surety: the creditor subsequently took from the principal debtor a promissory note for the amount, payable in two months, but afterwards, in consequence of the insolvency of the debtor, sued A. B. on the bond. A. B. then filed his bill, to restrain the action, on the ground that he was discharged from liability by the giving of the promissory note: the creditor by his answer denied that such was the effect of the transaction: and on the hearing an inquiry was directed in respect of the circumstances under which the promissory note had been given. The master reported that, though there was not any written or any [85] distinct parol agreement between the parties, yet there was a general understanding that the giving of the note was not to affect the bond: and it was held, on further directions that, under these circumstances, there was no case for the interference of a court of equity.

Rule absolute.

HARTLEY AND OTHERS v. MARE. May 9th, 1865.

[S. C. 34 L. J. C. P. 187; 12 L. T. 424; 11 Jur. N. S. 625; 13 W. R. 777. Considered, *Staffordshire Banking Company v. Emmott*, 1867, L. R. 2 Eq. 208. Referred to, *Rossi v. Bailey*, 1868, L. R. 3 Q. B. 621.]

After action brought, the defendant executed a deed of inspectorship under s. 192 of the Bankruptcy Act, 1861, which was duly filed, &c. before judgment signed. Execution was afterwards issued, and the defendant's goods taken: — Held, that the execution so issued could not be made available without the leave of the court under s. 198, notwithstanding the defendant might have pleaded the deed.

A writ under the Bills of Exchange Act, 18 & 19 Vict. c. 67, was issued against the defendant at the suit of the plaintiffs on the 29th of December, 1864, for 149l. 19s. 9d. principal and interest due to the plaintiffs as drawers of a bill accepted by the defendant. The plaintiffs, being unable to effect personal service of the writ, on the 17th of January, 1865, obtained a judge's order under the 17th section of the Common Law Procedure Act, 1852, for leave to proceed as if personal service had been effected. On the 7th of February, judgment was signed, and on the 8th a fi. fa. issued, under which the defendant's goods were seized.

On the 3rd of January, 1865, the defendant executed a deed of inspectorship under the 192nd section of the Bankruptcy Act, 1861, 24 & 25 Vict. c. 134, the validity of which was not disputed, which provided for his carrying on his business under inspection, and also contained a clause making the deed pleadable in bar as a release (a). This deed was registered under the Bankruptcy Act on the 2nd of February.

[86] The inspectors on the 11th of February gave notice to the sheriff of their claim, whereupon he took out an interpleader summons, which was served on the plaintiffs and the claimants. The interpleader summons came on to be heard before Byles, J., on the 14th of February, when that learned judge directed that the sheriff should withdraw, upon the claimants giving security or bringing 165l. into court,—the validity of the deed and all questions thereon being referred to the court. After some delay, the 165l. was handed to the sheriff of Kent, and by him brought into court.

R. E. Turner, on a former day in this term, obtained a rule calling upon the inspectors and the sheriff to shew cause why the sum of 159l. 3s. 11d., with costs of [87] motion, should not respectively be paid out of court to the plaintiffs or their attorneys, out of the 165l. so paid into court as above mentioned. He submitted that, as the defendant had an opportunity of pleading his discharge under the deed, and omitted to avail himself of it, he was precluded from setting it up now,—referring to *Whitmore v. Wakerley*, 3 Hurlst. & Colt. 538.

J. Brown, Q. C., and Lanyon, now shewed cause, upon an affidavit setting out the

(a) The material clauses of the deed were as follows:—

“And the said creditors do and each and every of them doth by these presents give and grant unto the said debtor full, free, and absolute liberty and licence henceforth to conduct, manage, and carry on his said business, and to collect, get in, release, and dispose of all his real and personal estate of or to which he is now seised, possessed, or entitled, under the inspection and subject to the approbation, direction, and control of the said inspectors or inspector, during the period of six calendar months from the said 1st day of January instant.”

“And it is hereby further agreed and declared that, if any of the said creditors shall at any time whilst these presents are in force commence, prosecute, or continue any action, suit, or other proceedings against the said debtor, in respect of their respective debts, claims, or demands, these presents, and the provisions herein contained, shall operate and have the same force and effect as an order of discharge granted to the said debtor under the Bankruptcy Act, 1861, and this declaration and agreement may be pleaded and used in bar of or as a defence or answer to every such action, suit, or other proceeding, in like manner, and with the same effect as an order of discharge under the Bankruptcy Act, 1861, might be pleaded and used, in case the said debtor had been adjudicated bankrupt on the day of the date of these presents, and had obtained his order of discharge under such adjudication.”

material clauses of the deed, and averring that all the requisitions of the statute had been complied with, so as to entitle the defendant to the protection thereby conferred on compounding debtors. The inspectors are entitled to the fund in court, and this rule must be discharged. The deed was registered on the 2nd of February, and judgment was not signed until the 7th; therefore, it is said, the defendant might have pleaded it, and, having omitted to do so, is estopped from now relying upon it. To that argument there are two answers. In the first place, it does not appear that the defendant had an opportunity of pleading the deed. The twelve days allowed by the statute for the defendant's appearance to the writ had elapsed before the registration of the deed (a). The defendant, therefore, could not have pleaded the deed. If it had been registered within the twelve days, there might have been something in the [88] argument. But, assuming that the defendant might have pleaded the deed, the plaintiffs are precluded by the 197th and 198th sections of the Bankruptcy Act 1861, from availing themselves of their execution. The 197th section enacts that, "from and after the registration of every such deed or instrument in manner aforesaid (ss. 192, 194), the debtor and creditors, and trustees, parties to such deed, or who have assented thereto or are bound thereby, shall in all matters relating to the estate and effects of such debtor be subject to the jurisdiction of the court of bankruptcy, and shall respectively have the benefit of and be liable to all the provisions of this act, in the same or like manner as if the debtor had been adjudicated a bankrupt, and the creditors had proved, and the trustees had been appointed creditors' assignees under such bankruptcy; and the existing or future trustees of any such deed or instrument, and the creditors under the same, shall, as between themselves respectively, and as between themselves and the debtor and against third persons, have the same powers, rights, and remedies, with respect to the debtor and his estate and effects, and the collection and recovery of the same, as are possessed or may be used or exercised by assignees or creditors with respect to the bankrupt, or his acts, estate, and effects in bankruptcy." And the 198th section enacts that, "after notice of the filing and registration of such deed has been given as aforesaid, no execution, sequestration, or other process against the debtor's property in respect of any debt, and no process against his person in respect of any debt, other than such process by writ or warrant as may be had against a debtor about to depart out of England, shall be available to any creditor or claimant, without leave of the court: and a certificate of the filing and registration of such deed under the hand of the chief registrar and [89] the seal of the court shall be available to the debtor for all purposes as a protection in bankruptcy." The "leave of the court" here means leave of the court of bankruptcy,—*Skilton v. Symonds*, 18 C. B. (N. S.) 418,—and that has not been obtained. If the defendant had been arrested, he would have been at once discharged: *Leigh v. Pendlebury*, 15 C. B. (N. S.) 819, 820; *Skilton v. Symonds*, which last-mentioned case virtually overrules *Whitmore v. Wakeley*, 3 Hurlst. & Colt. 538. It is for the plaintiff to apply to the court for leave to issue process, and not for the defendant to come and ask protection. He has it already by force of the direct words of the statute. *Bellhouse v. Mellor*, 4 Hurlst. & N. 116, is a distinct authority to shew that the inspectors here are entitled to this money. The facts of that case were these:—On the 16th of July, 1848, the defendants, who were traders, filed in the court of bankruptcy a petition for arrangement, praying that their persons and property might be protected from all process until further order. On the same day, a commissioner made an order which, after reciting the petition and prayer for protection until further order, proceeded,—“I hereby grant such protection, and order that the persons and property of the petitioners be protected from process until the 29th of July next,” and the commissioner also thereby appointed a meeting on the 29th of July, at 12 o'clock at noon, for the creditors to assent to or dissent from the proposed arrangement. About 11 o'clock

(a) The 2nd section of the 18 & 19 Vict. c. 67, enacts that “a judge of any of the superior courts shall, upon application within the period of twelve days from such service, give leave to appear to such writ, and to defend the action, on the defendant paying into court the sum indorsed on the writ, or upon affidavits satisfactory to the judge which disclose a legal or equitable defence, or such facts as would make it incumbent on the holder to prove consideration, or such other facts as the judge may deem sufficient to support the application, and on such terms as to security or otherwise as to the judge may seem fit.”

in the forenoon of the 29th of July, the plaintiffs took in execution the defendants' goods under a writ of *fi. fa.* On the 3rd of August, the defendants were adjudicated bankrupts. It was held,—first, that the order was valid within the 211th section of the Bankrupt Law Consolidation Act, 1849, which enables the court to grant protection “until further order,” and to renew [90] the same from time to time,—secondly, that the protection extended to the whole of the 29th of July,—thirdly, that the order being valid, the assignees under the bankruptcy were entitled to the proceeds of the execution. That case was confirmed by the court of Queen's Bench, in *Williams v. Dray*, 29 Law J., Q. B. 86.

Lush, Q. C., and R. E. Turner, in support of the rule. The defendant might have pleaded the deed, and did not, and therefore he cannot now set it up against the plaintiffs' judgment. The 3rd section of the Bills of Exchange Act enacts that, “after judgment, the court or a judge may, under special circumstances, set aside the judgment, and, if necessary, stay or set aside execution, and may give leave to appear to the writ, and to defend the action, if it shall appear to be reasonable to the court or judge so to do, and on such terms as to the court or judge may seem just :” so that, notwithstanding the lapse of the twelve days, the defendant still might have set up this deed, if it afforded him any defence to the action. [Montague Smith, J. What do you suggest the defendant should have pleaded ?] A clause in the deed which has been held equivalent to a release: *Clapham v. Atkinson*, 4 Best & Smith, 722, 730; *Walker v. Nevill*, 34 Law J., Exch. 73; *Lyme v. Wiggatt*, 18 C. B. (N. S.) 593. This is not an application to the discretion of the court, or to set aside the writ. It is in effect an interpleader issue, to try whether the execution-creditor or the inspectors under the deed be entitled to the money. The deed contains no assignment of the debtor's property, therefore it still remains in him [Byles, J. The 198th section of the Bankruptcy Act, 1861, puts assignments and deeds of inspectorship upon the same footing.] *Whitmore v. Wakerley*, 34 [91] Law J., Exch. 83, is precisely in point. The Lord Chief Baron there says,—“Though fraud be a possible result, we must give effect to the law of the land: and, as the defendant did not plead the deed when he had the opportunity, he cannot avail himself of it now.” An *auditâ querelâ*, which was an application to the equitable jurisdiction of the court, did not lie where there was any other remedy at law, either by plea or otherwise: *Young v. Collit*, Sir T. Raym. 89. And therefore where the party had time to take advantage of the matter which he had in discharge of himself, and neglected it, he could not afterwards be relieved by *auditâ querelâ*: 1 Rol. Abr. 306 (C.), pl. 1: 2 Wms. Saund. notes to *Turner v. Davies*, 147 et seq.” The question decided in *Skilton v. Symonds*, 18 C. B. (N. S.) 418, is quite beside that which arose in *Whitmore v. Wakerley*. The 198th section of the Bankruptcy Act, 1861, has reference only to proceedings where the sole remedy is by application to the court. *Belthouse v. Mellor*, 4 Hurlst. & N. 116, stands on a very different footing: there, the defendant had a protection in bankruptcy; and the application was, to set aside process which had improperly issued against him. Here there is no application to set aside the process: and the ordinary operation of a writ of *fi. fa.* is, to vest the goods from the time of seizure in the execution-creditor. [Erle, C. J. If this had been a *ca. sa.*, instead of a *fi. fa.*, the sheriff must have released the defendant on production of the certificate.] It appears from the affidavits that the deed in question was executed on the 3rd of January, registered on the 2nd of February, and gazetted on the 3rd. It does not appear, therefore, to have been registered within the twenty-eight days allowed by the 194th section. [Brown. The registrar will not receive the deed after the expiration of the twenty-eight days. Erle, C. J. We must give [92] credit to the act of the officer. He has forty-eight hours to register the deed. It may have been delivered to him on the 31st of January.]

ERLE, C. J. I am of opinion that this rule should be discharged. The action is brought by a creditor against Mare, the debtor. After the commencement of the action, the debtor executed a deed of inspectorship, which is admitted to be valid under the 192nd section of the Bankruptcy Act, 1861. After that deed had been executed and registered, and a certificate of registration given to the defendant, judgment was signed, and a *fi. fa.* issued by the plaintiffs, under which the defendant's goods were taken in execution. The inspectors named in the deed preferred a claim, and the money now sought to be obtained out of court was paid in by them under an interpleader summons: and we are now called upon to say whether the execution-creditors or the inspectors are entitled to that money. I am of opinion that the

inspectors are. The deed is one which gives Mr. Mare all the advantages of a protection in bankruptcy. My judgment turns on the 198th section of the act, which provides that, "after notice of the filing and registration of such deed has been given as aforesaid, no execution, sequestration, or other process against the debtor's property in respect of any debt, and no process against his person in respect of any debt, other than such process by writ or warrant as may be had against a debtor about to depart out of England, shall be available to any creditor or claimant, without leave of the court: and a certificate of the filing and registration of such deed, under the hand of the chief registrar and the seal of the court, shall be available to the debtor for all purposes as a protection in bankruptcy." No leave of the court has been obtained here. The plaintiffs are creditors [93] who have issued an execution against the goods of the debtor, and who are seeking to make it available after the execution and registration of a deed valid under the act. What is the meaning of this general enactment? It is contended that it is confined to judgments obtained after the execution and registration of the deed. But the language of the enactment is universal: "no execution against the debtor's property, &c., shall be available to any creditor, without leave of the court." I think this process cannot be available to the plaintiffs, and that the money in question must be handed to the inspectors, whose money it is. The words are general, and we are bound to give effect to them according to their plain meaning. The construction which we put upon this section in *Skilton v. Symonds* is quite consistent with our present decision. We have been pressed with the opinion of the court of Exchequer in *Whitmore v. Wakerley*, 34 Law J., Exch. 83, as being an authority the other way. There, however, the application was to set aside the fi. fa. Wakerley had lost the benefit of the deed of composition by having omitted to plead it when he had an opportunity. The judgment here will not conflict with the judgment there given, if what the court meant was that the defendant was trying to avail himself on motion of a deed which he might have pleaded but had omitted to plead. The defendant was seeking to set aside the writ. He had no right to ask the court to set aside the writ. It was perfectly competent to the plaintiff there, as it was for the plaintiff here, to go on to judgment: and, for aught I know, he might issue a fi. fa. But the moment he seeks to put the sheriff in motion, and tries to make the execution available either against the property or the person of the debtor, the 198th section comes into operation; and the court out of which the process issues has a right to say "You shall [94] not make your writ available in contravention of the act of parliament." I do not think there is necessarily any conflict between *Whitmore v. Wakerley* and the present case. The argument as to laches has no application where a third party's interest intervenes. The whole of these enactments of the Bankruptcy Act from 192 to 199 are framed in the interest of the general body of creditors, against one. Here, the inspectors intervene for the protection of the creditors generally. Those arguments, therefore, which would be good as against the defendant, have no relevancy to take away the rights of the general body of the creditors as represented by the inspectors.

BYLES, J. I am of the same opinion. I rely entirely on the 198th section of the Bankruptcy Act, 1861, which provides that, after notice of the filing and registration of such deed has been given as aforesaid, no execution, sequestration, or other process against the debtor's property in respect of any debt, and no process against his person in respect of any debt, shall be available to any creditor, without leave of the court. The affidavits in this case shew that all the preliminaries have been duly observed; and therefore by the express words of the statute the plaintiffs' execution is not to be available to help them to the 165l. or any part thereof. I must confess I do not see any conflict between the decision of the Exchequer in *Whitmore v. Wakerley* and that to which we are coming here. A writ of execution may be in force and perfectly valid until it is sought to make it available by seizure. It might be prejudicial to the plaintiffs' interest to have it set aside. We are not asked to set aside the fi. fa. here: all we are asked to do is to say that the plaintiffs' execution shall not be made available in defiance of the 198th section of the statute.

[95] KEATING, J. I am of the same opinion. If we were to make this rule absolute, we should be doing precisely that which the 198th section says shall not be done, namely, making the fi. fa. of the plaintiffs available against the goods of the debtor after all the conditions prescribed by the statute have been duly complied with,

and thus giving to one creditor money which the law says shall be distributed amongst the general body.

MONTAGUE SMITH, J. I am of the same opinion. The 198th section of the Bankruptcy Act, 1861, is perfectly general in its terms, and cannot, I think, be read as the counsel for the plaintiffs suggest it should be read. Taking the 197th and the 198th sections together, I agree with my Brother Keating that, if we were to make this rule absolute, we should be making the execution of the plaintiffs available for a purpose for which the statute says it shall not be made available.

ERLE, C. J. We think there were fair grounds for contesting the matter, and therefore that there should be no costs.

Rule discharged, without costs.

[96] LOCK v. HENRY FURZE, Executor of John Furze, Deceased. May 11th, 1865.

[Affirmed, L. R. 1 C. P. 441 : 35 L. J. C. P. 141. See *Wissell v. School for Indigent Blind*, 1882, 8 Q. B. D. 364 : *Wallis v. Hands*, [1893] 2 Ch. 85 : *In re Gray*, [1901] 1 Ch. 244.]

1. The rule in *Flureau v. Thorndell*, 2 W. Bla. 1078, that, where a contract of sale of real estate goes off in consequence of a defect in the vendor's title, the vendee is not entitled to damages *for the loss of the bargain*, does not apply to the case of a lease granted by one who has no title to grant it.—2. And it makes no difference that the lease is a lease in reversion, and not in possession,—at all events, where the lessee is already in possession of the premises under a valid subsisting lease.—3. A plea to an action for breach of the covenant for quiet enjoyment in such a lease, —that the plaintiff never had or entered into possession of the demised premises under or by virtue of the lease, —held bad, as attempting to put in issue matter neither expressly nor impliedly alleged in the declaration.—4. A. was in possession of premises under a lease from B. which would expire on the 4th of December, 1864. In February, 1860, A., in consideration of a premium of 400l., obtained from B. a further lease of the same premises for *twenty-one years* and twenty-one days, to commence from the expiration of the former lease. On the death of B., in 1863, it was found that B. was only tenant for life, with power to grant leases *in possession*, and not in reversion, and consequently that the lease so granted by him to A. in February, 1860, was void. A. thereupon obtained from the reversioners a fresh lease for *seven years*, at a considerable increase of rent, and sued C. (B.'s executor) upon the covenant for quiet enjoyment contained in the void lease :—Held,—upon the authority of *Williams v. Burrell*, 1 C. B. 402, —that A. was entitled to recover (besides the 400l. premium and the costs of preparing the void lease) the difference in value between the term professed to be granted to him by that lease and the seven years' term which he obtained from the reversioners.—5. Held also, that, in estimating the value of the term which the lessee had lost, it was not competent to the jury to give 10 per cent. in addition, as on a compulsory sale, by analogy to the practice in the case of lands taken by a railway or other public company.—6. Counsel's and surveyors' fees for advising on title, &c., not allowed as part of the costs of a lease.

This was an action for the breach of a covenant for quiet enjoyment contained in a lease.

The first count of the declaration stated that, by an indenture made the 14th of February, 1860, between John Furze, since deceased, of the one part, and the plaintiff of the other part, it was witnessed that, for and in consideration of the sum of 400l. to the said John Furze paid by the plaintiff, the receipt whereof the said John Furze did thereby acknowledge, and also for and in consideration of the covenant for insurance against loss or damage by fire thereafter contained, and of the rent thereafter reserved and made payable, and of the covenants, clauses, provisoes, conditions, and agreements thereafter mentioned and contained, and which by or on the part and behalf of the plaintiff, his executors, administrators, and assigns, were [97] to be paid, kept, done, observed, and performed, he the said John Furze by the said indenture did demise and lease unto the plaintiff a piece or parcel of ground, with the messuage, tenement, or dwelling-house thereon erected and built, situate, standing, and being in St. James's Street in the parish of St. James, in the city of Westminster, and

numbered 6, with the erections and building behind the same at the bottom of the yard or garden, with the appurtenances, To have and to hold the said premises thereby demised, with the appurtenances, unto the plaintiff, his executors, administrators, and assigns, from the 4th of December, 1864, at which time an existing lease of the said premises would expire, for and during and unto the full end and term of twenty-one years and twenty-one days from thence next ensuing and fully to be complete and ended, yielding and paying therefore unto the said John Furze, his heirs and assigns, for the first twenty one days of the said term the rent or sum of 10l., and yielding and paying every year during the remainder of the said term thereby granted the clear yearly rent or sum of 175l. : such respective rents to be free and clear of and from the land-tax, sewers-rate, main-drainage rate, and all other taxes, rates, charges, assessments, or impositions whatsoever: And the said John Furze did thereby covenant, promise, and agree to and with the plaintiff, his executors, administrators, and assigns, that the plaintiff, his executors administrators, and assigns, paying the said yearly rent thereby reserved, and observing, performing, fulfilling, and keeping all and singular the covenants, clauses, provisoes, conditions, and agreements therein contained, and which on his and their parts and behalves were and ought to be paid, observed, performed, fulfilled, and kept, according to the true intent and meaning of the said indenture, should and might peaceably and quietly have, hold, [98] use, occupy, possess, and enjoy the said piece or parcel of ground, messuage or tenement, and all and singular other the premises thereby demised, with the appurtenances, for and during the said term of twenty-one years and twenty days thereby granted as aforesaid, without the lawful let, suit, trouble, denial, interruption, molestation, or disturbance of or by the said John Furze, his heirs or assigns, or any of them, or any person or persons whomsoever lawfully claiming or to claim by, from, through, under, or in trust for him, them, or any of them: Averment, that all conditions were fulfilled, and all things happened, necessary to entitle the plaintiff to maintain this action for the breach thereafter mentioned; yet that, after the making of the said indenture, and before this suit, and before and during the said term, one Frances Vickers, then lawfully claiming the said demised premises through and under the said John Furze, deceased, and having a good title to the same, and to the possession thereof, through and under him, claimed and demanded the said demised premises of, from, and against the plaintiff, and threatened to oust him from the possession and enjoyment thereof, whereby the plaintiff could not and did not peaceably or quietly have, hold, use, occupy, possess, or enjoy the said premises by the said indenture demised, with the appurtenances, for or during the said term thereby granted, or any part thereof, without the lawful let, suit, trouble, denial, interruption, molestation, and disturbance of the said Frances Vickers, so lawfully claiming through and under the said John Furze, deceased, as aforesaid; and that, by reason of the premises, the plaintiff was forced and obliged to and did take and accept a lease or appointment of the said premises from the said Frances Vickers for the term of seven years from the 25th of December, 1864, at an increased rent of 300l. [99] a year, and was put to great trouble and expense and costs in obtaining such lease or appointment, and had also lost the benefit of the said lease granted by the said John Furze, deceased, and of the said sum of 400l. paid for the same.

There was also a count charging the defendant as executor for money payable by him as executor as aforesaid to the plaintiff for money received by the said John Furze in his life-time for the use of the plaintiff. Claim, 3000l.

The defendant pleaded to the first count of the declaration, that the said deed in that count mentioned was not the deed of the said John Furze, as alleged,—Secondly, to the said first count, that the plaintiff never had or entered into possession of the said demised premises under or by virtue of the said lease, as alleged,—Thirdly, to the said first count, that the said Frances Vickers did not claim the said premises, nor had she a good title thereto, nor to the possession thereof, through or under the said John Furze, deceased, as alleged,—Fourthly, to the said first count, that the said Frances Vickers did not claim or demand the said premises from the plaintiff, nor threaten to oust him from the possession or enjoyment thereof, as alleged,—Fifthly, to the last count, except as to the sum of 417l., parcel of the money claimed, that the said John Furze never was indebted, as alleged,—Sixthly, as to the said excepted sum of 417l., the defendant as such executor as aforesaid brought the same into court, &c.

The plaintiff joined issue upon all the pleas. He also demurred to the second plea, the ground of demurrer alleged in the margin being, "that the plaintiff is entitled to maintain the action, even though he should never have had possession under the lease in question." Joinder.

The cause was tried before Erle, C. J., at the sittings [100] in London after last Hilary Term, when the following facts appeared in evidence:—The plaintiff was in possession of certain premises in St. James's under a lease from the testator John Furze, bearing date the 9th of February, 1838, which would expire on the 4th of December, 1864, at the yearly rent of 150l. On the 14th of February, 1860, he obtained from him a further lease of the same premises for twenty-one years and twenty-one days from the expiration of the former lease, at the yearly rent of 175l. This lease contained a covenant on the part of John Furze, that the plaintiff, his executors, &c., paying the rent, &c., "should and might peaceably and quietly have and enjoy the demised premises for and during the said term of twenty-one years, &c. thereby granted, without any lawful let, suit, trouble, denial, interruption, molestation, or disturbance of or by the said John Furze, his heirs or assigns, or any of them, or any person or persons whomsoever lawfully claiming or to claim by, from, through, under, or in trust for him, them, or any of them."

In May, 1863, John Furze died. The defendant was his executor. In November, 1863, the plaintiff received an intimation on behalf of one Frances Vickers, a daughter of the deceased, that the lease of the 14th of February, 1860, was a void lease, and would not be recognized. It appeared that, on the marriage of Frances Vickers in 1841, the testator had settled the premises in question upon her and the issue of the marriage, reserving to himself a life-interest, with power to grant leases for any term not exceeding twenty-one years, *to take effect in possession, and not in reversion or by way of future interest.*

After much negotiation it was ultimately arranged that the plaintiff should have a new lease of the premises granted to him by Frances Vickers and her husband for seven years, from Christmas 1864, in consi-[101]deration of a premium of 400l. and a yearly rent of 300l.

The plaintiff thereupon brought this action against the defendant as the executor of John Furze, claiming by way of damages the difference in value between the void lease and the new lease from Vickers and wife, and also the 400l. which he had paid by way of premium to John Furze for the void lease, and 65l. the expenses he alleged he had been put to in consequence of the breach of the covenant for quiet enjoyment contained in that lease. Of this latter sum, 48l. was the amount of the expense which the plaintiff had incurred in the preparation of and in attempting to support the void lease (20l. of it consisting of counsel's and surveyors' fees), and 17l. the expense of the seven years' lease.

On the part of the defendant it was insisted, upon the authority of *Flureau v. Thornhill*, 2 W. Bl. 1078, and other cases, that the plaintiff was not entitled to recover any damages for the loss of his bargain; and that all he was entitled to was to have back the premium he had paid for the void lease, and the 17l. costs of preparing that lease,—which sums had been paid into court.

For the plaintiff, it was submitted that he was entitled to be reimbursed all he had lost by the testator's breach of contract, viz. the difference between the market-value of the new lease and the lease he had lost, including the customary addition of 10 per cent. for compulsory sale, and also all the expenses he had incurred.

His Lordship ruled that the plaintiff was entitled to recover the difference between the value of the seven years' lease and the price which the reversionary lease would have fetched in the market.

The jury, assessing the value of the reversionary [102] lease on the 6 per cent. tables, found the difference of value between the two leases to be 1320l.; to which they added 137l., being 10 per cent. for compulsory sale, and 65l. for the expenses: and they accordingly returned a verdict for the plaintiff for 1522l.

Bovill, Q. C., on a former day in this term, obtained a rule to shew cause why the verdict for the plaintiff on the second and fourth pleas should not be set aside, and instead thereof a verdict be entered thereon for the defendant, pursuant to leave reserved, on the ground that the facts proved at the trial did not entitle the plaintiff to a verdict upon those pleas: and why the damages should not be reduced to nominal damages, or to such sum as the court might direct, on the grounds that the plaintiff

was not entitled to recover more than the sum of 400*l.* he had paid, and the 17*l.* expenses, which two sums the defendant had paid into court, and that he lost nothing but what he had paid; that he was not entitled to recover the 65*l.*, the costs, &c., of the second lease, or any part of it: that the plaintiff must have paid the costs of one lease, and that he was not entitled to throw those costs or any of them upon the defendant; and that the plaintiff was not entitled to the 10 per cent. which the jury gave as upon a compulsory sale: Or, why a new trial should not be had, on the ground that the learned judge misdirected the jury in telling them that the plaintiff was entitled to recover the difference in value between the lease which was avoided and the lease which was granted, and that the plaintiff was entitled to recover the 65*l.*: and also in directing them that the plaintiff was entitled to recover the 10 per cent. claimed as upon a compulsory sale; and that the learned judge ought to have directed the jury that the plaintiff was not entitled to recover those several matters respectively.

[103] Lush, Q. C., J. Brown, Q. C., and Archibald, shewed cause (a)¹. The main question is, to what measure of damages the plaintiff is entitled for the testator's breach of the covenant for quiet enjoyment. It will be contended on the part of the defendant that, under the circumstances, he is only liable for the amount of the premium paid by the plaintiff for the void lease, and the costs he was put to in obtaining it, by analogy to the rule laid down in *Flureau v. Thornhill*, 2 Sir W. Bla. 1078, and adopted in subsequent cases that, where a contract for the sale of real estate goes off by reason of the vendor's defect of title, the vendee is entitled to no compensation for the loss of the bargain. The transaction here, however, went beyond a mere bargain. There was an absolute conveyance, with a covenant for quiet enjoyment. If the lease of February, 1860, had begun to run before the defect of title was discovered, beyond all question the plaintiff would have been entitled to recover damages for what he had lost. That is so distinctly laid down by this court in *Williams v. Barrrell*, 1 C. B. 402. Can it make any difference that the lease was to commence at a future time, that it was merely an *interesse termini*? It is submitted not. An *interesse termini* is an interest that is saleable and capable of being assigned or bequeathed: and it would be assets in the hands of an executor: notes to *Look v. Glascock*, 1 Wms. Saund. 250 g., n. (1). Although this was but an *interesse termini*, yet, being by deed, it vested an interest in the lessee immediately; an entry was not necessary for that purpose: see Bac. Abr. *Leases and Terms for Years* (N.); *Blatchford, App., Colc, Resp.*, 5 C. B. (N. S.) 54; *Harrison v. Blackburn*, 17 C. B. (N. S.) 678. [Byles, J. Some of the incidents of an *interesse ter-*[104]mini are mentioned in *Sheppard's Touchstone*, 267, and note (c) thereon by Atherley.] Although the general rule is that, where a contract of sale goes off for want of title in the vendor, the vendee is only entitled to recover the deposit and interest, with costs of investigating the title, that rule was held in *Hopkins v. Gratzbrook*, 6 B. & C. 31, 9 D. & R. 22, and in *Robinson v. Harman*, 1 Exch. 850, not to apply where the vendor at the time of the contract knew that he had no title. In the last-mentioned case, Parke, B., says: "The rule of the common law is, that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation with respect to damages as if the contract had been performed. The case of *Flureau v. Thornhill* qualified that rule of the common law. It was there held, that contracts for the sale of real estate are merely on condition that the vendor has a good title; so that, when a person contracts to sell real property, there is an implied understanding that, if he fail to make a good title, the only damages recoverable are the expenses which the vendee may be put to in investigating the title. The present case comes within the rule of the common law: and I am unable to distinguish it from *Hopkins v. Gratzbrook*." *Hopkins v. Gratzbrook* and *Robinson v. Harman* are recognized in *Pousett v. Fuller*, 17 C. B. 660 (a)². Where a lease is granted, the rights of the parties are regulated by the covenants: it rests no longer in contract. Except for some technical purposes,—to maintain trespass, for instance, entry is not necessary to perfect the lessee's title, or to enable him to sue for a breach of covenant. In *Doe d. Rawlings v. Walker*, 5 B. & C. 111, 118, 7 D. & R. 487, Bayley, J., says: "The right

(a)¹ It was agreed that the demurrer should be argued with the rule.

(a)² *Pousett v. Fuller* received the assent of the Exchequer Chamber in *Sikes v. Wild*, 4 Best & Smith, 421.

upon a lease to commence in [105] presenti is,—except under the Statute of Uses,—until entry, an *interesse termini* only, and so is the right upon a lease to commence in futuro; and the same rules are applicable to both. Each is a *right* only, not an *estate*. The whole *estate*, notwithstanding such right, is in the lessor. In neither case will a conveyance by the lessee to the lessor operate as a surrender, nor will a release from the lessor to the lessee operate by way of enlarging the estate. The right may be granted away as a right, or extinguished by a release, but it cannot be conveyed as an estate; and the lessee may extinguish it by a release to the lessor, but it has all the properties and consequences of a right only, and not an estate. Upon an ordinary lease, to commence instant, the lessee has at common law an *interesse termini* only till entry: Co. Litt. 46 b.: a release to him before entry, to increase the estate, is not good: Co. Litt. 46 b., 270 a.: nor can the lessor grant away the estate by the name of the reversion, for, before possession by the lessee, there is no reversion in the lessor: Co. Litt. 270 a.: nor can the lessee surrender the term (a): and, in the case of a lease to commence in futuro, all the common-law rules of an ordinary lessee before entry apply." To the same effect is *Bac. Abr. Leases and Terms for Years* (M.). In *Smith v. Compton*, 3 B. & Ad. 107, the defendant conveyed premises to the plaintiff, and covenanted for good title: an action of *formedon* was afterwards brought against the plaintiff by a party having better title, and the plaintiff compromised it for 550l.: and it was held that the plaintiff, in an action for the breach of covenant, might recover the whole sum so paid, and his costs as between attorney and client in the compromised suit, though he had given no notice of that suit to the defendant. Where the lessor covenants that he [106] will do nothing to prevent the enjoyment of the demised premises by the lessee, he as much deprives the latter of the value of his estate and breaks his covenant by preventing the lessee from entering as by causing him to be evicted after entry. This doctrine was set up in the case of a mortgage of a leasehold by assignment, in *Williams v. Bosanquet*, 1 Brod. & B. 238, 3 J. B. Moore, 500, where the whole argument is exhausted. Entry and possession are not traversable: 2 Chitt. Pl., 7th edit. 392 (t). According to *Williams v. Burrell*, 1 C. B. 402, if the plaintiff had entered, it is conceded that he would have been entitled to recover. Is he the less entitled because he has by the default of the lessor been prevented from taking possession? Besides, the plaintiff had as much possession as it is possible for a man to have of a void lease. His original lease expired on the 4th of December, 1864: and the lease by the reversioners commenced at Christmas: there were, therefore, twenty-one days uncovered by either of those leases, and the plaintiff remained in possession. The objection on the other side would have been equally good, if the plaintiff had been in possession for ten years under the lease of February, 1860. In *Platt on Leases*, 326, it is said: "To qualify a party to support an action on this covenant,"—the covenant for quiet enjoyment,— "some positive act of molestation, or some deed amounting to a prohibition of enjoyment, must be proved: it is from the *commission* of an absolute disturbance, or from a prevention of enjoyment, not from an *omission* to perform something which, if executed, might add to the security of the possession, that a breach arises: mere passive neutrality is insufficient to give the covenantee a right of action; but from active measures, or hindrance of enjoyment only, can this right arise. It is not to be understood that an ouster or expulsion must take place [107] in order to found a suit: it is enough that the quiet enjoyment of the covenantee be invaded or *prevented*. In the case of landlord and tenant, the covenant means a legal entry and enjoyment, without the permission of any other person: it follows, therefore, that a lease previously granted, and subsisting at the time of the second demise, as it will defeat the second lessee of his right of entry and occupation, must work a breach of the lessor's covenant for quiet enjoyment: *Ludwell v. Newman*, 6 T. R. 458." That is strictly analogous here.

The second plea is clearly bad: it attempts to put in issue matter which is neither expressly nor impliedly alleged in the declaration. If it means an actual entry, it is wholly immaterial. If it means legal possession, the verdict on that plea must be entered for the plaintiff.

As to the mode of assessing the value of the interest which the plaintiff has lost, there has been nothing done to violate any rule of law. And the plaintiff is clearly

(a) See Atherley's note to *Shep. Touchs.* 267.

entitled to the expense attending the grant of the new lease which through the testator's default he was obliged to take.

Bovill, Q. C., and Garth, in support of the rule. There was no suggestion that any fraud was intended here, so as to make the doctrine in *Hopkins v. Grazebrook*, 6 B. & C. 31, 9 D. & R. 22, and *Robinson v. Harman*, 1 Exch. 850, applicable. This was a lease to commence in futuro: it was nothing more than an *interesse termini*. When a contract for the sale of land goes off for want of title, the vendee is entitled to nothing for the loss of the bargain. That is clearly settled. Upon what principle does the doctrine rest? It is this, —that the party is in no worse position than he was in the day before. He has lost nothing: it is [108] simply an accident that the vendor has not the title which he conceived he had. In *Mayne on Damages*, p. 95, it is said: "Analogous to the case of warranties in sale of chattels are the various covenants for title, authority to convey, quiet enjoyment, and against incumbrances, which are usual upon transfers of real property. The cases upon this point in England are very scanty, while they are to be found in remarkable abundance in America. Actions may be brought for breach of the covenant for title and authority to convey, before any eviction or disturbance of the plaintiff has taken place: *Kingdon v. Nottle*, 4 M. & Selw. 53. What ought to be the amount of damages under such circumstances? It is plain that the conveyance may, notwithstanding the defect of title, pass something to the covenantee, or it may in fact pass nothing at all. The former state of facts occurred in a very old case: *Gray v. Briscoe*, Noy, 142. B. covenants that he was seised of Blackacre in fee-simple, where in truth it was copyhold land in fee, according to the custom. By the court: 'The covenant is * broken: and the jury shall give damages, in their consciences, according to that rate that the country values fee-simple land more than copyhold land.' This is exactly the same rule as we have seen before in the case of chattels personal, namely, that the measure of damages is, the difference between the value of the thing as it is and its value as it was warranted to be. On the other hand, the defect in the title may be so complete as to pass nothing from the grantor to the grantee. In such a case, in Massachusetts,—*Dickford v. Page*, 2 Mass. R. 455, 461, it was said, 'The rule for assessing the damages arising from this breach is very clear. No land passing by the defendant's deed to the plaintiff, he has lost no land by the breach of the covenant: he has lost only the consideration he paid for it. This he is entitled [109] to recover back, with interest to this time.' And it has been stated by Patteson, J.,—*Teppin v. Field*, 4 Q. B. 395, —that, where a mortgage is made, with covenant for title, the measure of damages, in case of breach of the covenant, is the original debt. Where the plaintiff has never got into possession of the land, and in consequence of the want of title never can, the above is clearly the proper measure of damages." If the party never was in possession, but had a mere *interesse termini*, he is just where he was. He loses nothing. What difference is there in principle between a purchase of land in fee, or for 999 years, or for 21 years? The mischief is the same in each case, and the same considerations apply to each. In *Sedgwick on Damages*, 2nd edit. 156, the learned author says, —"Very little learning is to be found in the English books on the subject of the measure of compensation for the [breach of] covenants contained in conveyances." Again, p. 159, it is said: "The question as to the measure of compensation came up at an early day in the state of New York, *Staats v. Ten Eyck's Executors*, 3 Caines, 111 f. The defendants' testator, Ten Eyck, had conveyed certain lots in Albany to one Walsh, for 300l. Walsh had conveyed to Staats, Staats to Chinn, who had been evicted, and had recovered against the plaintiff, Staats. The covenants in Ten Eyck's deed were of seisin and for quiet enjoyment: and the two points were,—first, whether the plaintiff was entitled to recover the value at the time of the eviction, or only at that of purchase, and to be ascertained by the consideration given,—and, secondly, if the latter, whether the plaintiff was entitled to interest on the purchase-money, and the costs of the eviction. Kent, C. J., in the course of a very able opinion, said that the rule at common law on a warranty on a writ of *warrantia chartæ*, was, that the demandant recovered [110] in compensation only for the land at the time of the warranty made, and that he did not find that the law had been altered since the introduction of personal covenants. 'Upon the sale of lands, the purchaser usually examines the title for himself, and, in case of good faith between

* "Not," in the report.

the parties (and of such cases only I now speak), the seller discloses his proofs and knowledge of the title. The want of title is therefore usually a case of mutual error, and it would be ruinous and oppressive to make the seller respond for any accidental or extraordinary rise in the value of the land. Still more burdensome would the rule seem to be, if that rise was owing to the taste, fortune, or luxury of the purchaser. No man could venture to sell an acre of ground to a wealthy purchaser, without the hazard of absolute ruin.' Mr. Justice Livingston said: 'To find a proper rule of damage in a case like this is a work of some difficulty: no one will be entirely free from objection, or not at times work injustice. To refund the consideration, even with interest, may be a very inadequate compensation, when the property is greatly enhanced in value, and when the same money might have been laid out to equal advantage elsewhere. Yet, to make this increased value the criterion, where there has been no fraud, may also be attended with injustice, if not ruin. A piece of land is bought solely for the purposes of agriculture; by some unforeseen turn of fortune, it becomes the site of a populous city, after which an eviction takes place. Every one must perceive the injustice of calling on a *bonâ fide* vendor to refund its present value, and that few fortunes could bear the demand. However inadequate a return of the purchase-money must be in many cases, it is the safest measure that can be followed as a general rule. My opinion is that, where there has been no fraud, and none is alleged here, the party [111] evicted can recover only the sum paid, with interest from the time of payment, when, as is also the case here, the purchaser derived no benefit from the property, owing to a defective title.'" [Byles, J. At p. 170, the learned author refers in a note to a great number of authorities from nearly all the States, and he winds up thus,—“‘The ultimate extent,’ says Chancellor Kent (Comm. vol. iv., p. 476), to whose laborious research I am indebted for the authorities in this note, ‘of the vendor’s responsibility under all or any of the usual covenants in the deed, is the purchase-money, with interest; and this I presume to be the prevalent rule throughout the United States.’”] Numerous passages in the same book shew that the prevailing rule in the American courts is as above mentioned. [Erle, C. J. The distinction put by Mr. Lush is, that this is a conveyance, not a mere contract. Montague Smith, J. Suppose a conveyance of land in fee, with a right of immediate possession, and the grantee entered, and was turned out by a superior title the next day? Or, suppose he never had possession?] If the grantee never had possession, the damages he would be entitled to would be simply the purchase-money and expenses. If he entered and was compelled to turn out, he would probably be entitled to something more. [Montague Smith, J. How is that reconcilable with *Williams v. Burrell*?] That was a case sent from Chancery. As to this point, it was not much considered. Besides, the lease was in *præsent*, and the party was let into possession, and had remained in for a considerable portion of the term. Here, it is true, the plaintiff was in actual possession at the time the void lease was granted: but there is no pretence for saying he was ever in possession *under that lease*. In Kent’s Commentaries, 10th edit. vol. 4, p. 580, the rule is stated [112] to be this:—“The measure of damages in actions on these personal covenants is regulated in some degree by the rule on the ancient warranty. At common law, upon voucher, or upon the writ of *warrantia chartæ*, the demandant recovered of the warrantor or heir other lands of equal value with the lands from which the *feoffee* was evicted. The value was computed as it existed when the warranty was made; so that, though the land had afterwards become of increased value, by the discovery of a mine, or by buildings, or otherwise, yet the warrantor was not to render in value according to the then state of things, but as the land was when he made the warranty. And, when personal covenants were introduced as a substitute for the remedy on the voucher and warranty, the estimated measure of compensation was not varied or affected. The buyer, on the covenant of *seisin*, recovers back the consideration money and interest, and no more. The interest is to countervail the claim for *mesne profits*, to which the grantee is liable, and is, and ought to be, commensurate in point of time with the legal claim to *mesne profits*. The grantor has no concern with the subsequent rise or fall of the land by accidental circumstances, or with the beneficial improvements made by the purchaser, who cannot recover any damages either for the improvements or the increased value. This appears to be the general rule in this country. But, on the covenant of warranty, the measure of damages, in Massachusetts, Maine, Vermont, and Connecticut, is, the value of the land at

the time of eviction, without regard to the consideration of the deed (a). In other [113] States, the measure of damages, on a total failure of title, even on the covenant of warranty, is the value of the land at the execution of the deed; and the evidence of that value is the consideration money, with interest and costs.' In *Sikes v. Wild*, 1 Best & Smith, 587, real estate had been demised to the defendant in trust to sell, who put up part of it for sale, which the plaintiff agreed to buy, and was accepted as the purchaser. The defendant was aware that he could not make a title free from incumbrance, as by a marriage settlement the land was vested in trustees to secure an annuity to the widow of the deviser, but he had ob-[114]-tained from her a parol promise that, in the event of the sale, she would transfer her security to another property. After the sale, the widow refused to assent to this, and the bargain went off in consequence. In an action by the plaintiff against the defendant for not completing the bargain, the jury found that the defendant bona fide believed that he would be able to make to the purchaser a good title free from incumbrance, and that he had reasonable grounds for so believing. It was held by Wightman, J., and Blackburn, J., dissentiente Cockburn, C. J., that the plaintiff, although entitled to recover his deposit, and the expenses of investigating the title, was not entitled to recover damages for the loss of his bargain. And this decision was unanimously affirmed by the Exchequer Chamber: 4 Best & Smith, 421. In *Ireland v. Birchem*, 2 N. C. 90, 97, 2 Scott, 207, where a lessee sued for a breach of a covenant for quiet enjoyment in a lease which was not to commence until more than a year after the commencement of the action, Tindal, C. J., said: "I do not feel that any answer has been given to the observation I have more than once thrown out, that the covenant under which the plaintiff sues is tied up to a covenant for quiet enjoyment while the lease shall be in possession. When the parties stipulate that the plaintiff and his assigns, paying the rent of 3l. 10s., and observing the covenants entered into on his part, shall during the term demised quietly enjoy the premises, I cannot fail to observe that such a covenant is strictly conditional; that is, conditional for securing the plaintiff quiet enjoyment so long as he shall continue in possession of the land, and, as tenant, shall pay the stipulated rent. As he is not yet in possession, neither the covenant nor the condition can have any effect."

As to the 137l. the allowance of 10 per cent., for compulsory sale, has always been limited to the case of [115] land taken under the authority of an act of parliament for a railway or other public undertaking; it has never been extended to the case of an ordinary vendor and purchaser. In the cases where it is allowed, it is given as a sort of compensation for the inconvenience of looking for a fresh investment for the money. As to the 65l. expenses, the plaintiff must at all events have

(a) The learned author refers to *Gore v. Butler*, 3 Mass. Rep. 523; per Parker, J. in *Caswell v. Wendell*, 4 Mass. Rep. 108; *Bigelow v. Jones*, 4 Mass. Rep. 512; *Sweet v. Patrick*, 3 Fairfield, 1; *Sterling v. Peet*, 14 Coun. Rep. 245; *Strong v. Shumway*, 1 D. Chapman's Rep. 110; *Park v. Bates*, 12 Vermont Rep. 381 (also in Mississippi, *Phipps v. Turpley*, 31 Miss. (2 George) 433); and he adds,—“But, in *Summers v. Williams*, 8 Mass. Rep. 163, 221, it was afterwards held that, on the covenants with respect to title as to warranty, &c., the true measure of damages was the consideration-money and interest: *Byrnes v. Rich*, 5 Gray (Mass.), 518. This was formerly the rule also in South Carolina: *Liber v. Parsons*, 1 Bay's Rep. 19; *Guward v. Rivers*, 1 Bay's Rep. 265; *Watherspoon v. Anderson*, 3 Dessaus. Eq. Rep. 245. But the rule is now settled in South Carolina according to the English common-law doctrine: *Hennings v. Withers*, 2 Treadw. S. C. Const. Rep. 584; *Ware v. Wraithall*, 2 McCord's Rep. 413; *Bond v. Quatlibaum*, 1 McCord's Rep. 484, and statute of 1824. In Louisiana, the vendee, on eviction, is allowed to shew the increased value of the land at the time of eviction above the original price, and that value, under certain qualifications, may form part of the damages: *Bissell v. Erwin*, 13 La. Rep. 143; *Wiber v. Coussy*, 12 La. An. 534. Such increase only is allowed as the parties could have had in contemplation at the time of sale, and not the enormous increase produced from unforeseen or transient causes. In Ohio, the rule of damages for breach of covenants of seisin and quiet enjoyment, and of warranty of title, is the consideration-money and interest, with some exceptions; and, if he has enjoyed the rents and profits, it stops the claim for interest, so far as he is accountable over for those rents and profits: *Clark v. Parr*, 14 Ohio Rep. 118; *Lloyd v. Quimby*, 5 Ohio (N. S.), 262.”

paid for *one* lease, and for that the defendant has paid 17l. into court; and a large portion of the remainder consists of fees to counsel and surveyors for consultations and opinions about this difficulty: these are never allowed. [The court intimating a doubt about this, it was arranged that this sum should be reduced by 20l.]

ERLE, C. J. This was an action brought by the plaintiff to recover damages from the defendant, as executor of John Furze deceased, for the breach of a covenant by the testator contained in a lease of certain premises in St. James's, that he, the lessee, his executors, &c., paying the rent and performing the covenants on his and their part to be paid, observed, &c., "should and might peaceably and quietly have, hold, use, occupy, possess, and enjoy the said piece or parcel of ground, messuage, &c., for and during the term of twenty-one years and twenty one days, thereby granted as aforesaid, without the lawful let, suit, trouble, denial, interruption, molestation, or disturbance of or by the said John Furze (the testator), his heirs or assigns, or any of them, or any person or persons whomsoever lawfully claiming or to claim by, from, through, under, or in trust for him, them, or any of them." The breach assigned is that, during the term, one Frances Vickers, then lawfully claiming the demised premises through and under the lessor, and having a good title to the same and to the possession thereof through and [116] under him, claimed and demanded the said demised premises of, from, and against the plaintiff, and threatened to oust him from the possession and enjoyment thereof and that, in consequence of that claim, the plaintiff was forced to accept a new lease for a shorter term and at a higher rent. The second plea is that the plaintiff never had or entered into possession of the said demised premises under or by virtue of the said (first-mentioned) lease. The lease upon which the plaintiff's claim is founded was granted in the year 1860, to commence on the 4th of December, 1864; and the plaintiff had possession of the premises down to that day under a prior lease; therefore the lease in respect of which this action is brought was a reversionary lease conveying to the plaintiff only an *interesse termini*. In the sense of possession the plaintiff had it not *under that lease*. The allegation is that the covenant was broken by reason of the demand of Frances Vickers. The second plea, in the sense contended for by the plaintiff, is entirely irrelevant to the declaration, and bad on demurrer. The claim is in respect of an *interesse termini*; and there is no allegation, express or implied, in the declaration, that the plaintiff had entered into possession of the premises under that reversionary lease. Upon the demurrer to the second plea, therefore, I am of opinion that the plaintiff is entitled to judgment.

The fourth plea alleges that the said Frances Vickers did not claim or demand the said premises from the plaintiff, nor threaten to oust him from the possession or enjoyment thereof, as alleged. Now, upon the facts, it is clear that Frances Vickers had title under John Furze, and had a right to say that that lease was a nullity. She did say so, and asserted her right; and by reason of that demand the plaintiff lost the benefit of his *interesse termini*. It is clear, therefore, that [117] the verdict for the plaintiff on that plea ought to stand.

The defendant has paid into court 417l.: and the remaining question is, whether that is the limit of the damages which the plaintiff is entitled to recover. It has been contended on the part of the defendant that the question is to be dealt with as if, instead of a covenant for quiet enjoyment, this had been a contract of sale, and to be governed by the rule of law which prevails in actions by vendee against vendor where the contract goes off by reason of the inability of the latter to make a good title; in which case he pays back the deposit and interest and the expenses to which the vendee has been put in the investigation of the title, and not damages for the loss of the bargain. I am of opinion that that contention is not sustainable. It is a known rule of law as to contracts of sale. It is the settled law founded upon numerous decided cases: and I believe that, in the case of contracts for the sale of property, the common convenience of mankind might justify it. Few vendors when they offer property for sale have any notion of the validity of their titles. But I think that rule is confined to contracts of sale, and that a line is to be drawn between a *contract* for the sale of land and a *conveyance* of an estate or interest therein. It is clear that, if there be a lease of land in possession, and the lessee enters under it, and is ousted or evicted by one against whose acts the lessor covenants, as here, the lessee is entitled to recover all he has lost, that is, the value of the term. It was held in *Williams v. Burrell*, 1 C. B. 402, that a lessee under a void lease, who had been ejected by the successor of his lessor, was entitled, in an action against the executors

for breach of the covenant for quiet enjoyment contained in the lease, to recover the value of the term which he had lost. That is the only [118] decided case on the point which was adduced before us. But it is contended on behalf of the defendant, that, as this was a reversionary lease, conveying only an *interesse termini*, the parties stand in the relative position of vendor and vendee, and not of covenantor and covenantee. I am of opinion, however, that that distinction cannot be maintained. The lease conveyed to the plaintiff an *interesse termini*,—a term of twenty-one years. That interest vested in the plaintiff as a matter of right, so as to be assignable; and he was in possession. The covenant, therefore, is in perfect analogy to the case of an instrument conveying a present term and a present interest, under which the lessee has entered. That being so, *Williams v. Burrell* decides that the ordinary rule shall apply, viz. that a party breaking his covenant must pay such damages as are the proximate consequences of his breach of covenant. The dicta cited from the American authorities are a neutral quantity: as many of the judges have laid down the rule one way as the other: and the two learned authors whose books are usually quoted do not sustain the defendant's argument. Mayne particularly limits his statement of that being the rule to the case where nothing has passed by the instrument which contains the covenant. Here, an *interesse termini* clearly passed. And, though Sedgwick says that in many parts of America the rule as contended for by the defendant prevails, he pretty clearly intimates that upon the whole his own opinion is the other way. There is no judgment which sustains that contention: and there is a distinct judgment of this court which is opposed to it. It is also negatived by the universal rule that one who breaks his contract must pay the damages proximately resulting from such breach. The plaintiff, therefore, in my judgment is entitled to the value of the term (which the jury have given), and [119] also to the expenses to which he has legitimately been put in endeavouring to obtain it. But I think there should be certain deductions from the amounts given. The main and substantial deduction is the 137l., which Mr. Garth's argument (though at first I must confess I did not understand the way it was intended to be put by him) has satisfied me that the plaintiff is not entitled to recover. The jury have calculated the value of the term upon the 6 per cent. tables, and have added 10 per cent. for compulsory sale,—making the 137l. If that was the intention of the jury, of which I believe there can be no doubt, they have clearly done wrong, and the plaintiff must lose the 137l. Then, a sum of 65l. was given for the expenses of the leases. Of this sum it is agreed that 20l. shall be deducted, as the amount of counsel's and surveyors' fees, which are never allowed. That reduces the amount to 45l. Then, it is said that, as the plaintiff must have incurred the expense of one lease, he is not entitled to recover the costs of both. To this objection I incline to yield, though I do not clearly see for which lease he is entitled to charge (a). Therefore I think 17l. must be deducted from the 45l. The result will be that the verdict will be reduced by 137l., 20l., and 17l.

BYLES, J. I entirely agree with all that has fallen from my Lord. The main question is one of considerable importance, viz. as to how the damages are to be computed in an action for breach of a covenant for quiet enjoyment in a lease. It is plain that, in the ordinary case of a contract for the sale of land by a written contract which is silent as to title, the law implies a contract for title. But that would operate [120] the greatest hardship in many cases. Suppose, for example, a man had contracted to sell another a thousand acres of land in Northamptonshire, at 50l. an acre, receiving a deposit of 10 per cent., and it turned out that he had no title; and, land having risen in value, the purchaser were to claim compensation based upon the market-value of the land at the time of the breach,—insisting that he had a right to be placed in the same position as if the vendor had performed his contract. If such a claim could be enforced, the hardship would be manifestly great. The rule of law therefore in such case is,—and it is now firmly established,—that the purchaser is not to be placed in the position he would have been in if the vendor had performed his contract, but in the position he (the purchaser) would have been in if the contract had never been made: that is, he is entitled to a return of his deposit (with interest), and to any expenses he may legitimately have been put to in investigating the title, and to nominal damages, and no more. That is an anomalous rule, confined, for the

(a) The natural thing would seem to be, that the plaintiff should pay for the lease under which he remained in possession of the premises.

sake of general convenience, to the case of vendor and purchaser. In all other cases of breach of contract, the measure of damages is the loss the plaintiff has proximately sustained by reason of the breach of the defendant's contract (*a*). It is here sought to apply that anomalous rule which obtains in the case of the contract which the law implies on a bargain for the sale of land, to the case of an express contract running with the land, and going to the end of the term,—the covenant for quiet enjoyment. As to authority, there is but one in this country which has any direct application, viz. *Williams v. Burrell*, 1 C. B. 402. The then Lord Chief Justice,—one of the most eminent legal authorities by [121] whom this court has ever been presided over,—not only says that the plaintiff is entitled to recover “the value of the term lost,” but he adds, “the liability of the executor is too clear to require discussion.” Sir Thomas Wilde and my Brother Channell, who appeared as counsel for the defendant, did not venture to contest that that was the true measure of damages. I agree with my Lord as to the American authorities which have been adverted to. It is enough to say of them that they are equiponderant, and therefore weigh nothing in the scale either way. Then it is said this is only an *interesse termini*. Will that take the case out of the rule as to the measure of damages for the breach of a contract, the lessee being bound by the contract, and having entered into actual possession? An *interesse termini* is a marketable interest assignable at law. It seems to me to stand in this respect upon precisely the same footing as a term of which the grantee is entitled to present possession: both may be valueless for a few years. The same considerations, therefore, I conceive, apply to the one as to the other. There is another ground upon which probably the plaintiff would be entitled to recover the value of the term here, viz. that, on the authority of *Hopkins v. Gratebrook*, 6 B. & C. 31, 9 D. & R. 22, even in the case of a contract for the sale of land, the ordinary rule is to be applied, if the vendor at the time of the sale knew that he had no title. But two observations arise upon that. In the first place, *Hopkins v. Gratebrook* is spoken of with much dissatisfaction by Lord St. Leonards (*Vendors and Purchasers*, 13th edit. 301, 302): and, in the next place, if that case be law, it applies only where there is fraud,—*Omnia præsumuntur contra spoliatores*. Here, there is no suggestion that what was done was not done with perfect bona fides. As to the details of the deductions, I entirely agree with what has fallen from the Lord Chief Justice.

[122] KEATING, J. I am of the same opinion. The judgment we are now pronouncing upon the main point involved in this case is undoubtedly of very great importance; and, as far as the argument has disclosed, it has never before arisen in Westminster Hall. The case which comes nearest to it is *Williams v. Burrell*, 1 C. B. 402: but the distinction between that case and the present is that there there was an actual entry, whereas here the interest which the testator purported to convey was only an *interesse termini*. An *interesse termini*, however, is a well-defined interest. It is described in the notes to *Took v. Glascock*, 1 Wms. Saund. 250 g., n. (1), as one which the lessee may grant to another, and which passes to his executors or administrators, and of which in declaring he is properly described as being possessed. It is therefore something very different from a mere contract for the sale of land, not carried into execution by a conveyance. That seems to me to establish a line of distinction upon which we may safely act on the present occasion. There is no sound distinction between an *interesse termini* and an estate, where there has been an entry for a single day. Our judgment, therefore, proceeds on that ground, and on that ground only. I may observe that I do not found my judgment upon any distinction supposed to have been established by the case of *Hopkins v. Gratebrook*, 6 B. & C. 31, 9 D. & R. 22. That case has been reflected on by a very great authority: and, besides, the facts here do not, on consideration, seem to raise the principle upon which the decision in that case proceeded. There was something like legal fraud there. For these reasons, I concur with the rest of the court upon the main question which has been argued before us. I also agree that the damages should be reduced in the way suggested by my Lord.

MONTAGUE SMITH, J. I agree with the rest of the [123] court upon all the points. As to the main point,—the principle on which the damages are to be computed,—it is not intended to cast any doubt upon the rule established in *Flureau v.*

(a) See *Neill v. Whitworth*, ante, vol. 18, p. 435, and *Borries v. Hutchinson*, ante, vol. 18, p. 445.

Thornhill, 2 W. Bla. 1078, that, where a contract for the sale of land goes off for want of title in the intended vendor, the vendee is entitled to nothing for the loss of his bargain, but can only recover back the deposit, with interest, and the expenses he has been put to in the investigation of the title. That rule rests upon considerations which have no place here. Baron Parke, in *Robinson v. Harman*, 1 Exch. 850, 855, says: "The rule of the common law is that, where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation with respect to damages as if the contract had been performed. The case of *Flureau v. Thornhill* qualified that rule of the common law. It was there held that contracts for the sale of real estate are merely on condition that the vendor has a good title; so that, when a person contracts to sell real property, there is an implied understanding that, if he fail to make a good title, the only damages recoverable are, the expenses which the vendee may be put to in investigating the title. Here, however, the conveyance is not conditional on the lessor's having a good title. The conveyance has been made; and it passed the right and title to the term to the lessee, so far as the lessor had any to grant. There remains nothing to be done by the lessor. In contracts for the sale of real estate, the courts have implied a contract for title, and have annexed to it the particular consequences which are to follow from a breach of the condition for title. But here we are dealing, not with a contract of sale, but with an actual grant, with an express covenant that the lessee shall have peaceable and quiet posses-[124]-sion and enjoyment of the premises during the term. The one is an executory contract, to which the courts have annexed certain implied conditions: but the other is the case of a contract fully executed, where nothing more remains to be done by the lessor, and where he has entered into an express covenant. The two cases are totally different: the covenantee, on breach, is entitled as in all other cases to full compensation for the loss he sustains. It is conceded that, if the testator had lived until the 5th of December, 1864, and the plaintiff had remained in possession of the premises, the case would have fallen precisely within the case of *Williams v. Burrell*, where the value of the term was held to be recoverable. It has been urged that the consequences will be serious if we hold that the plaintiff is entitled to substantial damages here. But it is well known that the covenant for quiet enjoyment is limited to acts which the lessor is able to guard against, viz his own acts and the acts of persons claiming under him. The lessor covenants that the lessee shall quietly enjoy, without molestation by himself or any person lawfully claiming by, through, or under him. The lessee is molested by or in consequence of an act of the covenantor himself, viz. his marriage-settlement. I agree that there are not facts to bring this case within *Hopkins v. Gratzbrook*, 6 B. & C. 31, 9 D. & R. 22. Here, a right and title to the land passed. There is an express covenant by the lessor that the lessee shall have quiet enjoyment during the term. That covenant has been broken: and I think the lessee is entitled to full compensation for that which he has been deprived of. As to the other points, I also agree. It is plain that the jury first considered what was the market-value of the term, and then added 10 per cent. for compulsory sale, by analogy to the case of a railway company taking land under the [125] compulsory powers of an act of parliament. But this is not to be likened to the case of a compulsory sale. It was through the voluntary act or default of the testator that this covenant was broken. I also agree that the plaintiff is entitled to succeed on the demurrer to the second plea, on the ground that it is no answer to the action; it is not a traverse of anything that is either expressly or impliedly contained in the declaration.

Judgment for the plaintiff on the demurrer to the second plea.

Rule absolute to enter a verdict for the defendant on the issue on the second plea, and to reduce the damages by 137l. and 37l.

Garth, for the defendant, prayed leave to appeal on the main question.

ERLE, C. J., after consultation. We think the defendant may have leave to appeal upon that point: but it should be presented definitely and divested of all extraneous matter.

Rule accordingly.

End of Easter Term.

[126] CASES ARGUED AND DETERMINED IN THE COURT OF COMMON PLEAS, IN TRINITY TERM, IN THE TWENTY-EIGHTH YEAR OF THE REIGN OF VICTORIA.

The Judges who usually sat in banco in this term, were,—Erle, C. J., Willes, J., Byles, J., and Montague Smith, J.

EVERETT AND ANOTHER v. THE LONDON ASSURANCE. May 30th, 1865.

[S. C. 34 L. J. C. P. 299; 11 Jur. N. S. 546; 13 W. R. 862.]

By the terms of a policy premises were insured against “such loss or damage as should or might be occasioned by fire to the property therein mentioned:”—Held, that this did not cover damage resulting from the disturbance of the atmosphere by the explosion of a gunpowder magazine a mile distant from the premises insured.

This was an action brought by the plaintiffs against the defendants for the recovery of 20l., being the amount of damage occasioned to the plaintiff's house under the circumstances hereinafter stated: and, by the consent of the parties, and by judge's order under the Common Law Procedure Act, 1852, the following case was stated for the opinion of the court, without pleadings:—

1. By a policy of insurance, bearing date the 17th day of April, 1862, numbered 211,525, and sealed with the common seal of the defendants, for the considerations therein expressed, the defendants covenanted and agreed that, subject to the terms therein mentioned, which had been duly complied with on the part of the plaintiffs, the capital stock, estate, and securities of the defendants should be subject and liable to pay, make [127] good, and satisfy unto the plaintiffs, their heirs, executors, or administrators, such loss or damage as should or might be occasioned by fire to the property of the plaintiffs therein mentioned and thereby insured, according to the conditions and stipulations thereon indorsed, not exceeding in each case respectively the sum of 600l.

2. The premium is stated in the policy to be paid for the insurance of the property mentioned in the policy “from loss or damage by fire, according to the exact tenor of the conditions and stipulations indorsed” on the policy. A copy of the said policy and the conditions indorsed accompanied and was to be taken as a part of this case.

3. The 5th condition indorsed on the policy was as follows:—“That losses by lightning will be made good, where the property assured by the corporation has been actually set on fire thereby, and burnt in consequence thereof.”

4. The 8th condition indorsed on the said policy was as follows:—“That books of account, manuscripts, written securities, money, bank-notes, bills, stamps, and gunpowder, will not be insured or comprehended in any insurance effected by or with this corporation, nor will any loss or damage in any case or of any description be made good when more than 25 lbs. weight of gunpowder shall be deposited or kept on the premises.”

5. On the 1st of October, 1864, a large quantity of gunpowder in the gunpowder magazine of Messrs. Hall, at Erith, ignited, and exploded, but from what cause is unknown: and the before-mentioned premises of the plaintiffs were thereby injured to the extent of 20l.

6. The plaintiffs' premises, which are rather more than half a mile distant from the spot at which the explosion took place, were not set on fire by the explosion of the gunpowder: nor was any part thereof [128] burnt, heated, or scorched by the explosion. The injury they sustained consisted in the shattering of the windows and window-frames and the damaging of the structure generally by the atmospheric concussion caused by the explosion.

The question for the opinion of the court was, whether the damage so caused to the plaintiffs' premises was a loss or damage insured against under the before-mentioned policy.

If the court should be of opinion in the affirmative, then judgment was to be entered up for the plaintiffs for 20l. and costs of suit. If the court should be of opinion in the negative, then judgment of non-pros, with costs of defence, was to be entered up for the defendants.

Hannen (with whom was Lush, Q. C.), for the plaintiffs (a)¹. By the terms of this policy, the defendants contract to indemnify the plaintiffs against such loss or damage as should or might be occasioned by fire to [129] the property of the plaintiffs therein mentioned and thereby insured. The words are general, and are not confined to fire on the premises. The conditions contain special provisions against the indirect consequences of fire. As to gunpowder, the stipulation is,—“Gunpowder will not be insured or comprehended in any insurance effected by or with this corporation; nor will any loss or damage in any case or of any description be made good, when more than 25 lbs. weight of gunpowder shall be deposited or kept on the premises.” That is the limit of the reservation of liability in the case of gunpowder. So of the provision as to lightning. This is a contract which must, like all other mercantile contracts, be construed according to the ordinary sense of the words used. Suppose a fire take place in an adjoining house, and the premises or goods of the assured were damaged by water; or suppose an explosion of gas to take place in an adjoining house, and the premises of the assured to sustain damage therefrom; would not the company in either case be responsible as for an injury resulting from fire? The only difference between the case last put and the present is, that the explosion which occasioned this damage occurred at a greater distance. The damage here is as certain and direct and immediate a consequence of fire, as the scorching the premises by the action of a fire happening on the other side of the street. The subject underwent discussion before Vice-Chancellor Page Wood in the case of *Taunton v. The Royal Insurance Company*, 33 Law J., Chan. 406, which arose out of the explosion of gunpowder on board the “Lotty Sleigh,” in the river Mersey.

Maude, for the defendants (a)². The short question [130] is whether damage resulting to the premises assured by an accidental explosion of gunpowder at a distance of a quarter of a mile therefrom, can be said to be a loss or damage occasioned by fire to the property insured, within the meaning of the policy. To bring the case within the words, it is submitted that the property insured must have sustained injury by the direct action of fire. The only injury here was a shattering of the premises by the atmospheric disturbance resulting from the explosion. Suppose the explosion had taken place under water, and by means of it the premises had been injured by water being thereby projected into them, could that have been said to be a loss or damage occasioned by fire? [Willes, J., or suppose the house had been caused to sink into the earth by means of an explosion of fire-damp.] Or by an earthquake occasioned by fire in the bowels of the earth? Or, suppose, instead of an explosion of a powder-mill, this had been occasioned by the bursting of a locomotive, would that have been within the language of the policy? Or, would the shattering of the plaintiffs' windows by the discharge of ordnance at a review be within the intention of the parties? All

(a)¹ The points marked for argument on the part of the plaintiffs were as follows:—

“1. That, as the damage sustained by the plaintiffs was occasioned by the ignition of the gunpowder, it was damage occasioned by fire within the meaning of the policy:

“2. That the policy is general against all loss occasioned to the property by fire, and is not limited to loss occasioned by fire on the premises, and therefore that the fact that the gunpowder which exploded was at some distance from the plaintiffs' premises is immaterial:

“3. That the policy is not limited to damage arising from the premises being actually set on fire or burnt, except in the particular case of lightning, and therefore that in other cases damage of whatever kind occasioned by fire is within the policy:

“4. That damage resulting from the atmospheric concussion is as much occasioned by the fire as scorching, both of them being effects of the fire transmitted through and by the motion of the air.”

(a)² The points marked for argument on the part of the defendants were as follows:—

“1. That the damage caused to the plaintiffs' premises was not a damage insured against by the policy in question:

“2. That, the plaintiffs' premises having been only injured by the atmospheric disturbance caused by the explosion of gunpowder at a distance, and not having been in any way burnt, the damage complained of was not a loss or damage by fire:

“3. That fire was not the proximate cause of the loss in question.”

these suggestions shew the difficulties which will arise from a departure from the plain meaning of the words. Some analogy may be drawn from the case of marine policies. In *Green v. Elmslie*, Peake, 212, it was held that, if a ship be driven by stress of weather on an enemy's [131] coast and there captured, it is a loss by capture, and not by the perils of the seas. So, in *Ionides v. The Universal Marine Insurance Company*, 14 C. B. (N. S.) 259, where a vessel the cargo of which was insured under a policy warranted "free from capture, seizure, and detention, and all the consequences thereof, or of any attempt thereat, and free from all consequences of hostilities, riots, or commotions," was wrecked off Cape Hatteras, in consequence of the master having mistaken his course through the removal of a light by the confederates during their recent conflict with the federal states of America,—it was held that the proximate cause of the loss was a peril of the sea, and not the hostile act of the confederate troops in extinguishing the light, and therefore not within the exception. The condition as to lightning materially aids this contention. It is that "losses by lightning will be made good, where the property assured by the corporation *has been actually set on fire thereby*, and burnt in consequence thereof." For a mere injury by lightning, unaccompanied by fire, the corporation would not be liable. In *Marshall on Insurance*, vol. 2, book iv.(a), p. 790 (edit. 1823), it is said that "by the terms of the usual policy, the insurers undertake to pay, make good, and satisfy to the insured all loss or damage which may happen by fire during the term specified in the policy to the houses or other buildings, furniture, or merchandize insured. In order, therefore, to bring the loss within the risk insured against, it must appear to have been occasioned by actual ignition; and no damage occasioned by mere heat, however intense, will be within the policy. Thus, in *Austin v. Drew*, 6 Taunt. 436, 2 Marsh. 130, a policy was effected against loss or damage by fire, on the stock of a sugar-house. In an action on the policy, it appeared that the sugar-[132]-house consisted of eight storeys, in each of which there was sugar in a certain stage of preparation; that heat was communicated to each storey by a chimney, at the top of which was a register which was usually shut at night after the fire was out, for the purpose of retaining the heat; that, on the present occasion, the fire was lighted in the morning, but the register was negligently kept shut, whereby the building was filled with smoke and sparks, and the sugar damaged, not by the smoke, but by the excessive heat; but *nothing took fire*. The court held that the loss arose from the mismanagement of the machinery, and not from any of those accidents from which the policy was intended to protect the assured; and therefore that the plaintiffs were not entitled to recover." [Willes, J., referred to *Dixon v Sadler*, 5 M. & W. 405.]

ERLE, C. J. I am of opinion that our judgment should be for the defendants. The question is, as put by Mr. Maude, what is the meaning of the parties to this contract, to be gathered from the instrument itself and the surrounding circumstances. The terms of the contract are these,—“The capital stock, estate, and securities of the said corporation shall be subject and liable to pay, make good, and satisfy unto the said assured, their heirs, executors, or administrators, such loss or damage as shall or may be occasioned by fire to the property hereinbefore mentioned and hereby insured.” The damage which accrued to the premises of the plaintiffs here was occasioned by a concussion or disturbance of the atmosphere by an explosion of a large quantity of gunpowder at a magazine about half a mile distant from them. Taking the words of the contract according to their plain and ordinary understanding, I am of opinion that they do not apply to such loss or damage as that. The stipulation as to [133] lightning,—“that losses by lightning will be made good, where the property assured by the corporation has been actually set on fire thereby, and burnt in consequence thereof,”—and the condition as to gunpowder, lead me irresistibly to the conclusion that the parties did not contemplate that the policy was to cover a damage occasioned as this was. And I think the manifest and fair intention of the parties will be carried out by holding that the plaintiffs are not entitled to recover.

WILLES, J. I am of the same opinion. We are bound to look to the immediate cause of the loss or damage, and not to some remote or speculative cause. Speaking of this injury, no person would say that it was occasioned by fire. It was occasioned by a concussion or disturbance of the air caused by fire elsewhere. It would be going into the causes of causes to say that this was an injury caused by fire to the property

insured. The rule "*In jure non remota causa, sed proxima spectatur*," determines this case.

BYLES, J. I am of the same opinion. The expression in the policy which we have to construe is, "loss or damage occasioned by fire." Those words are to be construed as ordinary people would construe them. They mean loss or damage either by ignition of the article consumed, or by ignition of part of the premises where the article is: in the one case there is a loss, in the other a damage, occasioned by fire. Lord Bacon says (*a*)¹: "It were infinite for the law to judge the causes of causes, and their impulsions one of another; therefore it contenteth itself with the immediate cause, and judgeth of acts by that, without looking to any [134] further degree." If that were not so, a ship in the neighbourhood of Mount Etna or Vesuvius during an eruption, and receiving damage from substances projected therefrom, might be said to be damaged by fire. So, a shot falling amongst crockery-ware might in one sense be said to occasion a loss by fire. But neither of these cases would fall within these words, which must be understood in their plain and ordinary sense.

MONTAGUE SMITH, J., having advised on the case when at the Bar, took no part in the discussion.

Judgment for the defendants.

SCOTT, Chamberlain of the City of London, v. JACKSON. May 30th, 1865.

The dealing in or buying and selling for reward of shares in English or foreign joint-stock banks or companies, or the debt, stock, or securities of foreign governments, is an acting and assuming to act as a broker, within the 57 G. 3, c. 60.

This was an action brought by the Chamberlain of the city of London against the defendant, for acting as a broker without being duly admitted.

The first count of the declaration stated that the defendant, before the commencement of this suit, and after the 27th of June, 1817, to wit, on the 22nd of February, 1864, within the said city and liberties thereof, did take upon himself to act as a broker within the said city and liberties, and as a broker within the said city and liberties did for reward to himself in that behalf sell for one Elise Bernal to a certain other person whose name is to the plaintiff unknown, a certain interest or shares, to wit, three transferable shares, of and in the capital or joint-stock of and belonging to a certain company, commonly called the Mercantile Credit Association (Limited), being a body corporate, contrary to the form of the statutes in [135] that case made and provided; he the defendant not having been before or at the time of such sale admitted by the court of Mayor and Aldermen of the said city of London to be or act as a broker within the said city and liberties; whereby and by force of the statutes in such case made and provided the defendant had forfeited for his said offence, to the use of the mayor and commonalty and citizens of the said city the sum of 100l., and thereby and by force of the statutes in that case made and provided an action had accrued to the plaintiff, as such chamberlain as aforesaid, to demand and have of and from the defendant the said sum of 100l., and the defendant had not paid the said sum, or any part thereof.

The second count was for a like penalty for acting as a broker in the sale of shares in the East Basset Mining Company; the third for a like penalty for acting in the sale of Mexican Bonds: and there were twenty other counts charging similar sales of shares in various foreign stocks and railway and mining and banking companies.

The defendant pleaded, not guilty, by statute,—the statute referred to in the margin being the 21 Jac. 1, c. 4, s. 4.

He also demurred to the declaration, the ground of demurrer stated in the margin being, "that the dealing in the shares of companies and the debts of foreign governments was not acting as a broker within the meaning of the statutes referred to." Joinder.

J. Brown, Q. C., in support of the demurrer (*a*)². The question is whether one who

(*a*)¹ Maxims of the Law, Reg. 1. Bacon's Works, by Basil Montagu, vol. 13, p. 145.

(*a*)² The points marked for argument on the part of the defendant were as follows:—

"1. That the defendant did not in any of the transactions mentioned in the declaration act as a broker within the meaning of the statutes referred to:

"2. That the statutes relied on are confined to brokers employed in the buying

buys or sells for others [136] for reward shares in British joint-stock companies, or foreign stock, is a broker within the statute 57 G. 3, c. 60. That statute recites, amongst other things, that, by the 6 Anne, c. 16, intituled "an act for the well garbling of spices, and for granting an equivalent to the city of London by admitting brokers," after reciting that "the office of garbler was part of the revenues of the city of London, and was then let by lease to William Stewart, under the rent of 300l. per annum, the profits of which office and the right of the said William Stewart to the same by repealing the said act would be very much diminished,"—it was enacted that, from, &c., "all persons that should act as brokers within the city of London and liberties thereof should from time to time be admitted so to do by the court of [137] Mayor and Aldermen of the said city for the time being, under such restrictions and limitations for their honest and good behaviour as that court should think fit and reasonable, and should upon such their admission pay to the chamberlain of the said city for the time being, for the uses therein and hereinafter mentioned, the sum of 40s., and should also yearly pay to the said uses the sum of 40s. upon the 29th of September in every year:" and, after directing the application of the money (amongst other things, to pay a compensation to Stewart), it was further enacted, "that, if any person or persons should take upon him to act as a broker, or employ any other under him to act as such within the said city and liberties, not being admitted as aforesaid, every such person so offending should forfeit and pay to the use of the said mayor, &c., for every such offence, the sum of 25l." The statute then proceeds to enact "that all persons that from and after the 1st of July next after the passing of the act, should be admitted to act as brokers within the city of London and liberties thereof by the court of Mayor and Aldermen of the said city for the time being, in pursuance of the recited act,—should upon such their admission, over and above the sum of 40s. required to be paid by the recited act, pay to the chamberlain of the said city for the time being the sum of 3l., and should also yearly pay to the said chamberlain, over and above the yearly sum of 40s. required to be paid by the recited act, the sum of 3l. on the 29th of September in every year" The 2nd section repeals the penalty imposed by the recited act, and enacts that, "from and after the passing of this act, if any person shall take upon him to act as a broker, or employ, or cause, permit, or suffer any person or persons to be employed with, under, or for him, to act as such within the said city and liberties, not being admitted in pursuance of the said re-[138]-cited act, every such person so offending shall forfeit and pay to the use of the mayor and commonalty and citizens of the said city for every such offence the sum of 100l.," &c. *Primâ facie* one would assume that "brokers" meant persons engaged in buying and selling goods for others,—ordinary articles of commerce. The subject was elaborately argued in *Clarke v. Powell*, 4 B. & Ad. 846, where the court came to the conclusion that those persons only came within the description of brokers in the act who were so considered at the time of the passing of the statute of Anne. [Archibald referred to *Smith v. Lindo*, 4 C. B. (N. S.) 395, where this court held that a dealer (in London) in shares in a public company (whether British or foreign) is a "broker" within the

and selling of *goods*: and this is to be inferred from the duties raised being given as a compensation for the abolition of an office relating to the sale of goods:

"3. That, if the meaning of the word broker is enlarged by the contemporaneous statutes *pari materia*, it does not go beyond brokers employed in the purchase and sale of public and joint stock, i.e. the National Debt of the United Kingdom, and brokers employed in the exchange of moneys:

"4. That a broker employed in the sale of shares in a company, is an agent who negotiates the transfer in a partnership, and not a broker within the acts:

"5. That a broker employed in the sale of the debt of a foreign government negotiates the transfer of the debt of such government and the investment of money, and is not a broker within the acts:

"6. That such debt not being public stock or securities within the Stock Jobbing Act on which the plaintiff relies, the defendant was not a broker within those acts or the acts declared on:

"7. That the subject-matter of such sales not being within the city, the defendant was not a broker within the city acts:

"8. That the demurrer is not too large:

"9. That it is distributive.

statute 6 Ann. c. 16, and incapable of suing for commission, unless duly licensed.] That case certainly seems to be directly in point; and it will be for the court to say whether the matter is open to me to argue otherwise than in a court of error. [Montague Smith, J. The decision of this court was affirmed on error: 5 C. B. (N. S.) 587.] The point now before the court seems to have been tacitly abandoned there.

Archibald (with whom was Lush, Q. C.), was to have argued for the plaintiff (a).

[139] WILLES, J. It is impossible to get over the case of *Smith v. Linds*, at least in this court. There must, therefore, be judgment for the plaintiff.

The rest of the court concurring,

Judgment for the plaintiff.

HORROCKS v. THE METROPOLITAN RAILWAY COMPANY. June 1st, 1865.

[Applied, *Tanner v. Swindon, &c., Railway*, 1881, 45 L. T. 210.]

The plaintiff having given notice to the defendants, a railway company, under the 68th section of the Lands Clauses Consolidation Act, 1845, that his premises had been injuriously affected by the execution of their works, and that he demanded compensation and an assessment before a jury, the defendants issued their warrant, and a jury was summoned, who found that the plaintiff was not entitled to any compensation. The plaintiff thereupon obtained a rule in the Queen's Bench to quash the inquisition and the verdict and judgment thereon, and gave the company a fresh notice, and, the company not issuing another warrant, the plaintiff brought this action:—Held that, the original warrant remaining unimpeached, the sheriff was bound to go on under it, by summoning a fresh jury, and that the company were in no default.

This was an action against the Metropolitan Railway Company to recover a compensation for land injuriously affected by their works, under the 68th section of the Lands Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 18.

The declaration stated that the defendants were a [140] railway company incorporated by an act of parliament passed in the seventeenth and eighteenth year of the reign of Queen Victoria, intituled "An Act to alter and extend the North Metropolitan railway, and to consolidate and amend the provisions relating thereto" (17 & 18 Vict. c. cxxi.), and that the plaintiff was entitled to compensation in respect of an interest in a certain house and premises situate and being No. 66 Euston Road, in the parish of St Pancras, in the county of Middlesex, which had been injuriously affected by the defendants as and being the promoters of the undertaking, by the execution of the works of the said railway, and that the defendants, as such promoters as aforesaid, had not made satisfaction to the plaintiff in respect of his interest in the said house and premises under the provisions of the said act or of any act incorporated therewith, and the compensation claimed by the plaintiff in respect of his interest in

(a) The points marked for argument on the part of the plaintiff were as follows:

"1. That, in the transactions and dealings respectively mentioned and described in each count of the declaration, the defendant acted as a broker, and took upon him to act as such within the meaning of the statutes 6 Anne, c. 16, and 57 G. 3, c. 60, and, not having been duly admitted by the court of Mayor and Aldermen of the city, rendered himself liable to each of the several penalties claimed:

"2. That, by the explanation of the term 'broker' to be gathered from the 1 Jac. 1, c. 21, the 8 & 9 W. 3, c. 20, s. 60, and the 8 & 9 W. 3, c. 32, and other acts which are in *pari materia* with the 57 G. 3, c. 60, it appears that the dealing in or buying and selling for reward of the shares or securities of English or foreign companies, or the debt, stock, or securities of foreign governments, is an acting and assuming to act as a broker within the meaning of the said last-mentioned statute:

"3. That the term 'broker,' in the statute 57 G. 3, c. 60, applies to all persons dealing in or buying and selling for reward on behalf of others stocks, shares, or securities similar to those dealt in by brokers at the time when that act was passed, although such stocks, shares, or securities were not then in existence:

"4. That the declaration is good in substance, and the demurrer too large."

the said house and premises exceeded the sum of 50l. ; and that the plaintiff, desiring to have the said compensation settled by a jury, gave notice of such his desire to the defendants as such promoters as aforesaid, stating in the said notice the nature of his interest in the said house and premises in respect of which he claimed compensation, and the amount of compensation so claimed by him, being 489l. 6s. 10d., that is to say, 148l. 15s. 4d., the amount of repairs done to the said premises, and of the architect's charges in reference thereto, and 340l. 11s. 6d. for loss of trade, damage done to the goodwill, and business value of the said house as a public-house, depreciation in value of stock-in-trade, damage done to stock in cellars, and legal and other expenses which the plaintiff had been put to : that the defendants, as such promoters as aforesaid, were not willing to pay the amount of the compensation so claimed, nor did they enter into a [141] written agreement for that purpose, nor did they within twenty-one days after the receipt of the said notice issue their warrant to the sheriff to summon a jury for settling the same in the manner provided by law ; that, by reason of such default to issue their warrant as aforesaid, the defendants became and were liable to pay to the plaintiff, being so entitled as aforesaid, the amount of compensation so claimed by him as aforesaid ; and that all conditions were fulfilled, and all things happened, and all times elapsed, necessary to entitle the plaintiff to maintain this action, yet that the defendants had not paid the said amount of compensation to the plaintiff : Claim, 500l.

The defendants pleaded,—first, that the plaintiff was not entitled to compensation as alleged, —secondly, that the said interest of the plaintiff in the said house and premises had not been injuriously affected by them the defendants, as alleged,—thirdly, that the plaintiff did not give to them, the defendants, such notice as alleged.

The fourth plea stated that, after the said interest of the plaintiff in the said house and premises had been injuriously affected by them the defendants, as and being the promoters of the said undertaking, by the execution of the works of the said railway, as alleged, and after the plaintiff became and was entitled to compensation in respect of the said interest having been so injuriously affected, as alleged, and long before the giving of the notice in the declaration mentioned, the plaintiff, desiring to have the said compensation settled by a jury, gave notice of such his desire to the defendants, as such promoters as aforesaid, stating in the said last mentioned notice the nature of his interest in the said house and premises in respect of which he claimed compensation, and the amount of compensation so claimed by him, and that [142] such claim was made and such notice given by the plaintiff for and in respect of the same compensation as that mentioned or referred to in the said notice in the declaration mentioned ; that thereupon the defendants, as such promoters as aforesaid, not being willing to pay the amount of compensation claimed by such notice, did within twenty one days after the receipt of such notice duly issue their warrant under their common seal, directed to the sheriff of the county of Middlesex, he being under the provisions of the Lands Clauses Consolidation Act, 1845, the proper officer in that behalf, requiring him to summon a jury for settling the said compensation in the manner provided by the Lands Clauses Consolidation Act, 1845, in that behalf, and delivered the said warrant to the said sheriff ; and that the said warrant had thenceforth been, and at the time of the giving of the said notice in the declaration mentioned continued to be, and still was, in the hands of the sheriff for the said county of Middlesex, and was still unexecuted and in full force and effect.

The plaintiff replied to the fourth plea that, upon the receipt of the warrant in the said fourth plea mentioned by the sheriff of the county of Middlesex, the said sheriff did in pursuance of the said warrant summon a jury for settling the said compensation in the manner provided by the Lands Clauses Consolidation Act, 1845, to meet at the house known by the name of the Sheriff's Office in Red Lion Square, in the said county of Middlesex, which house is not more than eight miles distant from the said house and premises of the plaintiff, on the 8th of January, 1862, which day was a time not less than fourteen nor more than twenty-one days after the receipt of the said warrant by the said sheriff ; that the said sheriff forthwith gave notice to the defendants of the time and place so [143] appointed by the said sheriff ; that, on the said day, at the said place, the plaintiff and the defendants came by their respective attorneys before the said sheriff, and also at that same time and place the said jury came, and the said jury, being duly called, and sworn truly and faithfully to inquire of and assess the compensation (if any) in respect of which their verdict was to be

given, did on their oath aforesaid say by their verdict that there was not at any time, nor was there at the time of holding the said inquisition, any compensation to be paid by the defendants to the plaintiff in respect of the said house and premises or the plaintiff's interest therein having been or being injuriously affected by the execution of the works of the defendants, as alleged in the plaintiff's said notice and claim; that the said sheriff duly gave judgment thereon: that the said verdict and judgment was duly signed by the said sheriff; and that thereupon certain proceedings were had on the part of the plaintiff in Her Majesty's court of Queen's Bench at Westminster, and it was ordered by the said court that a writ of certiorari should issue to remove into the said court the said inquisition, verdict, and judgment: and afterwards it was further ordered by the said court that the said inquisition, and the verdict and judgment given thereon, should be quashed: and that after the said warrant had been so executed as aforesaid, and the said inquisition, verdict, and judgment had been so quashed as aforesaid, and not before, the plaintiff gave to the defendants the notice in the declaration mentioned.

The plaintiff also demurred to the fourth plea, the ground of demurrer stated in the margin being, "that it is not alleged in the said fourth plea that the twenty-one days mentioned in the 41st section of the Lands Clauses Consolidation Act, 1845, have not [144] elapsed, or that the warrant remains in the sheriff's hands and is unexecuted, by the consent of the parties interested." Joinder.

The defendants rejoined to the second replication to the fourth plea, that the said inquisition was not duly held, and the said verdict and judgment were respectively not duly given: and that the said inquisition, verdict, and judgment, were quashed as in the said fourth plea mentioned, for the cause that the same were respectively not duly held and given as aforesaid, and for no other reason or cause.

The defendants also demurred to the second replication to the fourth plea, the ground of demurrer being, "that the replication shews that the warrant never was duly executed by the sheriff, and alleges no sufficient reason why the same should not now be executed by him, or why the defendants should issue any further or other warrant." Joinder.

The plaintiff joined issue and demurred to the rejoinder to the second replication, the grounds of demurrer being, "that it is not alleged that the sheriff did not duly summon a jury in pursuance of the said warrant, or shewn that the sheriff had power or authority to summon a second jury under the said warrant." Joinder.

Francis (with whom was Lush, Q. C.), for the plaintiff (*a*). The fourth plea is bad, or, if good, the repli-[145]-cation is a sufficient answer thereto. It appears on the record that the plaintiff gave notice under the 68th section of the Lands Clauses

(*a*) The points marked for argument on the part of the plaintiff, were as follows:—

"1. That the fourth plea is bad, because it is not alleged therein that at the time of the giving of the notice in the declaration mentioned the twenty-one days mentioned in the 41st section of the Lands Clauses Consolidation Act, 1845, had not elapsed, or that the warrant remained in the sheriff's hands, and was and is unexecuted, by the consent of the parties interested: and because it is not alleged or shewn that, at the time of the giving of the said notice, the sheriff had power or authority to execute the said warrant by summoning a jury, or that the plaintiff could compel him to do so: and because the said plea alleges no sufficient reason why the plaintiff was not at liberty to give the said notice in the declaration mentioned, or why the defendants should not have issued another or further warrant in pursuance thereof:

"2. That the fourth plea, if good, is sufficiently answered by the second replication, which shews that the said warrant was in fact duly executed by the sheriff, and that the plaintiff was legally justified in giving the notice in the declaration mentioned, and alleges a sufficient reason why the said warrant should not now be executed by the sheriff, and why the defendants should have issued a further or other warrant in pursuance of the said notice:

"3. That the rejoinder to the second replication is bad, because it is not alleged or shewn therein that the sheriff did not duly summon a jury in pursuance of the said warrant, or that he had power or authority to summon another or further jury under the said warrant, or without a fresh warrant issued to him for that purpose; and because no sufficient reason is alleged why the plaintiff should not have given the notice in the declaration mentioned."

Consolidation Act, 1845, that his premises had been injuriously affected by the execution of the defendants' works, and that he claimed compensation. It thereupon became the duty of the company, under s. 39, to issue their warrant to the sheriff to summon a jury to determine the amount of compensation due, and that of the sheriff, under ss. 41, 42, to summon and impanel a jury, not less than fourteen or more than twenty-one days after the receipt by him of the warrant. The proceedings under the former warrant having been quashed, and there being no provision in the act for the issuing of a second warrant or the impanelling of a second jury,—seeing that the sheriff can do nothing after the lapse of the twenty-one [146] days, the plaintiff was clearly right in giving a fresh notice. [Byles, J. You say that, if the sheriff had power to summon another jury, the plaintiff is entitled to avail himself of the old notice; and, if not, that he may rely on the new notice?] Precisely so. It would seem from the conclusion of the case of *The Queen v. The North Western Railway Company*, 3 Ellis & B. 443, 476, that the warrant is still in force. [Byles, J. The warrant standing, have you a right to give the company a fresh notice?] The time limited for the sheriff to act upon the warrant being done, he can do nothing. [Byles, J. The time for proceeding on the warrant must necessarily be enlarged. Suppose the sheriff were to die on the twentieth or twenty first day, after the inquisition had been begun,—what would be the result? Must you begin de novo?] It is submitted that we must.

H. Lloyd (with whom was Hawkins, Q. C.), *contra* (a). The defendants' construction is reasonable, and in accordance with the language of the statute. [He was stopped by the court.]

ERLE, C. J. The company make no objection to the [147] sheriff's going on under the old warrant. The 41st section of the Lands Clauses Consolidation Act, 1845, gives a direction to the sheriff which is obligatory on him: he is not less than fourteen nor more than twenty-one days after receiving the warrant, to summon a jury for settling any case of disputed compensation. But, if his attempts to do his duty are frustrated by the order of a superior court, he ought to go on again as if no such difficulty had arisen. I think he may summon a fresh jury under the authority conferred upon him by the warrant already issued, and consequently that the defendants' fourth plea is an answer to the action.

WILLES, J. I am of the same opinion. The sheriff is in substance made the judge in this matter: and by s. 44, if he "make default in any of the matters thereinbefore required to be done by him in relation to any such trial or inquiry, he shall forfeit 50l. for every such offence, and such penalty shall be recovered by the promoters of the undertaking, by action in any of the superior courts." The neglect of the sheriff, however, does not interfere with the rights of the parties.

BYLES, J. I am of the same opinion.

MONTAGUE SMITH, J. I am of the same opinion. This is an action brought on the 68th section of the Lands Clauses Consolidation Act, 1845, which provides that, if any party shall be entitled to any compensation in respect of any lands, or of any interest therein, which shall have been taken for or injuriously affected by the execution of the works, and for which the promoters of the undertaking shall not have made satisfaction under the provisions of this or the special act, or any act incorporated therewith, and if the compensation claimed in such case shall exceed the sum of [148] 50l., such party may have the same settled either by arbitration or by the verdict of a jury, as he shall think fit: and, if the party so entitled as aforesaid desire to have such question of compensation settled by a jury, it shall be lawful for him to give notice in writing of such his desire to the promoters of the undertaking, stating such particulars as aforesaid: and, unless the promoters of the undertaking be willing to

(a) The points marked for argument on the part of the defendants were as follows:—

"1. That the plaintiff was not entitled under s. 68 of the Lands Clauses Consolidation Act, 1845, to give the company a second notice, or to require them to issue a second warrant, but should have applied to the sheriff to execute the warrant already issued to him and in his hands:

"2. That the warrant already issued never had been duly executed, and was in no way invalidated, and might and should have been executed:

"3. That, for these reasons, the fourth plea is good, the plaintiff's second replication thereto is insufficient, and the defendants' rejoinder thereto is good."

pay the amount of compensation so claimed, and enter into a written agreement for that purpose, they shall within twenty-one days after the receipt of such notice issue their warrant to the sheriff to summon a jury for settling the same in the manner herein provided, and, in default thereof, they shall be liable to pay to the party so entitled as aforesaid the amount of compensation so claimed, to be recovered by action, &c. Here, the claimant gave the company notice under that section, and they duly issued their warrant to the sheriff, by whom an inquisition was held: and the jury found that the claimant was not entitled to any compensation. By the act of the claimant, that inquisition was afterwards set aside. The twenty-one days mentioned in s. 41 having now elapsed, the question is, what is the proper course to be pursued. As between the parties, the statute is clearly directory. The inquisition and the verdict and judgment thereon have been set aside: but the warrant remains, and that with the plaintiff's consent. There is no provision in the clause to justify the plaintiff in beginning again by giving a fresh notice. It would be a strong thing to allow that: he might vary his claim in the new notice. The most reasonable construction, as it seems to me, is, that the original notice and warrant remain, and the sheriff must go on again under it.

Judgment for the defendants.

[149] THE BROMPTON, CHATHAM, GILLINGHAM, AND ROCHESTER WATERWORKS COMPANY v. JENNINGS. June 1st, 1865.

A stipulation in a composition deed under the 192nd section of the Bankruptcy Act, 1861, that it shall be lawful for the trustees to require any person or persons claiming to be a creditor or creditors of the debtor to verify the nature and amount of such debt or claim, with full particulars shewing the consideration thereof, by statutory declaration before the commissioners of bankruptcy, *or otherwise, as the said trustee or trustees may think fit*,—is unreasonable, and renders the deed inoperative as against a non-assenting creditor.

This was an action for goods sold and delivered, goods bargained and sold, and work and labour, &c.

The defendant pleaded that, after the accruing of the plaintiffs' claim, and after the 11th of October, 1861, the defendant was indebted to the plaintiffs and divers other persons: and thereupon a deed, bearing date the 23rd of December, 1864, was made and entered into by and between the defendant of the first part, and J. Berridge, W. Haymen, and J. H. Ivey, as and being trustees on behalf of *all the creditors of the defendant of the second part, and the several persons whose names and seals were thereunto subscribed, being creditors of the defendant, on behalf of themselves and all the creditors of the defendant* so far as they had power to bind them, of the third part, relating to the debts and liabilities of the defendant and his release therefrom; and the defendant thereby conveyed and assigned all his estate and effects (except wearing apparel) to the said trustees, Upon trust for the benefit of *all the creditors of the defendant in manner therein mentioned; and the said creditors thereby severally and respectively released and discharged the defendant from all debts and liabilities of the defendant to the said creditors respectively, and from all actions and suits in respect thereof: Averment, that a majority in number representing three fourths in value of the creditors of the defendant whose debts respectively amounted to 10l. and upwards did in writing assent to and approve of the said deed; and the said trustees appointed by the said deed executed the same; and the execution of the said deed by the defendant was [150] attested by an attorney, and within twenty-eight days from the day of the execution of the said deed by the defendant the same was produced and left, having been first duly stamped, at the office of the chief registrar of the court of Bankruptcy, for the purpose of being registered, and, together with such deed, there was delivered to the said chief registrar an affidavit by the defendant that a majority in number representing three fourths in value of the creditors of the defendant whose debts amounted to 10l. and upwards had in writing assented to and approved of the said deed, and also stating the amount in value of the property and credits of the defendant comprised in the said deed; and the said deed did before the registration thereof bear such ordinary and ad valorem stamp-duties as were provided by the Bankruptcy Act, 1861, in that behalf; and immediately on the execution of the said*

deed by the defendant possession of all the property comprised therein of which the defendant could give or order possession was given to the said trustees; and at the time of the execution of the said deed the plaintiffs were creditors of the defendant in respect of the claim herein pleaded to, within the meaning of the Bankruptcy Act, 1861: and that, all conditions having been performed, and all things having happened necessary in that behalf, the plaintiffs became and were and are bound by the said deed as if they had been parties thereto and had duly executed the same.

To this plea the plaintiff replied that the said deed first in that plea mentioned was and is to the tenor and effect and in the words and figures following, that is to say,—“This indenture, made the 23rd of December, 1864, between Stephen Jennings of, &c., builder and contractor, of the first part, J. Berridge, of, &c., W. Haymen, of, &c., and J. H. Ivey, of, &c., who, and the survivor of them, and the trustees or trustee for [151] the time being are hereinafter referred to as “the said trustees or trustee” of the second part, the several persons, companies, and co-partnership firms whose names and seals are hereunto subscribed and affixed, being creditors of the said Stephen Jennings, *on behalf of themselves and all the creditors of the said Stephen Jennings so far as they have power to bind them*, of the third part: Whereas, the said Stephen Jennings has for some time past carried on the business of a builder and contractor at Rochester, in the county of Kent: And whereas the said Stephen Jennings is indebted to the several persons parties hereto of the third part in divers sums of money which he is unable to pay in full: And whereas, at a meeting of the creditors of the said Stephen Jennings, held on the 21st of December, 1864, at, &c., it was resolved by the creditors present thereat that the said Stephen Jennings should assign all his estate and effects to the parties hereto of the second part, *for the benefit of all the creditors of the said Stephen Jennings*: And whereas, the said several parties to these presents have agreed to carry out the said resolution by the execution of these presents, with such covenants and provisions as hereinafter contained: Now this indenture witnesseth that, in consideration of the premises, and of the said agreement, the said Stephen Jennings doth hereby grant, bargain, sell, assign, transfer, and release unto the said J. Berridge, W. Haymen, and J. H. Ivey, their heirs, executors, administrators, and assigns, All the real estate, chattels real, stock-in-trade, household-furniture, plant, machinery, fixtures, debts, securities for money, books of account, vouchers, and other documents in writing, and all other the real and personal estate of the said Stephen Jennings, except wearing apparel, with full power to enter into the messuages or tenements where any of the said premises are, and take possession of [152] the same, To have and to hold the said premises hereby granted, assigned, or otherwise assured or intended so to be unto the said James Berridge, William Haymen, and John Haymen Ivey, their executors, administrators, and assigns, Upon trust that the said trustees or trustee do and shall as soon as may be, and in such way or manner as to them or him may seem best, call in, collect, and receive the said estate, effects, and premises, and sell and convert into money all the saleable parts thereof, with power nevertheless for the said trustees or trustee in their or his discretion to postpone the sale of all or any part of the said estate, effects, and premises, and to *lease* such unsold portions, either from year to year, or for a term of years, for such rents as they or he may think fit, and with power for the said trustees or trustee to make any such *sale* either by public auction or private contract, or partly in either mode, and subject to such conditions, upon such terms, and generally in such manner as he or they may think fit, and, as to any policies of insurance, either by way of surrender to the office or offices which may have granted the same or otherwise, and to *give credit for the whole or any part of the purchase-money, either with or without taking security for the same*: And it is hereby agreed that the said trustees or trustee shall stand possessed of the moneys to arise from such calling in, collection, receipt, leasing, and sale as aforesaid, after payment thereof of all costs and expenses of and incidental to such calling in, collection, receipt, leasing, and sale as aforesaid, Upon trust thereof in the first place to pay the costs of and incidental to the said meeting of creditors, and of and incidental to the preparation, execution, and registration of these presents, and procuring the signatures or assent of the said creditors thereto, and of and incidental to the carrying out the trusts and provisions of [153] these presents, including payment of any premium payable as hereinafter mentioned: And the said Stephen Jennings doth hereby appoint the said trustees or trustee to be true and lawful attorneys, &c.: Provided always, and it is hereby agreed and declared, that the said trustees or trustee *shall have full discretion from time to time*

to determine the amount of dividend which shall from time to time be declared and paid out of the moneys in hand to and among the said creditors in respect of their respective debts, and to pay such dividends at such place, and in such manner, as they or he shall think fit: And it is hereby further agreed and declared that it shall be lawful for the said trustees or trustee to require any person or persons claiming to be a creditor or creditors of the said Stephen Jennings, notwithstanding that he or they may have executed these presents, and that the amount or alleged amount of his or their debt or debts may have been inserted in the schedule hereto, to verify the nature and amount of such debt or claim, with full particulars shewing the consideration thereon, by statutory declaration or other proof before the court of Bankruptcy, or otherwise, as the said trustees or trustee may think fit: And it is hereby further agreed, that it shall and may be lawful for the said trustees or trustee to give time for the payment of any debt or debts owing to the said Stephen Jennings, and to accept payment thereof by instalments, composition, or otherwise, and to abandon any debt or debts which they or he the said trustees or trustee shall consider bad, and also to make such arrangements as they or he may think expedient with any creditor or other person holding any portion of the estate and effects of the said Stephen Jennings by way of mortgage, pledge, or lien, in order to redeem or discharge such mortgage, pledge, or lien, or to release the equity of redemption thereof: And it [154] is hereby further agreed and declared that it shall be lawful for the said trustees or trustee to employ any persons or any person to assist them or him in winding up the affairs of the said Stephen Jennings, and the collection or realization of the estate and effects herein comprised, and to pay out of the said trust-estate to such person or persons such a fair remuneration for services rendered as the said trustees or trustee may think fit: Provided always, and it is hereby further agreed and declared that it shall be lawful for the said trustees or trustee to call a meeting of the said creditors, by circular letter stating the time, place, and object of the meeting, and sent by post or otherwise to the last known place of abode or business in England of such creditors, or their agents, in time to give such creditors or agents seven clear days' notice of such meeting: and that all resolutions which shall be passed at such meeting with reference to the subject or subjects stated in the said circular letter by the majority in number representing three fourths in value of the creditors present or represented at such meeting shall bind all the creditors to whom or to whose agents the said circular letter was sent, and also the said Stephen Jennings, his executors, administrators, and assigns: And it is hereby expressly agreed and declared that these presents shall not prejudice or affect the rights or remedies of any of the said creditors against any surety or sureties, or any person or persons other than the said Stephen Jennings, his heirs, executors, or administrators, nor shall these presents prejudice or affect any security which any of the said creditors may have or claim for his debt: but nevertheless, if such security shall be enforceable against the said Stephen Jennings, or his estate or effects, such creditors shall (unless he shall give up or abandon such security) be entitled to re-[155]ceive the dividends under these presents on so much only of his debt as may remain after such security shall have been realized or credit given for the full value thereof, such value to be agreed upon between the said trustees or trustee and such creditor, or, in case of disagreement, to be determined by the arbitration of two impartial valuers, one to be chosen by the said trustees or trustee, and the other by such creditor, or of an umpire to be chosen by such valuers before proceeding to business: [Provision for appointment of new trustees: trustees to be responsible for their own acts only, &c.] And this indenture lastly witnesseth that, in pursuance of the said agreement in this behalf, and in consideration of the grant, conveyance, assignment, and transfer hereinbefore contained, the said creditors do hereby, for themselves respectively, and their respective heirs, executors, administrators, partners, partner, or successors, acquit, release, and for ever discharge the said Stephen Jennings, his heirs, executors, and administrators, estate and effects, of, from, and against all the debts, claims, and demands of them the said creditors respectively, and of and from all actions, suits, and other proceedings at law or in equity which the said creditors respectively, or their respective partners or partner, have at any time heretofore brought, instituted, or taken, or which they the said creditors respectively, or their respective heirs, executors, or administrators, partners, partner, or successors, may or might (but for these presents) at any time hereafter bring, institute, or take against the said Stephen Jennings, his heirs, executors, or administrators, estate or effects, for or by reason or on account of such debts, claims, and demands, or any of

them: Provided always and it is hereby expressly agreed and declared that, in case the said bankruptcy shall not be duly annulled within one calendar month from the [156] day of the date of these presents, then the release hereinbefore contained on the part of the said creditors, and every other clause, covenant, and provision herein contained, shall be absolutely void. In witness," &c. [Here followed a schedule containing the names of several creditors and the amount of their respective debts.] Averment, that Stephen Jennings in the said deed mentioned is the defendant, and that the said J. Berridge in the said deed mentioned is the said J. Berridge in the said plea mentioned, and that the said W. Haymen in the said deed mentioned is the said W. Haymen in the said plea mentioned, and that the said J. H. Ivey in the said deed mentioned is the said J. H. Ivey in the said plea mentioned.

The defendant demurred to the replication, the ground of demurrer stated in the margin being "that the provisions contained in the deed set forth in the replication are not unreasonable, or such as to render it invalid." Joinder.

Macnamara, in support of the demurrer (a)¹. The deed in question is a valid deed, and an answer to the action. The court will so construe it as to make it valid, rather than otherwise: per Bramwell, B., in *Strick v. De Matlos*, 3 Hurlst. & Colt. 22, 59. It is no objection to the deed that it gives to the trustees powers which could not be enforced in a court of equity. It will be presumed that they will do their duty: and, if they attempt to exceed it, they will be restrained; and any clause which is contrary to the [157] general scope and intention of the Bankruptcy Act would be rejected: per Lord Westbury, C., in *Ex parte Spyer, In re Josephs*, 32 Law J., Bankruptcy, 62. [Bytes, J. To which clause of the deed is that remark applicable?] To almost every one. *Hudson v. Barclay*, 3 Hurlst. & Colt. 9, in error 3 Hurlst. & Colt. 361, is an authority to shew that there is nothing unreasonable in this deed. [Willes, J. The creditor can get nothing without acceding to this deed: if so, it is not a deed for the equal benefit of all the creditors.] The assignment to the trustees is in terms for the benefit of all the creditors. The first objection is to the leasing power: but, presuming that the trustees will act reasonably, what possible objection can there be to that? Then, as to the authority to sell upon credit,—by selling on credit in all probability a better price would be obtained: and, assuming that the trustees will act reasonably and discreetly, why should they not be intrusted with that power? Nor is there anything unreasonable in the provision that the trustees shall determine the amount of dividends and the time and mode of payment. Then, as to the proof of debts by statutory declaration,—it is but right and reasonable that the trustees should be satisfied of the existence of a debt before a creditor is admitted to share in the proceeds of the estate. Bramwell, B., in delivering the judgment of the court of Exchequer in *Strick v. De Matlos*, 3 Hurlst. & Colt. 57, says: "Then, clause 13, as to proof of debts, was objected to, and it was said by virtue of its provisions a creditor might be required, though at a distance, or under other circumstances of difficulty or unreasonableness, to make written statements of debt and declarations under the statute. But the answer is that this clause is not unreasonable because an attempt might be made to apply it unreasonably. We say an attempt, because it seems to us it [158] would be a breach of duty in the inspectors to exact these statements and declarations in such cases as those put at the bar; and consequently that requisitions to that effect could not be enforced; as relating to an insolvency where there is a large number of creditors, if honestly applied, as we are to assume it will be, this clause is not unreasonable." The decisions of this court in *Leigh v. Pendlebury*, 15 C. B. (N. S.) 815, and *Lyne v. Wyatt*, 18 C. B. (N. S.) 593, proceeded on the ground that the debt was forfeited for non-compliance with the condition.

Pateson, contra (a)², referred to *Coles v. Turner*, 18 C. B. (N. S.) 736, where it was

(a)¹ The points marked for argument on the part of the defendant were as follows:—

"1. That the deed set forth in the plea and in the second replication is an answer to this action:

"2. That the said deed is valid as a deed under the Bankruptcy Act, 1861, its provisions being reasonable and equal."

(a)² The points marked for argument on the part of the plaintiffs were as follows:—

"1. The deed is not binding on non-assenting creditors:

"2. The deed contains unreasonable provisions, and therefore is not binding: the following provisions are unreasonable,—the power to lease,—the power to pay dividends

held that a stipulation in a trust-deed for the benefit of creditors, under the 192nd section of the Bankruptcy Act, 1861, declaring that "it shall be lawful for the trustees to require any person or persons claiming to be a creditor or creditors of the debtor (notwithstanding that he or they may have executed the deed, and that the amount or alleged amount of his or their debt or debts may have been inserted in the schedule thereto) to verify the nature and amount of such debt or claim, with full particulars shewing the consideration thereof by statutory declaration proved before the commissioners of bankruptcy, or otherwise, as the said trustee or trustees [159] may think fit,"—is unreasonable, and renders the deed inoperative as against a non-assenting creditor.

ERLE, C. J. We must abide by our judgment in *Coles v. Turner*. The plaintiffs are therefore entitled to judgment on this demurrer.

The rest of the court concurring,

Judgment for the plaintiffs.

FRAYES AND ANOTHER v. WORMS. June 8th, 1865.

By a charterparty for a voyage from Cardiff to San Francisco with a cargo of coals, the owners engaged to deliver the same "on being paid freight at and after the rate of 4l. 10s. per ton of 20 cwt. *delivered*;" and the instrument contained the following stipulation,—“The freight to be paid by good and approved bills on London at six months’ date from date of sailing, less cost of insurance, to be affected by the charterer at ship’s expense, or in cash, under discount equal thereto, at charterer’s option; less, in either case, 800l., which is to be paid on delivery of cargo, in cash, at the current rate of exchange.” The freight, to the extent of 4807l., was paid in advance, and a general average loss was sustained on the voyage:—Held, that the owners were not liable to contribute to such general average in respect of the freight so advanced, but only in respect of the 800l. which was to be paid at the end of the voyage; but that the charterers, who had an insurable interest in that portion of the freight were the parties to contribute.

This was an action brought by the plaintiffs against the defendant for money payable for certain general average alleged to have become payable in respect of goods on a voyage of a ship called the “*Hibernia*,” and in respect of certain loss, damages, and expenses incurred by the plaintiffs in and about the preservation of the ship and cargo and the said goods from damage and loss, and for general average for and in respect of money paid by the defendant to the plaintiffs before completion of the voyage, by way of advance of freight, and for losses, damages, and expenses incurred by the plaintiffs in and about the preservation of ship and cargo and freight from damage and loss. There were also counts for money paid, and money found due on accounts stated.

[160] The defendant pleaded never indebted, payment, and the statute of limitations, and a special plea setting up the American judgment afterwards mentioned. The plaintiffs joined issue, and demurred to the last plea.

The amount claimed by the plaintiffs on the writ was 1007l. 13s. 11d., with interest at 4 per cent. per annum from the 29th of June, 1854.

The following case was stated under a judge’s order for the opinion of the court:—

1. On the 21st of April, 1853, Mr. Edward Oliver, the then owner of the ship “*Hibernia*,” through his agents, Messrs. Parry, Brown, & Co., effected the following charter of the said ship to the defendant:—

“Cardiff, 21st April, 1853.

“It is this day mutually agreed between H. H. Parry, Brown, & Co., agents for owners of the good ship or vessel called the ‘*Hibernia*,’ of the measurement of 272 tons or thereabouts, now at Liverpool, and H. Worms, of Cardiff, merchant, that the said ship, being tight, staunch, and strong, and every way fitted for the voyage, shall with all possible despatch sail and proceed to Bute Dock, Cardiff, or so near thereunto as she may

at such place and in such manner as the trustees think fit,—the provision as to proving debts,—the provision that resolutions passed at certain meetings of creditors shall be binding,—and the provision as to valuing securities:

“3. The release in the deed is too extensive.”

safely get, and there load from the factors of the said affreighters a full and complete cargo of steam-coal: captain taking sufficient coal for ship's use independent of the cargo: same to be indorsed on the bills of lading. Cargo to be brought and taken from alongside at merchant's risk and expense, and not exceeding what she can reasonably stow and carry over and above her tackle, apparel, provisions, and furniture: and, being so loaded, shall therewith proceed to San Francisco, or any of the landing places within the waters of San Francisco or Sacramento within one day's sail of the former, or so near thereunto as she may safely get, and deliver the same on [161] being paid freight at and after the rate of 4l. 10s. British sterling per ton of 20 cwt. delivered. Ship to be addressed to charterer's agent at port of discharge on usual terms for doing the ship's business. The act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of whatever nature and kind soever during the said voyage always excepted. *The freight to be paid by good and approved bills on London at six months' date from date of sailing, less cost of insurance to be effected by the charterer at ship's expense, or in cash, under discount, equal thereto, at charterer's option, less in either case 800l., which is to be paid on delivery of cargo, in cash, at the current rate of exchange; and ten days on demurrage over and above the said laying days, at 10l. per day. Penalty for non-performance of this agreement, 5000l. The vessel to be loaded at the quickest turn obtainable, with Powell, Wayne, or Thomas and Joseph, and discharged at rate of not less than 20 tons per working day, on being ready to deliver."*

2. The defendant under the said charterparty loaded the ship with a cargo of coals, consisting of 1246 tons: and the following bill of lading was duly signed for the same by the master of the said ship:—

"Shipped in good order and condition, for Mr. H. Worms, by Mr. J. R. Smith as agent, in and upon the good ship or vessel called the 'Hibernia,' whereof John Cleverley is master for this present voyage, and now riding at Cardiff, and bound to San Francisco, California. Twelve hundred and forty-six tons of best hard picked large Merthyr steam-coal, being marked and numbered as per margin, and are to be delivered in the like good order and well conditioned, at the aforesaid port of San Francisco (all and every the dangers and accidents of the seas and navigation of what- [162] ever nature and kind excepted), unto Mr. H. Worms or order, on being paid freight for said coals as per charterparty, with primage and average accustomed. In witness," &c.

3. Agreeably to the terms of the said charterparty, the defendant, in payment of the freight payable under the said charterparty, less the sum of 800l. mentioned therein, payable on delivery of the cargo, gave two bills of exchange amounting together to the sum of 4518l. 6s., being the balance of the freight less the insurance thereon, which amounted to the sum of 288l. 14s.: and thereupon the master indorsed on the said bill of lading the following receipt:—

"Received of Mr. H. Worms the sum of four thousand eight hundred and seven pounds sterling on account of the within freight, viz.

"By two bills on London each of 2259l. 3s., together	£4,518	6	0
Insurance 5 per cent., on each 144l. 7s., together	288	14	0
	<u>£4,807</u>	<u>0</u>	<u>0</u>

"Said amount of 4807l. to be deducted from freight at San Francisco."

4. Both the said bills of exchange were paid at maturity.

5. On the 14th of July, 1853, the said Mr. Edward Oliver transferred the said ship and the benefit of the said charter to the plaintiff Valentine Frayes: and he on the 26th of October, 1853, transferred 8/64ths of the said ship to the plaintiff Williams.

6. The ship shortly after the shipment of her cargo sailed on the voyage mentioned in the said charterparty, and during such voyage sustained considerable damage, and was for the safety of the general adventure compelled to and did put into Valparaiso, where [163] she arrived on the 7th of January, 1854, and remained until March, 1854.

7. Expenses were necessarily incurred at Valparaiso in the repair of the ship, the particulars of which appeared in the average statement mentioned in paragraph 13 of this case; and it is agreed between the parties that the portion put down to general average in such statement were general average charges.

8. The master of the said ship, not having funds at his command to defray the expenses, on the 10th of March, 1854, properly borrowed the requisite amount at Valparaiso, and duly executed a bottomry-bond, whereby the ship "together with all her tackle, apparel, furniture, and appurtenances, the said cargo, and freight," were hypothecated to secure the sum of 13,132 dollars, 62 cents., of lawful money of the United States.

9. After the completion of the repairs, the ship proceeded on her voyage to San Francisco, where she arrived in June, 1854, and duly delivered the cargo.

10. The plaintiffs, after hearing of the injury sustained by the "Hibernia," transmitted to San Francisco the sum of 1000*l.* towards defraying the bottomry-bond executed at Valparaiso.

11. On the 16th of May, 1854, the plaintiffs entered into the following contract with one William James:—

"53 South John Street, Liverpool,
"16th May, 1854.

"Messrs. Valentine Frayes and Bethnel Williams sell and William James of Liverpool buys the ship 'Hibernia,' now supposed to be on her passage from Valparaiso to San Francisco, on the following conditions, viz. that the ship is to be transferred to the purchaser at once by bill of sale; and, in case she is not sold at San Francisco, or no heavy expenses incurred there upon her previous to the arrival of the person [164] sent out by him, he is to take possession of her in the purchaser's name, and he W. James is to become the sole registered owner: but it is understood that one eighth of the said ship is still to belong to the original owners, viz. say one eighth of the net value of the ship and freight after she is discharged in Cadiz and all expenses upon her are paid, is to belong to them: but, in case the ship does not become the property of the said William James, any expense which he may be put to in sending a person out to San Francisco, interest of money, or otherwise, is to be refunded him by the present owners.

"In taking possession of the said ship, the 1000*l.* already remitted to San Francisco by the present owners, with any balance of freight which may be due there (supposed to be about 800*l.*), is to become the purchaser's, and also any insurance which is now due or may hereafter become due either in this country or New York on said ship or freight, and all freight on the return voyage, subject to the above reservation, or any other thing connected with the said ship, is to become his also.

"And, on payment for the said ship, the purchaser is to discharge the bottomry-bond now upon her for 3700*l.*, say about three thousand seven hundred pounds, liabilities in Cardiff, to Messieurs Parry, Brown, & Co., Batchelor, Brothers, and the bank there, together about 1500*l.*, all wages and expenses on the voyage, and 500*l.* to the present owners, by his acceptance at six months from receiving advices of the said ship having left the port of San Francisco: and all right in the existing charter is transferred with the said ship also.

"VALENTINE FRAYES.

"BETHNEL WILLIAMS.

"W. JAMES.

"Mem. Everything paid to be debited to the ship, [165] and everything received to be credited her (with interest for and against), and $\frac{1}{8}$ of the balance to belong to the original owners, the other $\frac{7}{8}$ to me, but nothing except what is named now. I to be liable for and only what wages may be due to the crew on the termination of the voyage."

And the said ship was on the said 16th of May, 1854, transferred to the said Mr. James by bill of sale.

12. Disputes subsequently arose with reference to the said contract between the plaintiffs and the said William James, which gave rise to proceedings at law and in equity; and, on the 2nd of August, 1855, the following agreement was entered into by the plaintiffs and the said William James:—

"An agreement made this 2nd of August, 1855, between Bethnel Williams, of Aberdare, in the county of Glamorgan, merchant, and Valentine Frayes, of Cardiff, in the same county, broker, of the one part, and William James, of Liverpool, merchant, of the other part: Whereas, certain differences have arisen between the parties hereto as to the performance of an agreement between them, dated the 16th of May, 1854, and proceedings at law and in equity are now pending between them in reference thereto, and they have this day agreed upon certain terms hereinafter set forth, whereby all proceedings are to be stayed, and all questions whatever under the said agreement and otherwise between the parties settled: Now, the said Bethnel Williams and Valentine Frayes on the one part, and the said William James on the other part, agree with each other, as follows,—

"1. That all proceedings at law and in equity between them be stayed:

"2. That each side pays his own costs of such proceedings:

[166] "3. That the said Bethnel Williams and Valentine Frayes discharge the said William James from any claim in respect to the one eighth of the ship 'Hibernia,' say the one eighth of the net value of the said ship and freight reserved to them by the said agreement; and that the said William James is to be sole and absolute owner of the said vessel:

"4. The said Bethnel Williams and Valentine Frayes release the said William James from the liability to pay them or give them a bill of exchange for 500l. as mentioned in the aforesaid agreement:

"5. That the said William James has this day given to the said Bethnel Williams and Valentine Frayes a bill of exchange at six months' date for 750l. as the remaining full consideration under the aforesaid and this present agreement:

"6. That the said William James hereby releases the said Valentine Frayes from all claims under certain bills of exchange, making together 6000l.

"BETHNEL WILLIAMS.

"VALENTINE FRAYES.

"W. JAMES."

13. After the ship's arrival at San Francisco, an average statement was duly made out in accordance with the law: but this statement is not to preclude either party from raising the question who is to contribute in respect of freight. A copy of the said average statement accompanied and was to be deemed to form part of this special case.

14. In the month of July, 1854, Mr. James paid the amount of the said bottomry-bond given at Valparaiso: and this action is brought by and prosecuted for the benefit of the said Mr. James.

15. The defendant, by himself or his agents, duly paid the 800l., the balance of the freight, and also the sum of \$912 charged on the cargo in the said average statement.

[167] 16. The said Mr. James took proceedings in the district court of the United States for the northern district of California. A copy of the proceedings in that court, and of the judgment pronounced therein, accompanied and was to be deemed to form part of this special case.

17. The money directed by such judgment to be paid was forthwith paid.

18. The defendant, on the 21st and 25th of July, 1853, effected two policies of insurance in France for 130,000 francs on advances made on freight of the cargo by the said ship for the said voyage from Cardiff to San Francisco, with faculty to call at any or all ports in the Southern seas. The policy was stated to provide for reimbursement of the advances in all cases of fortune of the seas which might have for consequence the deprivation of the said advances from the person assured. Copies of the original policies accompanied and were to form part of the case. The above were the only policies effected in respect of the advances.

19. The pleadings accompanied and were to be deemed to form part of this special case.

20. The demurrer to the fourth plea was argued on the 26th of April, 1861, when the court held the fourth plea bad, and the second count of the declaration good. The judgment of the court will be found reported in the 10 C. B. (N. S.) 149.

21. The court was to have power to draw any inferences of fact from the facts hereinbefore stated which a jury might draw.

The question for the opinion of the court was,—Whether the plaintiffs were entitled to recover all or any part of the money claimed by them.

If the court should be of opinion in the affirmative, then judgment was to be entered for the plaintiffs as [168] the court might direct, for such sum as the court might think fit, together with costs of suit. But, if the court should be of opinion in the negative, then judgment of *nolle prosequi* was to be entered for the defendant, with costs of defence.

Sir G. Honyman (with whom was McLeod), for the plaintiffs (*a*). This is a claim by the ship-owners against the charterer and shipper of the cargo; and the question is whether freight advanced, never to be returned, is to contribute to general average. As to the 800l. freight to be paid on arrival out and delivery of the cargo, of course the owners must contribute; but not, it is submitted, in respect of the 4807l. paid in advance. The plaintiffs by the charterparty provided the charterer with the means of covering himself against risk. If he has omitted to do so, that does not entitle him to throw the loss on the plaintiffs. On the [169] part of the defendant it will probably be contended, either that the 4807l. was paid under such circumstances as would make it recoverable back if the voyage were not completed, or that no general average was payable. The charterer was to insure the freight so advanced. How could he have any insurable interest therein unless it was a payment out and out? The bills were given for the amount, less the cost of insurance. If the ship had gone to the bottom, the charterer never could have reclaimed the money. That is the true test. Then it will be said that, assuming this to have been money paid, lost or not lost, the defendant is not liable to contribute to general average. The principle of general average is thus stated in 2 Arnould on Insurance, § 343 (2nd edit. p. 937),—“The leading principle of general average contribution, to whatever kind of loss it may be applied, is this, *that all the parties interested in the adventure for the benefit of which the loss was incurred, should be sufferers by the loss in exact proportion to the extent of their respective interests, but no further*: and this object can only be attained when the party whose property has been sacrificed, whose money has been disbursed, or whose credit has been pledged for the general benefit, is placed, by the result of the adjustment, exactly in the same position he would have stood in had the sacrifice been made, the expense incurred, or the credit pledged, not by himself, but by some other of his co-adventurers.” Apply that here: the plaintiffs have received 4807l.: if the ship had gone to the bottom, they could not have been called upon to refund the money: quoad that sum, therefore, they derive no benefit from the ship’s arrival. Whereas, the charterer, if the ship had gone down, would have lost his goods, and also the money he had paid for freight in advance. The ship-owners, there-[170]-fore, are the persons to contribute to general average in respect of the 800l. freight unpaid, and the charterer in respect of the 4807l., as the value of the use of the vessel preserved to him by the sacrifice. The plaintiffs, who have raised the money on bottomry and paid the whole amount, are consequently entitled to call on the defendant for contribution. It appears on the case that policies have been effected. The defendant, therefore, will get the money from the underwriters; or, if he fails, it will be through his own fault. In Stevens & Benecke on Average, Boston edit. 215, it is said: “As in the value of the ship, so also in the value of the freight to be brought into contribution, the foreign

(*a*) The points marked for argument on the part of the plaintiffs were as follows:—

“That the plaintiffs are entitled to recover the general average in question, for the following reasons,—

“1. That it appears by the average-statement referred to in the 13th paragraph of the case, that the average-stater apportioned the general average among the ship, cargo, and freight, and that the contributable amount of the latter item was put at 5607l., being the aggregate amount of the 4807l. paid by the defendant after the sailing of the ship as mentioned in paragraph 3 and of the 800l. payable at the port of discharge:

“2. That the plaintiffs are liable for general average in respect of the 800l. payable at San Francisco, that amount being at their risk; and the defendant is liable for general average in respect of the 4807l. paid as already mentioned, that amount being at his risk:

“3. That the plaintiffs are consequently entitled to recover a sum bearing the same proportion to the gross amount apportioned to freight as 4807l. bears to 5607l.”

authorities are not agreed. Some direct that only half the freight shall contribute (*a*)¹; others, the whole, after deducting the wages: one,—the Ordinance of Florence,—states one third; and, according to others, it is optional with the proprietors of the cargo, or with the owner of the ship, whether the full value of the ship or of the freight shall contribute. When the average is adjusted after the ship's arrival, and the freight is payable at the port of discharge, there can be no doubt that it should make part of the contributory interest; nor is there any when the average is settled at the loading port, if the freight, or whatever name it may be called by, be paid in advance; for, it then being a charge on the invoice, becomes part of the value of the cargo: but, when the payment of the freight depends on the contingency of arrival,—the ship being a general one, *not chartered* for the voyage,—it is thought by some that the ship and cargo should alone contribute, provisionally, they being the only real property at stake; for, in case of the ship being lost on the voyage, she would have earned no freight." Notwithstanding Mr. Phillips's remarks on [171] the obscurity of some portions of this passage, it is sufficiently obvious that it is those only who are interested in the ship's arrival who are to contribute to general average. In the present case, the average-stater has adopted the rule laid down in the Ordinance of France. It is therefore submitted that the amount of average here is to be apportioned between the ship owners and the charterer in respect of their several insurable interests. The plaintiffs are entitled to recover the money expended by them for the general benefit of the adventure: Arnould, §§ 344, 399. Their right of reimbursement does not depend on the law of San Francisco: it arises the moment the expenditure is made.

Mellish, Q. C. (with whom was Milward), for the defendant (*a*)². The first question is, who is to contribute to the general average. By the express terms of the charter-party, freight is payable only on coals *delivered*. How is that to be reconciled with the subsequent part of the instrument, "*The freight* to be paid by good and approved bills on London at six months' date from date of sailing, less cost of insurance, to be effected by the charterer at ship's expense, or in cash, under discount equal thereto, at charterer's option; less, in either case, 800*l.*, which is to be paid on deli-[172]-very of cargo, in cash, at current rate of exchange!" Taking the whole together, if no coals were delivered at San Francisco, no freight was payable at all: it was in terms payable only on the coals *delivered*. The money, therefore, was paid without consideration. "Freight," in its strict legal sense, means a compensation for the carriage of goods. [Byles, J. Does that definition apply to freight which has actually been paid?] The instrument must be so read as if possible to give effect to the whole of it. [Byles, J. Taking the whole charterparty together, is it not plain that the 4807*l.* is a sum to which the word "delivered" does not apply? Willes, J. I have always understood that, where the charterer is to insure the advance, the ship-owner is not to return the money if the ship is lost. In *Hicks v. Shield*, 7 Ellis & B. 633, by charter-party between the defendants, owners of a ship, and the plaintiff, it was agreed that the ship should proceed from London to Bassein, and there load a cargo from the plaintiff's factors, and therewith proceed to London, and deliver the same, on being paid freight at a specified rate; "cash for ship's disbursements to be advanced to the extent of 300*l.*, free of interest, but subject to insurance;" "the freight to be paid on unloading and right delivery of the cargo, as follows, say, in cash, less two months' interest at 5 per cent.;" and, if required, 300*l.* more to be paid in cash on arrival, less two months' interest." 300*l.* was advanced by the plaintiff's agents at Bassein for ship's disbursements. Neither plaintiff nor defendants insured in respect of this 300*l.* The ship left Bassein with a cargo for London, but was lost before reaching London. The plaintiff claimed the payment of the 300*l.* as a loan made to the

(*a*)¹ The Ordinances of France, Amsterdam, and Lisbon.

(*a*)² The points marked for argument on the part of the defendant were as follows:

"1. That the defendant has paid all that could be payable for average on the goods, and is in no sense liable for any average in regard to freight, which in fact falls on the ship-owner, and not on the charterer:

"2. That there is no agreement, either express or implied, to contribute general average for money paid by the defendant to the plaintiffs by way of advance of freight:

"3. That, assuming the defendant might be liable to someone for something, yet the present plaintiffs are not the proper persons to sue."

defendants: the defendants tendered the amount at which the 300l. might have been insured, but refused to pay more. It was held that the plain-[173]-tiff's claim could not be supported, as it appeared from the charterparty that the advance was not a loan, but was an *advance on freight*. Lord Campbell said: "A sum of 300l. is to be advanced, subject to certain deductions, one of which is for insurance. If it is to be insured, it must be for freight in advance: for a mere loan could not be insured: and if it is not a mere loan, but advance of freight, the plaintiff cannot recover it back." Assuming the court to be against the defendant on the first point, the next question is, whether the ship owners can recover the general-average from the charterer. In Phillips on Insurance, § 1404, the learned author, dealing with the question whether, in an adjustment at the port of departure, freight advanced is to be included in the contributory value of the goods, says,—“Mr. Benecke (London ed. 1824, p. 314; Benecke & Stevens by Phil. 257) says that, where a general average is adjusted on the value at the port of departure, freight advanced by the shipper is included in the value of the goods on which he contributes. But such a rule must be confined at least to the case of an advance of freight not to be recovered back in any event: but it is questionable whether it will apply in such case, since such advance has been held not to constitute a part of the amount of insurable interest in the adjustment of a total loss: *Winter v. Hallimant*, 2 B. & Ad. 649. The case is one of an absolute purchase of a part of the freight; and the purchaser, namely, the shipper, is to that extent put into the place of the ship-owner in a manner not unlike that in which the charterer of the whole ship may be substituted for the ship owner in respect of the whole freight. The question then arises, whether the shipper ought to contribute to general average on this proportion of the freight, where the freight is liable to contribute to general average, just as the [174] charterer of the whole ship may stand in the place of the ship-owner as to the contributions on this interest. Why ought the shipper who has advanced his freight unconditionally to contribute more than he would otherwise be assessed on the same goods? Certainly not because the goods are of any greater value: but, if for any reason, because the freight of his goods is at his risk, as well as the goods themselves. It is then in his character of owner of the freight to this extent that he ought to make an additional contribution, if indeed he ought to make any such additional contribution at all. But an objection to this mode of adjustment is that freight is not usually advanced upon the understanding that the shipper thereby takes any additional responsibility in respect to contributions in general average. If, then, no part of the contribution can in such case be assessed upon the party advancing freight, without giving an effect to such advance different from what was intended by the parties, in the ordinary circumstances and understanding in case of such an advance, it suggests what seems to be the safest and most just and practicable rule in such case, namely, that *the contribution should not be affected in the least by any particular unusual stipulations as to the time of payment of freight*, but should be made precisely as if the goods had been shipped on the usual bill of lading, stipulating to pay the freight on delivery of the goods, estimating the freight on each passage distinctly, whether the parties agree for freight on the termination of successive passages, or partly in advance, or however otherwise they may agree. This rule would operate more equally in a great majority of cases, and save third parties from being affected by unusual stipulations of which they could not be apprised.” [Byles, J. Suppose the charterer puts up the ship as a general ship?] In that case, the [175] increased freight which the charterer received would contribute to general average. [Willes, J. And the shipowner in respect of the chartered freight?] Yes. In Arnould, vol. 2, § 352, it is said: “When the shipper pays freight in *advance* at the outset of the voyage, a question has been raised whether the freight so paid is to be added to the contributory value of the goods. Mr. Benecke thinks it is, because the loss of such freight to the shipper was saved by the sacrifice: Pr. of Indem. 314. Mr. Phillips is of a contrary opinion (3rd. edit. vol. 2, pp 157, 158): and it appears to me, for the reasons he gives that, on principle, such addition ought not to be made, but that the shipper who thus pays in advance should be regarded as the purchaser of the freight, and not be exposed on account of it to any claim for contribution.” The freight is not at risk. To be contributory at all, it must be pending at the time. “The proper place,” says Mr. Arnould, § 350, “for the adjustment of general average, is the ship's port of destination or discharge; when this happens to be a foreign port,

the general average loss is adjusted there according to the law and usage of the country to which such foreign port belongs." At San Francisco, they would probably rely on Phillips.

Sir G. Honyman was not called upon to reply.

ERLE, C. J. The general principle of contribution to general average has not been disputed. All who are interested must contribute to the expenses incurred for the joint benefit of ship and cargo. The owners of the ship, the freight, and the cargo are liable to contribute, each to the extent of what he has at stake. Here, the claim is in respect of 4807l. advanced freight on a charterparty, which was not to be returned: that sum, therefore, was no longer at risk. [176] The charterer under such circumstances has an interest in the ship and in the value of the goods increased by the amount of the freight advanced. The general rule seems to me to be that the charterer is liable to contribution for general average in respect of advances on freight. I therefore think the plaintiffs are entitled to judgment.

WILLES, J. I am of the same opinion. As to the question whether the money advanced on account of freight was to be returned in the event of the goods not reaching their destination, that seems to me to be concluded by the terms of the charterparty. The charterer was to insure the advance. It was therefore at his risk: and he must proceed against his underwriters. As to the second question, which is whether a person who has advanced money on account of freight, and has shipped his goods on the voyage, is liable to contribute to general average, I apprehend that must be answered in the affirmative. This is not a question between underwriters on cargo and underwriters on freight. If it were, it might be necessary to go into the question whether the interest of the defendant was an interest in cargo or an interest in freight. He is interested in the cargo, and he has purchased the right to have it carried to its destination. Without regard to the liability of the underwriter, it is laid down that the sacrifice made for the benefit of all is to be contributed to by the persons interested in the ship, in the freight, and in the cargo. Here, the charterer is interested in the safe carriage of the cargo. He is interested in the same way as a ship-owner who has partly filled up the ship with his own goods is interested. That might be insured in the name of freight, and would have to contribute to general average. The case seems to me a very clear one.

[177] BYLES, J. I am of the same opinion. The charterer is in reality the purchaser of a portion of the freight, and is liable to the loss of that freight by the loss of the ship. He therefore was the person liable to contribute to general average in respect of the 4807l. paid in advance. In substance, his goods are augmented in value by the pre-payment he has made. It is not necessary, however, to put the case on that ground. Justice is plainly on the side of the plaintiffs.

MONTAGUE SMITH, J. I am of the same opinion. Upon the fair construction of this charterparty, I think the 4807l. advanced on account of freight could in no event be recoverable back. The charterer had an interest in the cargo, plus the freight advanced, and consequently was liable to contribute to that amount to general average.

Judgment for the plaintiffs.

THE HIGHWAY BOARD OF WRENHAM, *Appellants*; JAMES HARDCASTLE,
Respondent. May 30th, 1865.

A.'s year of office as surveyor of highways in the township of D. expired on the 25th of March, 1863, when B. was appointed his successor, pursuant to the 5 & 6 W. 4, c. 50, and at the next special sessions (on the 1st of April) A. verified and passed his accounts, which shewed a balance of 24l. 6s. 5d. in his hands due to the township. At this time there were debts owing by A. as such surveyor. On the 10th of April, a highway board was formed (under the 25 & 26 Vict. c. 61) for a district which included the township of D.; and on the 4th of May the board appointed a district-surveyor. B. never acted as surveyor at all:—Held, upon the construction of the 5 & 6 W. 4, c. 50, ss. 42, 43, and 25 & 26 Vict. c. 61, ss. 11, 43,—that A. was an "outgoing-surveyor," and as such liable to account to the board but that he was entitled to the same allowances for disbursements, &c. from the

board as he would have been entitled to if he had paid over the balance to his immediate successor in office, B.

The following case was stated, pursuant to the 20 & 21 Vict. c. 43, for the opinion of this court:—

At a special sessions for the highways, holden at [178] Ruabon, in and for the division of Ruabon, in the county of Denbigh, on the 4th of November last, before two of Her Majesty's justices of the peace in and for the said county, a complaint dated the 6th of October, 1864, and preferred by the highway board of the Wrexham district, hereinafter called "the appellants," against James Harcastle, Esq., hereinafter called "the respondent,"—“For that he the said James Harcastle, having been an outgoing surveyor of the highways for the township of Dynbrynle-issa, in the said county, now included within the Wrexham highway district, and as such outgoing surveyor being liable and bound to account to the said board for all the moneys in his hands by virtue of his office, and to pay over all surplus moneys or balances to the treasurer of the said board, had neglected to render such accounts, and to pay over to the treasurer of the said board the balance remaining in his hands as such surveyor,” was heard and determined by them, the said parties being then present: and upon such hearing the justices dismissed the complaint, without costs.

The appellants demanding a case, the justices stated the facts and their decision, as follows:—

On the hearing of the aforesaid complaint, it was proved that, during the year ending on the 25th of March, 1863, Mr. Harcastle, the respondent, was surveyor of highways for the township of Dynbrynle-issa, in this division, and in that capacity collected highway-rate and repaired roads: that, on the 25th of March, 1863, Mr. Joseph Jones was duly appointed surveyor of the highways for the said township, and succeeded the respondent in office as such surveyor, pursuant to the Highway Act, 5 & 6 W. 4, c. 50: and that, at the next succeeding special sessions (held on the 1st of April, 1863), the respondent duly verified [179] and passed his accounts before the justices, shewing a balance of 24l. 6s. 5d. in his hands due to the township: and it was also proved that there were debts owing by Mr. Harcastle as such surveyor, and some arrears uncollected of the highway-rate made during his year of office. It was also proved that the working-tools used by the roadmen of the said township were left upon Jones's premises soon after the vestry: but the exact date when they were so left was not shewn. It was also admitted that, upon the 10th of April, 1863, the highway board for the Wrexham district (which includes the township of Dynbrynle-issa) was duly formed, and held their first meeting under the provisions of the Highways Management Act, 25 & 26 Vict. c. 61: and that a clerk was then duly appointed: and that, upon the 4th of May, 1863, a district-surveyor was appointed by the said board. It was likewise proved that Jones never performed any act of surveyor, either in the repairs of the roads, collecting rate, or otherwise, for the township: that he never received the books nor balance from the respondent as his predecessor in office: that he delivered up the working-tools belonging to the office, which had been left on his premises, to the district-surveyor for the highway board: and that the respondent objected to pay over the balance of 24l. 6s. 5d. to the highway board, without having deductions allowed therefrom for payments which he claimed to have made on account of the township after his year of office had expired, but which claim the board would not recognize.

Upon these facts, it was contended by the respondent that he was not liable to this proceeding on the part of the highway board, as they were not his successors in office under the 42nd section of the 5 & 6 W. 4, c. 50, and also as he was not the outgoing sur-[180]-veyor of the township within the 43rd section of the 25 & 26 Vict. c. 61: nor was the board under the same section successor to him, but to Jones, who was the surveyor *de jure et de facto* when the board was formed and the district-surveyor appointed: and that, if the respondent was to be considered such outgoing surveyor, any balance in his hands was liable, under that section, and also under the General Highway Act, 5 & 6 W. 4, c. 50, to the discharge of any debts legally owing on account of the highways of the said township.

For the appellants, it was contended that, under the 42nd section of the 5 & 6 W. 4, c. 50, the respondent was bound to deliver his balance to his successor within fourteen days; and, under the 103rd section, he could be proceeded against by and

ordered to pay such balance to his successor; and that, under the 11th and 43rd sections of the 25 & 26 Vict. c. 61, all property which would belong to or was vested in any surveyor, and all powers and rights attaching to any surveyor, were now vested in them, the appellants, as the highway board; that they were the successors of Joseph Jones in office; and that all his powers, rights, and capacities became vested in them as his successors; and that they were entitled to recover the balance in question from the respondent.

The magistrates, however, being of opinion that the respondent was not liable upon the complaint before them, decided against the appellants.

The questions for the opinion of the court were,—first, whether the respondent as surveyor during the year ending on the 25th of March, 1863, when Jones was appointed a successor to the office in his stead, could be held to be “the outgoing surveyor” at the time of the formation of the district on the 10th of April following, under section 43 of the 25 & 26 Vict. c. 61,—[181] secondly, if he could be so held, whether he was liable to pay over the whole balance of 24l. 6s. 5d. shewn upon his accounts as verified on the 1st of April, 1863, or whether he could claim to apply the same in reimbursing any expenses incurred by him during his period of office as such surveyor, and in discharging any debts legally owing by him on account of the highways within his jurisdiction, although not included in his accounts as verified, and then to pay the balance (if any) to the treasurer of the highway board?

Hayes, Serjt., for the appellants. The material clauses of the Highway Act, 5 & 6 W. 4, c. 50, are the 42nd, 43rd, and 44th. Under s. 42, it is the duty of the surveyor, district-surveyor, or assistant-surveyor, on quitting office, to deliver to his successor in office all books and accounts duly verified, together with all such sums of money as shall be due from him, and likewise all tools, materials, implements, and other things. Section 43 provides for the case of the death of a surveyor, &c. The 44th section enacts that, “within fourteen days after the election or appointment of surveyor as herein directed, the accounts as aforesaid made in writing, and signed by the surveyor, &c., for the year preceding, of all moneys received and disbursed by virtue of this act, ending on the day of the election or appointment of surveyor, shall be made up, balanced, and laid before the parishioners in vestry assembled;” and shall be signed and verified, &c. And s. 103 gives a summary remedy for the recovery of balances: see *Kilham v. Collier*, 21 Law J., Q. B. 65. Here, the case finds that Jones, Hardecastle’s successor, never interfered. The new board now call upon the respondent. The difficulty is, whether they are his successors in the office of surveyor: the statute does not in terms limit it to his *immediate* successor. By [182] the 11th section of the 25 & 26 Vict. c. 61, all property and rights which the surveyor formerly had are now vested in the highway board. The magistrates here seem to have relied on the 43rd section of that act, which, amongst other things, provides that “the outgoing surveyor of every parish within the district shall continue in office until seven days after the appointment of the district-surveyor by the highway board of the district of such outgoing surveyor, and no longer: and he may recover any highway-rate made and then remaining unpaid, in the same manner as if this Act had not been passed, and the money so recovered shall be applied, in the first place, in reimbursing any expenses incurred by him as such surveyor, and in discharging any debts legally owing by him on account of the highways within his jurisdiction, and the surplus (if any) shall be paid by him to the treasurer of the highway board: and he shall be entitled to receive from the highway board any sum not exceeding 5l. which on the allowance of his accounts shall be found to be due to him as such surveyor after the collection and expenditure of the whole of the highway-rate made in such parish during the year: and the highway board shall, for all the purposes of the principal act except that of levying highway-rates, be deemed to be the successor in office of the surveyor of every parish within the district.” There are no words in the act limiting the right to recover to the *immediate* successor of the surveyor.

Cleasby, Q. C., *contrà*, was not heard.

ERLE, C. J. It seems to me that the respondent was an outgoing surveyor within the information, and that the magistrates ought to have gone on. With respect to the second question, we are all of opinion that the [183] highway board claim under Jones immediately, and, in taking the account with Mr. Hardecastle, would be bound to make him the same allowances that would have been made to him if the

account had been taken between him and Jones. The board have jurisdiction over Harcastle as an outgoing surveyor, and stand in the shoes of Jones with regard to the allowances to be made to Harcastle for disbursements legally made by him in his office of surveyor. Upon this footing he is ready to account. The case will therefore go back to the magistrates with this intimation of our opinion: and we think there should be no costs of this appeal on either side.

Rule accordingly.

LONGMORE v. THE GREAT WESTERN RAILWAY COMPANY. May 31st, 1865.

[S. C. 35 L. J. C. P. 135. Distinguished, *Crafter v. Metropolitan Railway*, 1866, L. R. 1 C. P. 303. Referred to, *Tay v. Midland Railway*, 1875, 34 L. T. 32.]

A railway company, for the more convenient access for passengers between the two platforms of a station, erected across the line a wooden bridge, which the jury found to be dangerous:—Held, that the company were liable for the death of a passenger through the faulty construction of this bridge, although there was a safer one about one hundred yards further round, which the deceased might have used.

This was an action brought by the plaintiff, as administratrix of her deceased husband, against the Great Western Railway Company, to recover compensation for his loss, which was alleged to have occurred through the improper construction of a bridge belonging to the defendants.

The cause was tried before Keating, J., at the last Spring Assizes at Stafford. The facts proved were as follows:—The deceased, who was about sixty years of age, whilst on his way to the booking-office at a small station on the defendants' railway between Birmingham and Wolverhampton, in crossing a wooden bridge [184] erected by the company for the convenience of passengers wishing to go from one side to the other, fell through what was described in the declaration as a "dangerous aperture," on to the platform below, and was killed. At the place through which the deceased fell, there was a descent of eight or ten steps, between which and the hand-rail at the side was an opening of seven feet three inches by four feet two inches, without any protection. Two witnesses called on the part of the plaintiff stated that in their opinion the bridge was extremely dangerous.

For the defendants, it was proved that the bridge in question had been erected about ten years; that it was a clear moonlight night when the accident happened; that the steps were in perfect repair; and that, though many thousand persons had passed over the bridge (and the deceased himself many times), no casualty had ever before happened there. It was also proved that there was another bridge over which the deceased might have gone if so minded, but which was about one hundred yards further round. And it was submitted that there was no evidence to go to the jury of negligence on the part of the company: that the company were not bound to provide a bridge more than ordinarily safe; and that, if the public chose to avail themselves of the shorter cut, they must take the bridge as they found it.

The learned judge left it to the jury to say whether or not the company had been guilty of negligence in providing a bridge for the use of the public that was not reasonably safe.

The jury returned a verdict for the plaintiff, damages 500l.

Cooke, Q. C., pursuant to leave reserved to him, in Easter Term last obtained a rule nisi to enter a non-[185]-suit, on the ground that there was no evidence of negligence to go to the jury; or for a new trial, on the ground that the learned judge ought to have directed the jury that the defendants were not liable, there being another bridge crossing the railway, and that the deceased used the wooden bridge at his own risk. He referred to *Bolch v. Smith*, 7 Hurlst. & N. 736.

Huddleston, Q. C., and Macnamara, now shewed cause. There was abundant evidence of negligence to go to the jury, and (if it were necessary so to contend) to warrant the verdict. The deceased was going to the booking-office by a mole of access provided for the public by the defendants. It was their duty to see that it was safe. Two witnesses proved that it was dangerous: and the result justified their opinion. [Willes, J. The Privy Council in one case held that the occurrence of an

accident was *prima facie* evidence of negligence (a): but that is inconsistent with some other authorities.] There was no pretence for saying that the deceased by his own carelessness contributed to the accident: nor did the fact of there being another and safer bridge a hundred yards off absolve the company from the duty of making the bridge in question safe. It may be that, if a way be dedicated to the public with a dangerous structure on it, the public must take it with the danger (b). But, if a railway company for their own convenience choose to construct a bridge to connect the two platforms of a station, and invite the public to use it, they are responsible if it turns out to be unsafe. It is to be remembered that this bridge is to be used, not by the active and robust only, but also by children and by the old [186] and infirm. In the case referred to at the trial (*Bolch v. Smith*), there was no duty.

Cooke, Q. C., and H. James, in support of the rule. To render the company liable, there must be some evidence of negligence on the part of their servants, some failure to perform a legal duty. They are not responsible for an extraordinary and unforeseen accident at a spot which has been safely traversed for years by thousands. If the company ought to have known that the want of an additional rail made this bridge peculiarly dangerous, so ought the deceased, who was proved to have passed over it many times. The case is in this respect very like that of *Toomey v. The London, Brighton, and South Coast Railway Company*, 3 C. B. (N. S.) 146. On the platform of a railway station there were two doors in close proximity to each other, the one, for necessary purposes, had painted over it the words "For gentlemen," the other had over it the words "Lamp room." The plaintiff, having occasion to go to the urinal, inquired of a stranger where he should find it, and, having received a direction, by mistake opened the door of the "lamp room," and fell down some steps, and was injured. In an action against the railway company, it was held that, in the absence of evidence that the place was more than ordinarily dangerous, the judge was justified in nonsuiting the plaintiff, on the ground that there was *no evidence* of negligence on the part of the company. In using a way like this, some caution is necessary on the part of the public. In *Bolch v. Smith*, 7 Hurlst. & N. 736, the workmen in a government dock-yard were permitted to use certain water-closets erected for their accommodation, and for that purpose to use certain paths across the dock-yard. The defendant, a government contractor, was permitted to erect in the dock-[187]-yard certain machinery for the purpose of his work. He erected across a path which led to one of the water-closets a revolving-shaft, partly covered with planks. The plaintiff, a workman in the dock-yard, having gone along this path to the water-closet, on his return stumbled, and, on putting out his hand to save himself, his arm was caught by the shaft, and lacerated. There was another path along which he might have gone, but the one he used was the more convenient. It was held that the defendant was not liable for the injury, since he was under no obligation to fence the shaft, and the defect in the fencing was apparent. In *Cornman v. The Eastern Counties Railway Company*, 4 Hurlst. & N. 781, the defendants, a railway company, had on their platform, standing against a pillar which passengers passed in going to and coming from the trains, a portable weighing machine, which was used for weighing passengers' luggage, and the foot of which projected about six inches above the level of the platform. It was unfenced, and had stood in the same position, without any accident having occurred to persons passing it, for about five years. The plaintiff, being at the station on Christmas Day inquiring for a parcel, was driven by the crowd against the machine, caught his foot in it, and fell over it. It was held that there was no evidence of negligence on the part of the company to go to the jury, the machine being in a situation in which it might have been seen, and the accident not being shewn to be one which could have been reasonably anticipated. Bramwell, B., in delivering judgment, says: "In such a case, it is always a question whether the mischief could have been reasonably foreseen. *Nothing is so easy as to be wise after the event.* But here no witness stated that he would have known that the position of the weighing-machine was likely to cause danger. I adopt the rule stated by [188] Williams, J., in *Toomey v. The Brighton Railway Company*,—"It is not enough to say that there was *some evidence*. A scintilla of evidence, or a mere surmise that there

(a) *The Great Western Railway Company of Canada v. Braid*, and *The Same v. Fawcett*, 1 Moore's P. C. (N. S.) 101.

(b) See *Robbins v. Jones*, 15 C. B. (N. S.) 221.

may have been negligence on the part of the defendants, clearly would not justify the judge in leaving the case to the jury: there must be evidence on which they might reasonably and properly conclude that there was negligence.' Here, the evidence was that the company might reasonably have anticipated that no mischief could occur, since no mischief had resulted from keeping the machine in the position in which it stood for so long a period." Here, the bridge had been erected ten years, and no accident had happened there. In *Marfell v. The South Wales Railway Company*, 8 C. B. (N. S.) 525, 534, Erle, C. J., says: "The undefined latitude of meaning in which the word 'negligence' has been used, appears to me to have introduced the evil of uncertain law to a pernicious extent: and I think it essential to ascertain that there was a legal duty, and a breach thereof, before a party is made liable by reason of negligence." The evidence here shewed that the accident was one of an extraordinary and unforeseen nature.

ERLE, C. J. I think this rule should be discharged. The question seems to me to have been one peculiarly for the jury, viz. whether the defendants exercised reasonable care and skill in the construction of this bridge which passengers going by their railway were invited to use. The evidence given on the part of the plaintiff, was, that it was not constructed with reasonable skill: and I think the judge clearly would not have been justified in taking upon himself as a matter of law to determine as to the propriety of its construction, and withdraw that question from the jury. There being, then, evidence for the jury, and it being [189] within their province to decide upon it, and they having done so, and having also found that the deceased himself did nothing to contribute to the accident, I think we ought not to disturb their verdict.

WILLES, J. I am of the same opinion.

BYLES, J. I also am of opinion that this rule should be discharged. I was struck at first by the observation of Mr. James: but the fact is, that the defect itself, as we now see, is not obvious to any one who looks at the bridge: and, further than that, the danger from the defect, even if the defect *were* obvious, would not be apparent: and, that being so, and the bridge being a nearer mode of access to the railway from the house from which the deceased came, he was invited by the company to pass over the bridge, which had a defect in it which was not obvious, and the danger from which was not apparent. In addition to that, it is to be recollected that the jury have negatived all carelessness on the part of the deceased. The simple question is, was this an improper structure. The plaintiff's witnesses stated that it was: and they stood uncontradicted, and their judgment is sustained by the event. It was purely a question for the jury.

KEATING, J. I am of the same opinion. No doubt, the jury might, if so minded, have found that there was no negligence on the part of the company. And it certainly seemed to me that there was a very strong case for the company. If I had been upon the jury, I do not say that I should have found the same way, though I do not at all mean to inti-[190]mate an opinion that they should not have found as they did.

Rule discharged (a).

MURCHIE v. BLACK. June 3rd, 1865.

[S. C. 34 L. J. C. P. 337; 12 L. T. 735; 11 Jur. N. S. 608; 13 W. R. 896.]

A. was possessed of a piece of land which was laid out for building and offered for sale in lots, subject to certain conditions, one of which was as follows:—"The

(a) See *Nicholson v. The Lancashire and Yorkshire Railway Company*, 3 Hurlst. & Colt. 534. There, the plaintiff, a passenger by the defendants' railway, was set down at Thornhill Lees after dark on the side of the line opposite to the station and place of egress. The train was detained more than ten minutes at Thornhill Lees, and from its length blocked up the ordinary crossing to the station, which is on the level. The ticket-collector stood near the crossing with a light, telling the passengers, as they delivered their tickets, to "pass on." The plaintiff passed down the train to cross behind it, and from the want of light stumbled over some hampers put out of the train, and was injured. The practice of passengers had been to cross behind the train, when long, without interference from the railway company. It was held that these facts disclosed evidence for the jury of negligence on the part of the company.

purchaser will be required to covenant to build according to the elevation of lot 2, or such other elevation as the vendor shall approve." By another condition it was provided that the walls between the several lots when built should be deemed party-walls, and that, if erected by the purchaser of any one of such lots, the owner of the adjoining lot should be bound to pay him one half the cost if he should make use of the same.—On the 12th of May, 1863, the defendant became the purchaser of lot 6, and on the 26th the plaintiff became the purchaser of lot 7, both purchases being declared to be "subject to the above conditions."—When the plaintiff took possession of lot 7, there was on it an antient wall 15 feet high adjoining lot 6; and the plaintiff raised this wall to the height of 24 feet.—The defendant afterwards took possession of lot 6, and proceeded to excavate the land for the purpose of erecting thereon a building in accordance with his agreement. This was done in a proper manner, and so as not to have affected the antient wall on lot 7 if it had remained in its original state: but the withdrawal of so much of the lateral support of lot 7 rendered the soil insufficient to sustain the additional weight which the plaintiff had placed thereon, and the building in consequence fell:—Held, that the defendant was not liable; he having done no more than he was required (or licensed) by his agreement with A. to do.

This was an action to recover compensation for damages alleged to have been sustained by the plaintiff by reason of the defendant's having caused the plaintiff's [191] house to fall down. The cause came on to be tried before Shee, J., at the Carlyle Spring Assizes, 1864, when a verdict was found for the plaintiff, by consent, subject to terms embodied in an order of Nisi Prius thereupon made, for the money claimed in the declaration, and subject to the following case:—

1. On the 10th of February, 1862, Francis Graham was seised in fee-simple in possession, by virtue of a purchase and conveyance from one Edwin Hough, of certain lands and premises situate on the south side of Devonshire Street, in the city of Carlisle. They consist of the pieces of land described on a plan annexed to the case as lots 6, 7, 8, 9, 10, and 11

2. On the 10th of February, 1862, the said Francis Graham conveyed the said lands to Edwin Hough by way of mortgage in fee, to secure the re-payment of 2000*l.* advanced by the said Edwin Hough to the said Francis Graham. Before Francis Graham's said purchase, the lands so purchased by him had, with other pieces of land also situate on the south side of the said street, and which are described in the said plan as lots 1, 2, 3, 4, and 5, been laid out by Mr. Hough in lots as shewn in the said plan, for building purposes. Of the lands so laid out, lots 1, 2, 3, 4, and 5, had before Francis Graham's said purchase been sold by Mr. Hough, who at the time of such sale was seised thereof in fee-simple in possession. Lots 2, 3, and 4, and part of lot 5, had been built upon before the 27th of March, 1863.

3. After the said purchase by the said Francis Graham, and before the 27th of March, 1863, Francis Graham had sold lots 9 and 11; and the same had been conveyed to the purchaser thereof.

4. On March 27th, 1863, the lands described on the plan as lots 6, 7, 8, and 10, were put up for sale by auction in separate lots: but no sale of any lot then [192] took place. On the 30th of April, 1863, a verbal agreement was made between the said Francis Graham and the defendant, with the consent of the said Edward Hough, for the purchase by the defendant, by private contract, of lot 6; and, on the 12th of May, 1863, an agreement in writing embodying the terms of the said verbal agreement, and which agreement in writing had been prepared on and dated the 30th of April, 1863, was signed by the said Francis Graham and the defendant (*a*). The conditions

(*a*) This agreement was written at the foot of the conditions, and was as follows:—
 "Memorandum of agreement made the 30th of April, 1863, between Francis Graham, of, &c., owner of the above-mentioned premises, of the one part, and George Black, of, &c., builder, of the other part, witnesseth that the said Francis Graham doth hereby declare the said George Black the purchaser of the said premises subject to the above conditions so far as the same are applicable to a sale by a private contract, at the price or sum of 419*l.* 4*s.*: And the said George Black doth hereby, for himself, his heirs, executors, and administrators, covenant, promise, and agree with and to the said Francis Graham, that he the said George Black, his heirs, executors, or administrators,

of sale referred to in the said agreement contained the following stipulation,—“The purchaser will be required to covenant to build according to the elevation of lot 2, or such other elevation as the vendor shall approve;” and also the following,—“The walls between lot 5 and this lot, and this lot and lot 7, and between lots 7 and 8, and between lots 8 and 9, and between lots 9 and 10, and between lots 10 and 11, shall, when built, be deemed party-walls: and, if erected by the purchaser of any one of such lots, the owner of the adjoining lot shall be bound to pay to him one half the cost of erecting [193] such wall, whenever the owner of such adjoining lot shall make use of the same.” By the expression “elevation of lot 2,” occurring in the said conditions, is meant the elevation of the building then standing on the lot described in the plan as lot 2.

5. On the 26th of May, 1863, an agreement was made between the said Francis Graham and the plaintiff, with the consent of the said Edwin Hough, for the purchase by the plaintiff of lot 7, and an agreement dated May 26th, 1863 (*a*), was thereupon signed by the plaintiff and the said Francis Graham. The conditions referred to in the said last-mentioned agreement, the plan, and lots referred to in the said last-mentioned conditions, are the same as those referred to in the conditions of sale mentioned in the agreement of the 30th of April, 1863, and signed on the 12th of May, 1863, of which said agreement, and of the conditions referred to therein, the plaintiff had no positive knowledge at the time of his entering into the said agreement of the 26th of May, 1863; but he then had reason to suppose, and did suppose, that the defendant had entered into an agreement corresponding in its terms and conditions with the agreement then entered into by him, the plaintiff.

6. On the 29th of May, 1863, the plaintiff was put into possession by Mr. Graham of lot 7, with Mr. Hough's consent, and continued in possession thereof till the house afterwards erected upon it fell.

7. Lots 6 and 7 so respectively purchased by the plaintiff and defendant were plots of land on which respectively buildings stood at the time of such purchases respectively. The western wall of the old building standing on lot 7 was an ancient wall, having been built above twenty years. It stood on lot 7 [194] at the time of its purchase by the plaintiff, and remained continuously there until the fall of the plaintiff's building, as hereinafter mentioned. It extended from Devonshire Street towards the passage parallel with Devonshire Street, described on the plan as “backway to the buildings;” and, when the plaintiff was put into possession, it stood 15 feet above the surface of lot 7. The intended party-wall between lot 6 and lot 7, referred to in the conditions mentioned in the respective agreements of 30th of April, 1863, and 26th of May, 1863, would have cleared every part of the above mentioned old wall at the front or north end, and for about two thirds of the length: for the remaining third it would have taken away about 2½ inches of the old wall below the surface of the ground, but would not have interfered with it above the surface, as the intended party-wall was to be a 14 inch wall below the surface, and a 9 inch wall above the surface. The said old wall is a 14 inch wall throughout, inclusive of the foundation.

8. The plaintiff, on being put into possession, as before mentioned, made preparation for altering and raising the old building so then standing upon lot 7, a verbal understanding having been come to between himself and Mr. Graham at the time of his agreeing to purchase that lot, that the building to be erected by him thereon should not be immediately constructed in accordance with the elevation of lot 2, but that he should be at liberty to put up a temporary building thereon in the first instance. In accordance with this understanding, the plaintiff proposed to effect the alterations of the old building on lot 7 by leaving the western wall of it standing, and raising its height.

9. The plaintiff, with the consent of Mr. Graham, but without the knowledge of Mr. Hough, raised the western wall of the old building to the height of [195] twenty-four feet from the surface, being nine feet additional to its former height. The wall so raised formed the side of the plaintiff's house next to lot 6. The alterations so

shall and will well and faithfully pay the said sum of 419l. 4s. to him the said Francis Graham, his executors or administrators, for and as the purchase-money of the above-mentioned premises accordingly.”

(*a*) This agreement was in precisely the same form as that set out in p. 192, note (*a*), relating to lot 6.

made by the plaintiff were completed on the 7th of July, 1863. The raising of this wall and the building of the plaintiff's house made a considerable addition to the weight of the wall as it was before it was raised. About one third more support was needed for the raised wall and the new house than had been required for the support of the old wall as it stood when the plaintiff was put into possession. When the lateral support of the earth is removed, more labour and material is required or greater risk is incurred in supporting a heavier building than is required or incurred in supporting a lighter building; such increase of labour and material or risk was small in the case of the plaintiff's raised wall, as compared with the wall before it was so raised: but such increase existed, and a builder contracting for the support of the respective buildings would take it into consideration, but would estimate it at less than 20s. The house built by the plaintiff was a lighter house than a house would have been, erected according to the elevation of lot 2.

10. On the 3rd of August, 1863, the defendant took possession of lot 6, and made preparations to pull down the old buildings standing upon it, and to build thereon a new house according to his agreement dated the 30th of April, 1863, and the conditions therein referred to; and for that purpose he proceeded to make the excavations in lot 6 for the said new house to be erected thereon. In consequence of the excavations so made, and before they were completed, the plaintiff's building on lot 7 gave way, and on the 1st of September, 1863, fell.

11. The excavations so made were in accordance [196] with the defendant's said agreement of the 30th of April, 1863, and the conditions therein referred to; and were such excavations as were required for a building similar to those on lot 2, the elevation of which is referred to in the said conditions. The said excavations were of considerable depth below the surface of lot 6, which was on the same level as the surface of lot 7. They were entirely within lot 6, and, at the time when the house fell, had not approached within some feet of the plaintiff's wall. The earth then left unexcavated on lot 6 adjoining lot 7 was more than sufficient to support the earth in lot 7 in its natural state without any superincumbent weight; but it was insufficient to support the earth of lot 7 with the superincumbent weight of the plaintiff's building thereon, as that building was after the wall had been raised; and it was not such as in the opinion of competent builders or architects could have been relied on to support the earth of lot 7 with the superincumbent weight of the old building before it was raised. The probabilities are that the excavations which caused the fall of the plaintiff's house would have caused the fall of the old wall in its unaltered state.

12. The proper means for supporting such a building as the plaintiff's, either in its original or altered state, when the lateral support of the earth adjoining is removed, are, by under-pinning or under-propping, which consists in taking away earth upon which the building stands, and inserting brick pillars, or wooden posts, in its place. This was not done with respect to the plaintiff's house. The only means taken for its support were the placing stays or props against the side of it, which was done on three several occasions, about the 20th, 25th, and 31st of August, when shrinks or cracks shewed themselves in the house; but which means were quite insufficient.

[197] 13. After the building had begun to crack, and until within a day or two of its fall, it might have been saved had the proper means been resorted to; but neither the plaintiff or the defendant would incur the expense of resorting to them. Neither party placed any impediment in the way of the other's supporting the building by any means the other might think proper; and each expressed his readiness to assist the other, disclaiming at the same time his own obligation to support the house, and insisting that such obligation rested on the other. Thus the stays were put up by the co-operation of both, as an act of mutual concession; but the means known by both to be effectual for supporting the house, were omitted.

14. No conveyance of either lot 6 to the defendant or of lot 7 to the plaintiff was executed until after the plaintiff's house fell, in the manner stated.

15. The court was to be at liberty to draw all inferences of fact which a jury would be justified in drawing.

The question for the decision of the court was, whether the plaintiff was entitled to recover. If he was entitled to recover, judgment was to be entered for him for 2611., the agreed amount of damages, and costs, to be taxed. If the plaintiff was not entitled to recover, judgment was to be entered for the defendant, with costs, to be taxed.

E. James, Q. C. (with whom was T. Jones), for the plaintiff (a). Where one who is the owner of an entire [198] property separates it and conveys one portion to one purchaser and the other to another, whether simultaneously or not, and in whatever order of time, each portion remains impressed with the same burthens and the same rights that belonged to it whilst there was unity of ownership. Thus, when Graham sold lot 6 to the defendant, he reserved to himself the right to have the support of the land of lot 6 for his building on lot 7. This is the rule laid down in *Gale on Easements*, 3rd edit. 83 et seq., founded (amongst others) upon the decision of the court of Exchequer in *Richards v. Rose*, 9 Exch. 218, that, where several houses belonging to the same owner are built together, so that each requires the mutual support of the neighbouring house, and the owner parts with one of the houses, the right to such mutual support is not thereby lost: the legal presumption being that the owner reserves to himself such right, and at the same time grants to the new owner an equal right: and, consequently, if the owner parts with several of the houses at different times, the possessors still enjoy the right to mutual support, the right being wholly independent of the question of the priority of their titles. The case states that the excavation on the defendant's land would have brought down the building on the plaintiff's land as it originally stood: the addition, therefore, to the superincumbent weight, cannot affect the question. In *Jones v. Tipling*, 13 W. Rep. 617, the House of Lords held,—reversing several previous deci-[199]-sions,—that the owner of a house has no right to obstruct his neighbour's lights because his neighbour has thought fit to enlarge them. The same principle applies here: the plaintiff had a right to build as he did upon his own soil, but his so doing did not deprive the defendant of his right. The additional weight was contemplated by the conditions on which both portions of the property were sold. The rule as laid down in *Richards v. Rose* is re-affirmed by Parke, B., in *Guyford v. Nicholls*, 9 Exch. 702, 708. The same rule was applied in *Pyer v. Carter*, 1 Hurlst. & N. 916, to the easement of a drain. The plaintiff's and defendant's houses adjoined each other. They had formerly been one house, and were converted into two by the owner of the whole property. Subsequently, the defendant's house was conveyed to him, and after that the plaintiff took a conveyance of his house. At the time of these conveyances a drain ran under the plaintiff's house, and thence under the defendant's, and discharged itself into the common sewer. Water from the eaves of the defendant's house fell on the plaintiff's house, and then ran into a drain on the plaintiff's premises, and thence through the drain into the common sewer. The plaintiff's house was drained through this drain. It was held that the plaintiff was, by implied grant, entitled to have the use of the drain as it was used at the time of the defendant's purchase of his house. Watson, B., in delivering the judgment of the court, there says: "It seems in accordance with reason that, where the owner of two or more adjoining houses sells and conveys one of the houses to a purchaser, that such house in his hands should be entitled to the benefit of all the drains from his house, and subject to all the drains then necessarily used for the enjoyment of the adjoining house, and that without express reservation or grant, inasmuch as he purchases the house *such as it is*. [200] If that were not so, the inconveniences and nuisances in towns must be very great. The same law must apply to all kinds of easements. *Brown v. Robins*, 4 Hurlst. & N. 186, is a very strong case. There, the plaintiff was owner of a house erected in 1834 on solid ground. Previously to the building of the house, a portion of the minerals had been gotten under a garden which adjoined the house. In 1838, a portion of the minerals was gotten under the defendant's land, which adjoined the garden. In 1855, the defendant commenced getting out the rest of the minerals under his land. In 1857, the plaintiff's land sank, and the house was injured by the defendant's mining operations. It was found by the jury that the sinking of the plaintiff's land was caused by the defendant's workings; that

(a) The points marked for argument on the part of the plaintiff were as follows:—

"1. That the plaintiff was entitled to have his house supported by the soil of lot 6.

"2. That the defendant was liable for having so dealt with the soil of lot 6 as to deprive the plaintiff's house of such support:

"3. That the defendant was liable for having caused the plaintiff's house to fall by reason of his having excavated the soil of lot 6 negligently and without taking the proper, usual, and reasonable precaution for supporting the plaintiff's house."

some damage would have happened, but not to the same extent, if the garden ground had been left solid; that the defendant knew of the excavations under the garden; that the land would have sunk in just the same whether there was a house on it or not; and, lastly, that the damage to the plaintiff's house by the sinking was 300l.,—250l. occasioned solely by the defendant's workings, and 50l. damages caused in part by the excavation under the garden. It was held,—first, that, inasmuch as the sinking of the plaintiff's land was in no way caused by the weight of the house, the plaintiff was entitled to recover whether he had acquired a right to support for his foundations by the defendant's soil, or not,—secondly, that, although the excavation under the garden contributed to the extent of 50l. to cause the damage, the plaintiff was entitled to the whole 300l., because, if the defendant had not done the wrongful act complained of, no part of the damage would have occurred. *Strojan v. Knowles*, 6 Hurlst. & N. 454, was decided upon the same principle. To the same effect is the judgment of [201] Lord Cranworth, C., in *The Caledonian Railway Company v. Sprot*, 2 Macq. 449. In *Dugdale v. Robertson*, 3 K. & J. 695, it was held that there is a *prima facie* inference at common law, upon every demise of minerals or other subjacent strata, where the surface is retained by the lessor, that the lessor is demising them in such a manner as is consistent with the retention by himself of his own right of support; and that, in the absence of express words shewing clearly that he has waived or qualified his right, the presumption is that what he retains is to be enjoyed by him *modo et formâ*, and with the natural support which it possessed before the demise. In *The North Eastern Railway Company v. Elliott*, 29 Law J., Ch. 808, it was held that although, as between conterminous owners, the lateral support of a neighbour's soil can only be claimed for the surface of the land in its natural state, yet, where a person sells land to another, to be used for an express purpose, he will not be allowed to derogate from his own grant by doing anything in the adjacent soil which unfits the land sold for the purpose for which it was sold. Vice-Chancellor Page Wood, in delivering judgment, there says: "I have to consider what, looking to all the authorities, should be the application of those authorities to a state of circumstances such as this. The soil which is bought by the company of the proprietor Mr. Boulcott, has a natural support, if I may so call it, that is, the support of the original earth, to the extent that these pillars are not removed, and has also the additional support of the water under the circumstances of the accident which took place (a)¹; which state of things has been allowed to continue for forty years. The authorities,—especially *The Caledonian Railway Company v. Sprot*,—have determined, that first, at common law, wholly [202] independent of any question of conveyance by the one owner to the other, and the two owners being at arm's length, it may be, and having no connection with each other, there exists the right to have the soil in its natural state supported by the adjacent soil of the owner of the adjoining property; and that owner can do nothing by removing any portion of his soil, either from below if it happens to be so situate, or laterally if it is adjacent, which will occasion the falling in of the adjoining soil from its natural state. The common law gives no further right: and, if a man choose to build on his soil, and so to place an additional weight upon it, he is not entitled to any support for that additional weight. Where, however, the case is not that of two independent land-owners, but of the owner of two closes conveying one of those closes to another person, there he can do nothing derogating from his own grant; and, if he has conveyed it for the express purpose of having buildings erected upon it, he then enters into an implied contract that he will do nothing to his soil which will prevent the soil he has granted from being able to serve the purpose for which, to his own knowledge, he has conveyed it; and the person who acquired the soil under these circumstances has the additional right of having support for the buildings, or for whatever else may be the object for which he has purchased the soil. This is the law, as decided by *The Caledonian Railway Company v. Sprot*." These authorities, it is submitted, abundantly shew that the plaintiff is entitled to recover for the damage done to his premises.

Manisty, Q. C. (with whom was Kemplay), for the defendant (a)². The plaintiff

(a)¹ The flooding of the defendant's mine.

(a)² The points marked for argument on the part of the defendant were as follows:—

"1. That, on the facts stated in the case, the plaintiff is not entitled to recover from the defendant for the damages sustained by the falling of his building:

"2. That the excavations made by the defendant in lot 6 were such as under the

had no such right of sup-[203]-port from the defendant's land as to entitle him to maintain this action. The authorities referred to have no application. This case must be determined upon the contract and the specific facts found in the special case. The plaintiff cannot stand in any better position than his vendor stood in after he had entered into the contract he did with the defendant. Now, what was the state of things at that time? The vendor Francis Graham was the owner of several plots of land which had been laid out for building purposes. Graham having that object in view, some of the sites having already been sold, lot 2, which had been built upon, was taken as the standard for the elevation of the houses to be erected on the other lots: and, accordingly, Graham sold lot 6 to the defendant under a contract which imposed it upon him as a condition [204] that he should erect a building upon that lot "according to the elevation of lot 2, or such other elevation as the vendor should approve." Lot 7 was not at that time sold. By the conditions of sale, a wall between lots 6 and 7 was to be built, and the person building it was to receive from his neighbour one half of the cost thereof, if he used it as a party-wall. The case expressly finds, in paragraph 11, that the excavations made by the defendant on his land were in accordance with his agreement, and were such excavations as were required for a building similar to those on lot 2. It also finds that enough earth of lot 6 was left unexcavated to support lot 7 in its natural state, and without the superincumbent weight placed there by the plaintiff. The next paragraph shews that the proper means for supporting the plaintiff's premises could not be resorted to without going upon his land. This the defendant would not be authorized to do, and consequently the law casts no duty upon him to do so. [Byles, J. Suppose this had been the case of a licence to build on the adjoining land,—would that have been subject to the implied condition that the licensee should not so build as to injure a structure belonging to licensor?] This is a stronger case than that. The defendant is not only licensed, but *required* to build in a given manner. For these reasons, it is submitted that none of the cases referred to have any analogy whatever to the present.

E James, Q. C., in reply. The defendant was under no obligation to build at all: but, if he did build, he was bound to do so with due regard to the rights which the vendor reserved to himself or his assigns.

ERLE, C. J. I am of opinion that our judgment in this case should be for the defendant. The action is [205] brought against him by an adjoining owner for damage alleged to have been sustained by the plaintiff by reason of his (the defendant's) having excavated the soil of his own land, and so deprived the plaintiff's land of the lateral support to which he claims to be entitled. The plaintiff is the owner of a piece of land described in the case as lot 7, and the defendant is the owner of lot 6: each of them became possessed in the course of the year 1863: the conveyance to the defendant being in April, the conveyance to the plaintiff in May of that year. Down to the time of these several conveyances, there was unity of possession in Francis Graham. The plaintiff under these circumstances stands in the same position precisely as if lot 7 had remained in the vendor. If there had been a simple conveyance to the defendant of lot 6, lot 7 would have been entitled to support, as well at law as in equity, according to the series of authorities cited by Mr. James. But the question is

circumstances stated he was entitled to make without under-pinning or under-propping the plaintiff's building:

"3. That, under the circumstances stated, the plaintiff was not entitled, either for his old building or for his altered building, to the support of the soil of lot 6 which was removed by the defendant in making his excavations in that lot:

"4. That, under the circumstances stated, the defendant was under no obligation to under-pin or under-prop the plaintiff's building:

"5. That, under the circumstances stated, the defendant had been guilty of no breach of duty or wrongful act for which the plaintiff was entitled to maintain this action:

"6. That the plaintiff became possessed of lot 7 and the building thereon, subject to the right of the defendant to pull down the old buildings standing on lot 6, and to build thereon a new house, according to the agreement of the 30th of April, 1863, and the conditions therein referred to, and for that purpose to make the excavations in lot 6 without under-pinning or under propping the plaintiff's building."

whether there is not in the conveyance of the 30th of April, 1863, that which justifies what otherwise would have been an actionable wrong on the part of the defendant. If the defendant had simply dug so near the plaintiff's land as to deprive it of the lateral support it was entitled to, he would no doubt have been liable to an action. But here the vendor, being the owner of both lots, sells lot 6 to the defendant; and, according to the terms of the contract by which it is conveyed to him, he makes it obligatory on him to do, or, at all events, within the provisions of that contract, he was only doing his duty to his vendor when he did, the act which brought down the plaintiff's house. That is how the case stands on the title between these parties. It seems to me also to be a point well worthy of consideration, whether, assuming that the plaintiff was entitled to the lateral support of lot 6, he was entitled [206] to such lateral support for a building of much greater weight than that which originally stood upon it. If the matter were gone into, it seems to me that there is good ground for saying that by imposing a heavier burthen on the land he would lose the right which he otherwise would have had. Upon the first ground, however, I am clearly of opinion that the defendant is entitled to judgment.

WILLES, J. I am of the same opinion. This case has been argued, first, with reference to the plaintiff's right to the support of the adjoining land, secondly, with reference to the contract under which the defendant became the purchaser of his land. If the plaintiff had the right he asserts, it seems to me that that which my Lord has just adverted to puts an end to it. It is not like the case of a man, having one antient window, opening out another. Where an addition is made to the weight of a building, the whole must be considered as one entire weight: as, if a carpenter undertake to make a table capable of sustaining a pressure of 1 cwt., and the customer puts half a ton upon it, and it breaks in consequence, the latter cannot complain that the former has failed to perform what he undertook to do. I think the plaintiff has by his own act destroyed a right which the law would otherwise have given him. Viewing it as a matter of contract, I am also of opinion that the defendant is entitled to judgment. He has done no more than by his engagement with his vendor he was bound to do, or at all events justified in doing.

BYLES, J. I am of the same opinion. Had there been no special contract here, and no superponderate weight upon the old wall, the cases referred to by Mr. James might have applied. But I think Mr. Manisty was right when he said that the consideration of those [207] authorities was unnecessary here. The vendor not only licensed, but obliged the defendant by his contract to build as he has done. There is no stipulation requiring him to underprop the adjoining building, or to give notice to any one: and, if there had been anything requiring him to give notice, the 13th paragraph of the special case shews that the plaintiff had notice of what was going on. It is agreed that the defendant did nothing more than he was obliged to do. There was no proof here of the extent of the plaintiff's addition to the superincumbent weight of the building on lot 7: the impossibility, therefore, of saying how much of the damage (if any) was caused by the act of the plaintiff himself. Upon both grounds, I am of opinion that the defendant is entitled to judgment.

MONTAGUE SMITH, J. I also am of opinion that the defendant is entitled to judgment. It is not denied that *prima facie* the owner of land is entitled to the lateral support of the land of his neighbour. The right is an implied one, and capable of being rebutted by the existence of stipulations which are inconsistent with it. It seems to me that there are such stipulations here. The vendor, when he agreed to sell lot 6 to the defendant, put him under an obligation, or at all events licensed him, to do as he did. He must have contemplated the consequences which ensued. His own wall might have cracked, even if no addition had been made to it. Was it the defendant's duty under the circumstances to prop up the wall, or the plaintiff's? I think the latter; and that, upon the true construction of the stipulations in his agreement, the defendant is not liable for the injury done to the plaintiff's building. Upon the other point, it is unnecessary to give any opinion. My judgment turns upon the contract.

[208] WILLES, J. I would wish to refer to a case which has a considerable bearing upon the subject in hand, viz. *Rouchtham v. Wilson*, 6 Ellis & B. 593. That was an action for injuring the plaintiff's reversion, by removing the minerals without leaving support to the surface, on which were houses more than twenty years old; whereby the houses were injured. On a special case it appeared that, ninety years

before the action, the locus in quo was inclosed by an award made under an inclosure act; that the surface was allotted to one Pears, whose estate the plaintiff had, and the minerals to one Howlett, whose estate the defendant had: that, on the face of the award, it was stipulated that the allottees of the mines should have liberty to work the mines, and the allottees of the surface should have no claim to compensation for any consequent sinking of the surface. Pears executed the award as a deed. Howlett did not execute it, but accepted the allotment under it. The houses were afterwards built. By the defendant's mining, without negligence, the surface unavoidably sank. It was held by the court of Queen's Bench that it sufficiently appeared that, upon the severance of the minerals and the surface, the owner of the surface took it as a separate tenement with only a qualified right of support; that no further right of support was gained by the erection of the houses, though they had stood for more than twenty years; that the subsequent owners of the surface took it with only the qualified right of support originally created; and that therefore the plaintiff was not entitled to maintain the action. That decision was affirmed by a majority of the judges in the Exchequer Chamber (8 Ellis & B. 123), and also by the House of Lords,—see 8 House of Lords Cases, 348.

Judgment for the defendant.

[209] MOCKFORD v. TAYLOR. May 31st, 1865.

A count for the conversion and a count for the detention of goods ought not to be allowed, unless a judge at Chambers is satisfied that substantial justice requires that they should be joined.

This was an action brought by assignees to recover the stock in trade and household furniture of the bankrupt. The first count was for the conversion of the goods, describing them; the second was in detinue for "goods of a similar description to those in the first count mentioned."

An application had been made to Montague Smith, J., at Chambers, founded upon an affidavit that the same goods were sought to be recovered under both counts, to strike out the second count, pursuant to rules 1 and 2 of Hilary Term, 1853 (see 13 C. B. 87), the first of which is, that, "Except as hereinafter provided, several counts on the same cause of action shall not be allowed, and any count or counts used in violation of this rule may, on the application of the party objecting, within a reasonable time, or before an order made for time to plead, be struck out or amended by the court or a judge, on such terms as to costs or otherwise as the court or judge may think fit:" and the second, that "several pleas, replications, or subsequent pleadings, or several avowries or cognizances founded on the same ground of answer, &c., shall not be allowed: provided that, on an application to the court or a judge to strike out any count, or on an objection taken before the judge, on a summons to plead several matters, to the allowance of several pleas, replications, or subsequent pleadings, avowries, or cognizances, on the ground of such count, &c., being in violation of this rule, the court or judge may allow such counts on the same cause of action, or such pleas, replications, or subsequent pleadings, or such avowries or cognizances, founded on the same ground of answer or defence, as [210] may appear to such court or judge to be proper for the determining the real question in controversy between the parties on its merits, subject to such terms as to costs and otherwise as the court or judge may think fit." The learned judge, however, declined to interfere.

Tapping now moved for a rule calling upon the plaintiff to shew cause why the second count should not be struck out. He referred to Day's Common Law Procedure Act, 2nd edit. p. 387, where it is said that Willes, J., had always discountenanced the joinder of these two counts; and he observed that the two could not properly be joined, inasmuch as the judgment in trover passes the property in the goods. [Wilkes, J. On payment. The solutio pretii is the foundation of that doctrine. There is, however, a stronger objection than that, and it is two fold,—first, the difficulty of pleading two counts for the same goods,—and, secondly, that before the Common Law Procedure Act these two counts could not be joined, and now the two are only allowed if the judge thinks fit, and upon such terms as he may think it right to impose.] It was further objected that there was no specific description of the goods in the detinue count, as is required by the form given in the Common Law Procedure Act, 1852.

Hance now shewed cause. In trover, the plaintiff can only recover the value of the chattels; but, in detinue, under the Common Law Procedure Act, he may have the identical goods, under a judge's order. "Before the Common Law Procedure Act, 1854,"—Bullen & Leake, 2nd edit. 272,—“the defendant, under the judgment in this action, had the option to deliver the goods, or to retain them and pay the value assessed by the jury: *Phillips v. Jones*, 15 Q. B. 859. By s. 78 of [211] that act ‘the court or judge shall have power, if they or he see fit so to do, upon the application of the plaintiff in any action for the detention of any chattel, to order that execution shall issue for the return of the chattel detained, without giving the defendant the option of retaining such chattel upon paying the value assessed; and that, if the said chattel cannot be found, and unless the court or judge should otherwise order, the sheriff shall distrain the defendant by all his land and chattels in the said sheriff's bailiwick till the defendant renders such chattel, or, at the option of the plaintiff, that he cause to be made of the plaintiff's goods the assessed value of such chattel; provided that the plaintiff shall, either by the same or a separate writ of execution, be entitled to have made of the defendant's goods the damages, costs, and interest in such action.’” There can be no reason, therefore, why the two counts should not be allowed. They are not founded upon the same cause of action. [Willes, J. There is great difficulty in keeping a count in detinue with a count in trover. There is a section in the Common Law Procedure Act, 1860, 23 & 24 Vict. c. 126, which was intended to meet that difficulty: but still it is a difficulty.] That was the 25th section, which enacts that, “in any action for detaining the goods of the plaintiff, it shall be lawful for the defendant, by leave of the court or a judge, and upon such terms as they or he shall think fit, to pay into court a sum of money to answer the claim of the plaintiff to the value of the goods alleged to be detained.” There may be good reasons why the plaintiff should wish to retain the two counts, and it is difficult to see how the defendant can be prejudiced thereby. It will not add much to the length of the record.

Tapping, contra, was not called upon.

ERLE, C. J. This is properly a matter which ought [212] to be disposed of at Chambers. We are therefore desirous that the parties should go back to my Brother Montague Smith with an intimation of our opinion that the sounder practice generally is, to allow a single count in trover or detinue only, and not both together; subject, however, to the plaintiff satisfying the judge that there is a substantial reason for having both.

WILLES, J. It is inconvenient to have a count in trover and a count in detinue for the same goods: and it is no answer to the objection to say that it adds little to the length of the record. There might, no doubt, be good reasons for allowing the two: but that is for a judge at Chambers to determine.

BYLES, J., and KEATING, J., concurred.

Hance elected to strike out the count for the detention of the goods.

Rule accordingly (a).

[213] ALTON AND ANOTHER v. THE MIDLAND RAILWAY COMPANY.

June 7th, 1865.

[S. C. 34 L. J. C. P. 292; 12 L. T. 703; 11 Jur. N. S. 672; 13 W. R. 918. Discussed, *Potter v. Metropolitan Railway*, 1874, 32 L. T. 37; *Bradshaw v. Lancashire and Yorkshire Railway*, 1875, L. R. 10 C. P. 191. Referred to, *Dickson v. Reuter's Telegraph Company*, 1877, 2 C. P. D. 70; 3 C. P. D. 1. Principle applied, *Daly v. Dublin, Wicklow and Wexford Railway*, 1892, 30 L. R. Ir. 520. Discussed, *Taylor v. Man-*

(a) In *Kettle v. Bromsall*, Willes, 118, Serjt. Comyns cited *Buckmere's case*, 8 Co. Rep. 87 b., to shew that trover and detinue cannot be joined,—“because they require different pleas.” To this Mr. Durnford adds a note,—“Not only the *pleas*, but the *judgments* also are different: in trover, only damages can be recovered, but in detinue the things themselves, or their value, may be recovered. And two counts cannot be joined in the same declaration, unless the same judgment may be given on both: *Brown v. Dixon*, 1 T. R. 274. See also Gilb. Hist. C. B. 6, 7.”

chester, Sheffield and Lincolnshire Railway, [1895] 1 Q. B. 134. Distinguished, *Mear v. Great Eastern Railway*, [1895] 2 Q. B. 391.]

1. One who is no party to a contract cannot sue in respect of the breach of a duty arising out of the contract.—2. An action will not lie against a railway company, as carriers of passengers for hire, at the suit of a master, for a personal injury sustained through their negligence by his servant, whereby the master lost the benefit of the services of the servant,—the contract out of which arose the duty to carry safely being a contract between the company and the servant.

This was an action by the plaintiffs, who were brewers, against the Midland Railway Company, for the loss of the services of a traveller in their employ, through the defendants' negligence.

The declaration stated that one Charles Thomas Baxter, before and at the time of the committing of the grievances thereafter mentioned, was, and from thence hitherto had continued, and still was, the servant and traveller of the plaintiffs in their business of brewers and otherwise; that the defendants were carriers of passengers upon a certain railway, to wit, the Midland railway, from a certain station of the defendants at Trent to a certain other station of the defendants at Nottingham, for hire and reward to the defendants; that the said C. T. Baxter, so being the servant and traveller of the plaintiffs as aforesaid, became and was received by the defendants as a passenger to be by them safely and securely carried upon the said railway on a journey from the said station of the defendants at Trent to the said station of the defendants at Nottingham, for hire and reward to the defendants on that behalf; that thereupon it became and was *the duty* of the defendants to use due and proper care and diligence in and about the carriage and conveyance of the said C. T. Baxter, so being such servant and traveller of the plaintiffs as aforesaid, upon the said railway, on the said journey: yet that the defendants did not safely and securely carry the said C. T. Baxter, so being such servant and traveller of the plaintiffs as aforesaid, upon the said railway, on the said journey, and did not use due and [214] proper care and diligence in and about the carriage and conveyance of the said C. T. Baxter, so being such servant and traveller of the plaintiffs as aforesaid; and by their servants so negligently, unskilfully, carelessly, and improperly behaved and conducted themselves in that behalf, that the said C. T. Baxter, so being such servant and traveller of the plaintiffs as aforesaid, was thereby and by reason of the negligence, carelessness, unskilfulness, and improper conduct of the defendants and their servants, wounded and injured, and became and was sick, disabled, and unable to attend to the necessary business of the plaintiffs, about which he was employed at the time of the injuries complained of, and so remained from thence for a long time, to wit, for nineteen weeks; whereby the plaintiffs during all such time lost the services of the said C. T. Baxter in their said business, and all benefits and advantages which would otherwise have accrued to them from such services, and the said business of the plaintiffs so carried on by the said C. T. Baxter suffered great loss and injury, and the plaintiffs were by reason of the premises, and of the wrongful and improper conduct of the defendants, otherwise injured and damaged: Claim, 500l.

To this declaration, the defendants pleaded that they contracted with the said C. T. Baxter to carry him as such passenger as in the declaration mentioned, on the said journey, and that they received him as in the declaration mentioned under and by virtue of that contract, and they did not contract with the plaintiffs to carry the said C. T. Baxter; and that the matter complained of in the declaration was not a breach of any contract between the defendants and the plaintiffs, but was a breach of the said contract between the defendants and the said C. T. Baxter.

The defendants also demurred to the declaration, [215] the ground of demurrer stated in the margin being, "that the defendants are not liable to third persons for breach of the contract between their passenger and themselves." Joinder.

The plaintiffs took issue on the plea, and also demurred thereto, alleging for ground "that the facts stated in the plea afford no answer to the action." Joinder.

David Keane, Q. C. (with whom was Graham), for the plaintiffs (a). The question

(a) The points marked for argument on the part of the plaintiffs were as follows:—

"1. That a duty is imposed by law on the defendants, as carriers of passengers, to carry with due and proper care all persons who are lawfully travelling on their

is, whether a railway company whose servants have been guilty of negligence in carrying as a passenger a servant of a manufacturer, is liable to the latter for the injury which has deprived him of his services. Railway companies, who hold themselves out as carriers of passengers or goods, are sub-[216]-ject to all the liabilities of common carriers: *Chitty & Temple on Carriers*, 16, 17; *Hodges on Railways*, 4th edit. 501; *Carpue v. The London and Brighton Railway Company*, 5 Q. B. 747; *Crouch v. The London and North-Western Railway Company*, 14 C. B. 255. The 86th section of the 8 & 9 Vict. c. 20, which enacts that "it shall be lawful for the company to use and employ locomotive engines or other moving power, and carriages and waggons to be drawn or propelled thereby, and to carry and convey upon the railway all such passengers and goods as shall be offered to them for that purpose, and to make such reasonable charges in respect thereof as they may from time to time determine upon, not exceeding the tolls by the special act authorized to be taken by them," contains a pretty accurate description of the duties of common carriers. Proof of a contract is not necessary to support an action against common carriers; they might be sued in an action on the case for the injury as arising ex delicto, and such an action is not necessarily to be considered as founded on contract: *Bretherton v. Wood*, 6 J. B. Moore, 141, 9 Price, 408, 3 Brod. & B. 54. Their duty is independent of any contract made by them: *Pozzi v. Shipton*, 8 Ad. & E. 963, 1 P. & D. 4. That explains away some of the difficulties raised by the plea. In *Marshall v. The York, Newcastle, and Berwick Railway Company*, 11 C. B. 655, a declaration in case against a railway company for the loss of a passenger's luggage, stated that the defendants received the passenger to be safely carried, together with his luggage, "for reward to the defendants in that behalf:" it then alleged that it was the defendants' duty safely and securely to carry the plaintiff and his luggage, and averred a breach of that duty, whereby the luggage was lost: and it was held that, the action being founded on the breach of duty, and not on con-[217]-tract, it was not necessary to allege or to prove that the reward was to be paid by the plaintiff: but that the plaintiff was entitled to recover, although it appeared that the fare was paid by the plaintiff's master, with whom he was travelling at the time. In *Tuttan v. The Great Western Railway Company*, 2 Ellis & Ellis, 844, it was held that an action against a common carrier for the breach of his duty to carry safely goods delivered to him as such to be carried for hire, whereby the goods are lost, is an action not of contract, but of tort, in substance as well as in form; the duty being imposed upon him by the custom of the realm, and being distinct from and independent of his obligation under the contract of carriage, in respect of which latter he might also be sued in an action of contract: and therefore that the plaintiff, in an action against a common carrier for the breach of the duty in question, brought in a superior court to recover a sum not exceeding 20l., is not deprived of his costs by the 19 & 20 Vict. c. 108, s. 30, if the defendant suffers judgment by default, for that the action is not one of contract within that section. In giving judgment, Cockburn, C. J., says: "Whatever may be the distinction between an obligation arising out of a contract and a duty imposed by the common law on persons entering into a contract, it is impossible to refer to the cases to which our attention has been called, without seeing that they establish that a duty was imposed upon the defendants in the present case, by the custom of the realm, so soon as they entered into the contract with the plaintiff, and independently of the terms of the contract itself. The plaintiff might, had he thought

railway, and that they are liable for any injury which is the direct consequence of a breach of such duty:

"2. That such duty arises on the receipt of a passenger to be carried, and is totally independent and irrespective of any contract:

"3. That the injury sustained by the plaintiffs is the direct consequence of the defendants' negligence:

"4. That the said C. T. Baxter was travelling on the business of the plaintiffs, and was their agent in making the contract with the defendants:

"5. That the declaration discloses a good cause of action:

"6. That the plea is bad, because it does not aver that there was any special contract limiting the defendants' liability, or any other contract than such as would be implied by law from the fact of the said C. T. Baxter becoming and being received by the defendants as a passenger on their railway:

"7. That the facts stated in the plea afford no answer to the action."

fit, have brought his action on the contract: but he was also entitled to sue the defendants for the breach of their common-law duty. Having chosen the latter course, he cannot, according to the authorities, be said [218] to have brought an action of contract: although, therefore, he has recovered less than 20l. by a judgment by default, he is not deprived of his costs by the statute 19 & 20 Vict. c. 108, s. 30. The action is an action on the case, not in form only, but in substance." In *Lunden v. Gye*, 2 Ellis & B. 216, the plaintiff was held to be entitled to recover damages against the defendant for enticing away a dramatic artiste. In *Smith's Master and Servant*, 2nd edit. 96, it is said that "numerous instances are to be found in the books, of actions by masters for personal injuries to their servants, whether caused by an assault (*Gilbert v. Schwenn*, 14 M. & W. 488), or by battery (*Duck v. Hartung*, Stra. 595), or by negligent driving (*Hall v. Hollander*, 4 B. & C. 660, 7 D. & R. 133; *Martinez v. Gerber*, 3 M. & G. 88, 3 Scott, N. R. 386, *Gough v. Brian*, 2 M. & W. 770), or by a ferocious dog (*Hodsoll v. Stillebrass*, 11 Ad. & E. 301, 3 P. & D. 209, 8 Dowl. P. C. 482)." In *Martinez v. Gerber*, 3 M. & G. 88, 3 Scott, N. R. 386, it was held that case, per quod servitium amisit, may be maintained by the master, although the injury done to the servant was not direct, but consequential, and the servant could not have maintained an action of trespass for such injury, but must have sued in case. The argument in arrest of judgment there was that, "where a servant can maintain trespass, or where, as in a case of seduction, the servant has no right of action, a master may maintain an action on the case for the loss of service: but where, as here, the remedy of the servant is in case, the master cannot support an action, the injury being too remote, as it is a consequence upon a consequence." But Maule, J., said "The injury to the servant and that to the master are collateral to each other, and not consequent upon one another." Serjeant Manning in a note refers to a writ for a master in Reg. Brev. 95 a. [219] "Quare vi et armis mansum ipsius A. apud H. obsederunt, et homines et servientes suos extra mansum prædictum existentes, idem mansum, ad servitium et commodum ipsius A. inibi faciendum, ingredi, et quosdam alios homines et servientes suos, inibi existentes, mansum prædictum, ad terram ejusdem A. excolendum, et ad alia negotia ibidem facienda, exire, non permiserunt: per quod," &c. [Willes, J. I am not aware of any instance in which the right of a master to maintain an action for a damage done to his servant, has been extended to the case of an injury resulting from the breach of a duty arising (as this does) out of a contract. No inconvenience has been found to result from that state of things: much might result from holding otherwise. Changing the form of the action cannot alter the liability of the defendant.] This is not the case of a duty arising out of a contract. The duty arises from the defendants' holding themselves out as common carriers. [Byles, J. I am not aware of any authority for an action of this sort.] The mere absence of a precedent is not conclusive: the principle being ascertained, it is the duty of the court to apply it to the instance. When an individual or a company professes the trade of a common carrier, certain duties and obligations follow, amongst others, to carry safely if a human being, to insure in the case of goods: it is not because there is a collateral contract for remuneration that the duty is gone. In *The Great Northern Railway Company v. Harrison*, 10 Exch. 376, the defendants, a railway company, were in the practice of allowing the reporters of a London newspaper, when going to country races on the defendants' line for the purpose of framing their reports, to travel on the defendants' line carriage free. The reporter was for such purpose supplied with a ticket by the company, which had written upon it the name of [220] a person in the reporting department. The ticket also purported on the face of it to be not transferrable; and there was also a memorandum on it, to the effect that any party other than the person named in it using the pass, would be liable to the penalty which a passenger incurs by travelling without having paid his fare, or that he should be liable to pay the fare: but it did not distinctly appear which of these two liabilities was stated in the memorandum, and, if the former, it did not appear that the penalties were which were alluded to. The plaintiff, acting bona fide, and going on the business of the journal, and entitled by the usage to have the benefit of a ticket with his name on it, went to the station with a ticket such as that described. His name, however, was not upon it, but there was that of another person, who, however, was a reporter and in the same department with himself. The plaintiff shewed this ticket to the porter at the station whose business it was to examine passengers' tickets, who said that it was all right, and placed the plaintiff in a carriage. There was no distinct

evidence, however, that the porter knew personally who the plaintiff was. It appeared that the plaintiff and other reporters had, on several occasions before, travelled with similar tickets not bearing the names on them of those who used them: and there was evidence that the persons whose names were on the tickets were personally known to some of the officers and servants at the station. In an action by the plaintiff against the company for an injury received on their line whilst travelling in one of the company's carriages, in which the declaration alleged that "the plaintiff then lawfully was," and which allegation was denied by the plea, the question having been left to the jury, and a verdict having been found for the plaintiff,—it was held, on error on a bill of exceptions, that there was [221] evidence for the jury in support of the issue, and that the question was rightly left to them. There was not the remotest shade of contract there. [Willes, J. I do not agree that there was no contract in that case. It is often worth a banker's while to remit money without charging a commission; but the taking the money is sufficient in such a case to raise a contract. So, the permitting persons sending goods to a railway station to have the use of a crane there for the purpose of loading and unloading, was held (*Blakemore v. The Bristol and Exeter Railway Company*, 8 Ellis & B. 1035) to raise a contract or a duty to have the crane sufficient for the purpose. So, in the case of a bailment, the acceptance of it raises an obligation quasi ex contractu to use the thing in a proper manner. So, as to the carriage of passengers. These are all obligations arising out of contract.] The contract is mere accident: the foundation of the action in all these cases is a duty. In *Ansell v. Waterhouse*, 6 M. & Selw. 385, a declaration charging the defendant as proprietor of a common stage-coach for carrying passengers from London to Manchester for hire, and that he received M. (the wife of the plaintiff) as a passenger to be safely carried from Manchester to London for a certain fare, and by reason thereof ought carefully to have carried her, yet that the defendant, not regarding his duty, conducted himself so carelessly that by the negligence of him and his servants, and for want of due care and attention to his duty, the coach was overturned, whereby M. was injured, &c., was held to be a declaration in tort. Lord Ellenborough there says: "The practice of declaring against common carriers on the custom of the realm is as antient as the law itself, and was uniformly adopted until somewhere about the time of *Dale v. Hall*, 1 Wils. 281. Since then it has been usual not to declare in this form, but in contract; yet the [222] modern use does not supersede, although it has supplanted, the former practice of declaring in tort. The advantage of proceeding on the custom of the realm is that the plaintiff may sue one or more of several tort-feasors, for, in tort, all the parties need not be joined. Looking at the declaration now in question, I do not find one word sounding in contract. What, then, is there to oust the plaintiff of the benefit of declaring on the custom, with all its consequences? It is said the defendant is not charged verbatim as a common carrier, upon the custom; but the declaration is tantamount: for it charges him as the proprietor of a common stage-coach for hire, and alleges the negligence as a breach of duty arising out of the employment for hire and reward." Bayley, J., says: "There is a broad distinction in personal actions between tort and assumpsit, or such actions as arise ex contractu and ex delicto which are founded upon contracts, or for wrongs independently of contract. Now, the present action is founded altogether on a misfeasance or breach of the particular duty imposed by law on this defendant." Abbott, J., says: "This decision will not interfere with any of those which have been cited on the other side; because, in those, although the declaration alleged a breach of duty, it appeared that the duty arose out of a special contract, and not out of a general obligation of law. All that I understand to have been decided in those cases is that, when it is in substance a contract, the rights of parties shall not be changed by the form of declaration. In the present case, however, the duty, as it seems to me, attaches entirely on the defendant from the general obligation cast upon him by law as a common carrier." And Holroyd, J., adds: "This action is founded on what is collateral to contract; for the terms of contract with a common carrier, provided they do not vary his general responsibility, are quite immaterial." Here, the plaintiffs rely upon the general obligation cast by the law upon common carriers. In *Bretherton v. Wood*, 3 Brod. & B. 54, 6 J. B. Moore, 141, 9 Price, 408, in an action on the case against ten defendants as proprietors of a coach, for injuries sustained by the plaintiff, a passenger, in consequence of negligence in driving, whereby the coach was upset, the jury found a

verdict against eight of the defendants, and in favour of other two, and judgment was entered accordingly: and that judgment was affirmed on error. Dallas, C. J., in delivering the judgment of the Exchequer Chamber, says: "This action is on the case against a common carrier, upon whom a duty is imposed by the custom of the realm, or, in other words, by the common law, to carry and convey their goods or passengers safely and securely, so that, by their negligence or default, no injury or damage happen. A breach of this duty is a breach of the law, and for this breach an action lies, founded on the common law, *which action wants not the aid of a contract to support it.*" And, after commenting on the cases of *Powell v. Layton*, 2 N. R. 365, and *Mar v. Roberts*, 12 East, 89, his Lordship adds: "In the present case, a duty was imposed on the defendants, which did not arise by the contract, but by the custom or common law of England." [Byles, J. That case only establishes, as many more do, that, so far as the parties are concerned, it may be treated as a matter of tort.] *Pozzi v. Shipton*, 8 Ad. & E. 963, 1 P. & D. 4, is a still stronger authority for the plaintiffs. There, the declaration stated that the plaintiff delivered to the defendants, and they accepted and received from him, goods to be taken care of and carried and conveyed by the defendants from Liverpool to Birmingham, and there delivered to Pensey for the plaintiff, for reasonable reward to the defendants in that behalf, and thereupon it became the [224] duty of the defendants to take due care of such goods while they so had the charge thereof for the purpose aforesaid, and to take due and reasonable care in and about the conveyance and delivery thereof as aforesaid: yet that the defendants, not regarding their duty in that behalf, but contriving, &c., did not nor would take due care, &c., but, on the contrary, whilst they had charge, &c., took such bad care, &c., that the goods were injured, to the plaintiff's damage, &c. The defendants pleaded not guilty, and a traverse of the delivery and acceptance modo et forma. On the trial, the plaintiff gave no proof of an express contract, but endeavoured to shew that the defendants were common carriers. No objection was taken to the course of the evidence. The case was proved as to one defendant only, who was shewn to be a common carrier, and a verdict was taken against him and for the other defendant. On motion to enter a nonsuit, on the ground that the action was founded in contract, and therefore a verdict could not pass against one defendant only, it was held that the declaration *might*, and therefore *must* after verdict, be read as a declaration against carriers on the custom of the realm, and consequently that the verdict was maintainable. Patteson, J., in delivering judgment, says: "The declaration does not state that the goods were delivered to the defendants at their special instance and request, nor contain any other allegation necessarily applicable to an express contract only, or even pointing to any express contract. We cannot therefore say that it shews the action to be founded on contract: and it is sufficient for the present purpose, if the language in which it is couched is consistent with its being founded on the general custom as to carriers." In *Marshall v. The York, Newcastle, and Berwick Railway Company*, 11 C. B. 655, a declaration in case against a railway company for the loss of a passenger's luggage, stated that the defend[225]-ants received the passenger, to be safely carried, together with his luggage, "for reward to the defendants in that behalf:" it then alleged that it was the defendants' duty safely and securely to carry the plaintiff and his luggage, and averred a breach of that duty, whereby the luggage was lost: and it was held that, the action being founded on the breach of duty, and not on contract, it was not necessary to allege or to prove that the reward was to be paid *by the plaintiff*: but that the plaintiff was entitled to recover, although it appeared that the fare was paid by the plaintiff's master, with whom he was travelling at the time. That shews that there need be no contract. "It is said," says Jervis, C. J., "that, under the circumstances of this case, no action would lie by the plaintiff against these defendants, whatever the form of the declaration. But the admissions made in the course of the argument, and the authorities cited, place the defendants in a difficulty; for, it is conceded,—and indeed the concession could not have been avoided that, if—under the same circumstances, the plaintiff had sustained the loss of a limb, or any other personal injury, he alone could have sued. It is said that that is because the master could not maintain an action in respect of the personal suffering of the servant, *though he might in respect of the loss of service.* But, upon what principle does the action lie at the suit of the servant for his personal suffering? Not by reason of any *contract* between him and the company, but by reason of a duty implied by law to carry him safely. If, under the circumstances

of this case, the plaintiff could have recovered in respect of a personal injury sustained by him, there is no reason why he should not also recover in respect of the loss of his luggage. The breach of duty is the same in the one case as in the other." And Williams, J., says,—"The whole current of authorities, [226] beginning with *Gorett v. Rudridge*, 3 East, 62, and ending with *Pozzi v. Shipton*, 8 Ad. & E. 963, 1 P. & D. 4, establishes that an action of this sort is, in substance, not an action of contract, but an action of tort against the company as carriers. That being so, the question is, whether it was necessary to allege any contract at all in the declaration. The earliest instance I find of an action of this sort is, in Fitzherbert's *Natura Brevium*, *Writ de Trespass sur le Case*, where it is said, —p. 94 D.,—"If a smith prick my horse with a nail, &c., I shall have my action upon the case against him without any warranty by the smith to do it well; for it is the duty of every artificer to exercise his art rightly and truly as he ought." There is no allusion there to any contract. That being so, it seems to me to follow that the allegation of a contract in a case of this kind is altogether unnecessary." In *Pippen and Wife v. Sheppard*, 11 Price, 400, it was held that it is not a ground of demurrer to a declaration in an action on the case by a man and his wife against a surgeon, for an injury to the wife by reason of the defendant's improper and unskilful treatment, that it is not stated,—in the averment that the defendant was retained and employed as surgeon for reward to be to him paid,—*by whom* he was so retained, or *by whom* he was to be paid. In *Everard v. Hopkins*, 2 Bulstr. 332, it was held that an action upon the case lay against a surgeon for applying medicamenta imperita to the plaintiff's servant, whereby he lost his services for a long time. In *Collett v. The London and North Western Railway Company*, 16 Q. B. 984, an action was held to be maintainable by the plaintiff, an officer in charge of the mails, although the contract for the carriage of the mails was made with the post-master-general. "The allegation," said Lord Campbell, "that it was the duty of the com-[227]-pany to use due and proper care and skill in conveying, is admitted. That duty does not arise in respect of any contract between the company and the persons conveyed by them, but is one which the law imposes: if they are bound to carry, they are bound to carry safely; it is not sufficient for them to bring merely the dead body to the end of the journey. They must exercise a reasonable care in performing the duty which is cast upon them by the act (1 & 2 Vict. c. 98); if the plaintiff has been injured through the want of such reasonable care, he has a right of action." Patteson, J., says: "The plaintiff's right to sue arises, not from any particular contract with the defendants, but from their general duty to carry the mails and officers." And Wightman, J., says: "It was clearly the duty of the defendants to carry safely, as alleged: and that duty does not arise from any contract, but is cast upon them by stat. 1 & 2 Vict. c. 98." In *Gladwall v. Steggall*, 5 N. C. 733, 8 Scott, 60, a declaration in case against a surgeon for negligence alleged that *the plaintiff* (who was an infant of twelve years), at the request of the defendant, *had employed the defendant* to bestow the care, &c., of him the defendant in the profession and business of a surgeon and apothecary, &c., and the defendant then accepted and entered upon such employment as such surgeon; and then proceeded to allege the duty resulting from such retainer: and it was held that it was immaterial *by whom* the defendant was retained, though a distinct issue was taken by the plea upon the retainer; and that, if the allegation of employment *by the plaintiff* was material, it was supported by proof that the plaintiff submitted to and received the defendant's attendance. [Byles, J. In all those cases there was a legal duty.] A railway company, like a loaded gun, is an instrument of great danger, requiring the exercise of the utmost skill and [228] circumspection. In *Dixon v. Bell*, 5 M. & Selw. 198, the defendant was held responsible in case for incautiously leaving a loaded gun in a state capable of doing mischief. Here, ex concessis, there was negligence on the part of the defendants. [Byles, J. *Dixon v. Bell* is like *Langridge v. Levy*, 2 M. & W. 519; in error, *Levy v. Langridge*, 4 M. & W. 337.] The cases of *Collins v. The Bristol and Exeter Railway Company*, 4 Hurlst. & N. 517, *Multon v. The Midland Railway Company*, 4 Hurlst. & N. 615, and *Coron v. The Great Western Railway Company*, 5 Hurlst. & N. 274, are no authorities against the plaintiff here: the parties there chose to declare on the contract, when they might have relied on the duty. In *The Great Western Railway Company v. Blake*, 7 Hurlst. & N. 987, the plaintiff purchased a ticket at the Paddington station of the Great Western Railway Company, and paid one fare for his conveyance from thence to Milford in Pembrokeshire. The line of the Great Western Railway Company

terminates a short distance beyond Gloucester, and the line from thence to Milford belongs to the South Wales Railway Company. By arrangement between the two companies the lines are worked and the fares paid by the passengers apportioned between them. The plaintiff was conveyed in the same carriage which he entered at Paddington towards Milford, and, after the train had passed on to the line of the South Wales Railway Company, it came into collision with a locomotive engine left on that line by the servants of the South Wales Railway Company. There was no negligence on the part of the driver of the train. It was held in the Exchequer Chamber, that the Great Western Railway Company were responsible to the plaintiff, since, under the circumstances, there was an implied contract on their part that they would use reasonable care to maintain [229] the whole line from Paddington to Milford in a condition fit for traffic. "Railway companies," says Cockburn, C. J., "ought at least to use due and reasonable care to keep the line over which they contract to carry passengers in a safe condition. There is no doubt that is the obligation which attaches to a railway company who undertake to convey passengers through the whole distance on their line; and if, by arrangement with another company, they convey passengers over the whole or part of another line, the same obligation attaches, and they make the other company their agent, and on their part they undertake that the other company shall keep their line in a proper condition." And Byles, J., expresses himself in similar terms: and he adds,—“Possibly the South Wales Railway Company might have been liable to the plaintiff below: yet here is a contract from which results a duty on the part of the Great Western Railway Company to take due care that the machinery from Paddington to Milford is safe and secure.” In the case of seduction, it is the invasion of the legal right of the father to the services of his daughter that gives him the right to maintain the action: see *Grinnell v. Wells*, 7 M. & G. 1033, 8 Scott, N. R. 741, 2 D. & L. 610: and see the cases collected in *Smith's Master and Servant*, 2nd edit. 96 et seq. The defendant is guilty of no illegal act there, yet the master is entitled to an action: and, is it to be said that he is not entitled here, where the defendants have been guilty of a wrong? The action for seduction may be in case as well as in trespass: see *Robert Mary's case*, 9 Co. Rep. 113 a.; *Chamberlain v. Haslewood*, 5 M. & W. 515. All the authorities shew that the essential foundation of the action is the public duty: *Williams v. Holland*, 10 Bingh. 112, 3 M. & Scott, 540; *Com. Dig. Action upon the Case for Negligence* (B. 1), [230] where it is said that “the master may have an action for goods lost at an inn where his servant was a guest.” The result of all the authorities is this,—that, where a railway company allows a person to become a passenger on the railway, it becomes a common carrier and subject to all the responsibilities of a carrier according to the custom of the realm; and that there is a duty independent of and collateral to the contract for remuneration, analogous to that of the surgeon, the smith, or the innkeeper. The defendants have failed to perform this duty in regard to a person with whom they have made a contract, and in so doing have invaded that in which the plaintiffs had a property, viz. the services of the person they engaged to carry. That the plaintiffs have lost the services of this person through their negligence is conceded. What answer can it be said that the defendants have entered into a contract with their servant?

Bovill, Q. C. (with whom were O'Malley, Q. C., and Houston Brown), contra. This is confessedly a case of the first impression. The only authority at all in point is *Everard v. Hopkins*, 2 Bulstr. 332, and there the contract was with the plaintiff in the action. [Erle, C. J. That case was cited merely for the dicta of the judges.] If this action will lie, there was no necessity for Lord Campbell's Act, 10 Vict. c. 98. [Erle, C. J. Formerly, there could be no civil remedy until public justice had been satisfied by indicting the offender. That may be an answer to that argument.] The custom of the realm applies to carriers of goods only, not to carriers of passengers. The duty to carry safely is one which arises out of the contract, whether express or implied from the relation of the parties. To whom do the defendants owe a duty here? Clearly to the person with whom they contracted. Suppose [231] an anchor or a cable to give way through a defect in the welding, are the sailors or the passengers to have actions against the anchor-smith or the chain-maker for compensation for damage resulting to them from the loss of the ship? In *Langridge v. Levy*, 2 M. & W. 519, the action was held to be maintainable by the son, on the ground of the false representation or warranty. The court there expressly repudiate the ground upon

which the plaintiffs rely here. "We are not prepared," says Parke, B., "to rest the case upon one of the grounds on which the learned counsel for the plaintiff sought to support his right of action, namely, that, wherever a duty is imposed on a person by contract or otherwise, and that duty is violated, any one who is injured by the violation of it may have a remedy against the wrong-doer. We think this action may be supported without laying down a principle which would lead to that indefinite extent of liability so strongly put in the course of the argument on the part of the defendant; and we should pause before we made a precedent by our decision which would be an authority for an action against the vendors, even of such instruments and articles as are dangerous in themselves, at the suit of *any person* whomsoever into whose hands they might happen to pass, and who should be injured thereby." Lord Denman, in delivering the judgment of the court of error,—*Lervy v. Langridge*, 4 M. & W. 339, —says: "We agree with the court of Exchequer, and affirm the judgment on the ground stated by Parke, B., 'that, as there is fraud, and damage, the result of that fraud, not from an act remote and consequential, but one contemplated by the defendant at the time as one of its results, the party guilty of the fraud is responsible to the party injured.'" In *Winterbottom v. Wright*, 10 M. & W. 109, A. contracted with the post-master-general to provide [232] a mail-coach to convey the mail-bags along a certain line of road; and B. and others also contracted to horse the coach along the same line; B. and his contractors hired C. to drive the coach: and it was held that C. could not maintain an action against A. for an injury sustained by him while driving the coach, by its breaking down from latent defects in its construction. Lord Abinger there said: "This is an action of the first impression, and it has been brought in spite of the precautions which were taken in the judgment of this court in the case of *Lervy v. Langridge* to obviate any notion that such an action could be maintained. We ought not to attempt to extend the principle of that decision, which, although it has been cited in support of this action, wholly fails as an authority in its favour; for, there the gun was bought for the use of the son, the plaintiff in that action, who could not make the bargain himself, but was really and substantially the party contracting. Here, the action is brought simply because the defendant was a contractor with a third person; and it is contended that thereupon he became liable to every body who might use the carriage. If there had been any ground for such an action, there certainly would have been some precedent of it: but, with the exception of actions against innkeepers, and some few other persons, no case of a similar nature has occurred in practice. That is a strong circumstance, and is of itself a great authority against its maintenance. It is, however, contended, that this contract being made on the behalf of the public by the post-master general, no action could be maintained against him, and therefore the plaintiff must have a remedy against the defendant. But that is by no means a necessary consequence: he may be remediless altogether. *There is no privity of contract between these parties*: and, if the plaintiff can [233] sue, every passenger, or even any person passing along the road who was injured by the upsetting of the coach, might bring a similar action. Unless we confine the operation of such contracts as this to the parties who entered into them, the most absurd and outrageous consequences, to which I can see no limit, would ensue." Alderson, B., said: "The only safe rule is to confine the right to recover to those who enter into the contract: if we go one step beyond that, there is no reason why we should not go fifty." And Rolfe, B., says: "The breach of the defendant's duty stated in this declaration is his omission to keep the carriage in a safe condition: and, when we examine the mode in which that duty is alleged to have arisen, we find a statement that the defendant took upon himself, to wit, under and by virtue of the said contract, the sole and exclusive duty, charge, care, and burden of the repairs, state, and condition of the said mail-coach, and, during all the time aforesaid, it had become and was the sole and exclusive duty of the defendant, to wit, under and by virtue of his said contract, to keep and maintain the said mail-coach in a fit, proper, safe, and secure state and condition. The duty, therefore, is shewn to have arisen solely from the contract: and the fallacy consists in the use of that word 'duty.' If a duty to the post-master-general be meant, that is true: but, if a duty to the plaintiff be intended (and in that sense the word is evidently used), there was none." The company here do not enter into two contracts, one with the master, the other with the servant. In *Tollit v. Shurstone*, 5 M. & W. 283, a declaration in case stated that one Young delivered to the defendant, a livery-stable-keeper,

a horse of the plaintiff, to be kept by him for Young, and to be delivered upon the request of Young, on satisfaction of the defendant's demands; and it [234] thereupon became and was the duty of the defendant, on being paid his demand in respect of the horse, to re-deliver it on the request of Young: averment, that Young requested the defendant to deliver the horse to the plaintiff, and the plaintiff then paid the defendant all his demands in respect of the horse; yet the defendant did not, when so requested, deliver the horse to the plaintiff, but wrongfully kept and detained him, whereby the plaintiff lost the profit arising from the possession and employment of the horse. On motion in arrest of judgment, it was held that the count was bad, as not shewing any duty in the defendant to re-deliver the horse to the plaintiff; and that it could not be supported as an informal count in trover, the detention under such circumstances not amounting to a conversion. "As the declaration," says Lord Abinger, "recognizes such an interest in Young as enabled him to make a lawful contract with the defendant, and there is nothing to shew the determination of that interest, we must take the wrong to be done to Young, and not to the plaintiff. Then, if the count be not maintainable as a count in trover, is it so on the ground of a duty resulting to the plaintiff? In the cases cited by Mr. Thesiger, the persons claiming were parties to the original contract: but here the only contract of the defendants was with Young, and the order by him was, for aught that appears, to deliver to the plaintiff as his agent, and the detention was from him: there is, therefore, no breach of duty to anybody but Young." So, here, the only contract of the defendants was with Baxter. They could owe no duty to the plaintiffs, who were strangers. Maule, J., says: "It is clear that an action of contract cannot be maintained by a person who is not a party to the contract: and the same principle extends to an action of tort arising out of contract." The court called upon

[235] Keane, Q. C., to reply. If it were the mere contract which gave the right of action, the liability of the company to the master would depend upon whether or not the contract for the conveyance of the servant was made by him. The defendants cannot, however, get rid of their public duty as carriers. It is clear from the judgment of Lord Ellenborough in *Ansell v. Waterhouse*, 6 M. & W. 385, and of Dallas, C. J., in *Bretherton v. Wool*, 6 J. B. Moore, 141, 9 Price, 408, 3 Brod. & B. 54, that this did not rest in contract (a). Mr. Justice Cowen, in a case of *Cole v. Goolwin*, 19 Wendell (American), 251, lays it down that, although ordinary bailees may make their own terms with their customers, it is not so with common carriers and innkeepers; and that they, from their public employment, owe duties, at common law, from which public policy demands that they should not be discharged, and consequently that they cannot limit their common-law liability even by express agreement. [Willes, J. In *Johnson v. The Midland Railway Company*, 4 Exch. 367, it was held that a railway company is not bound to carry every description of goods, and between all places on their line, but only such goods, and to and from such places, as they have publicly professed to do, and have convenience for that purpose. There was a long series of cases in which the liability of railway companies was qualified by contract, and which resulted in the passing of the Railway Traffic Act, 17 & 18 Vict. c. 31.] *Tollit v. Sherstone*, 5 M. & W. 283, and *Winterbottom v. Wright*, 10 M. & W. 109, have no application. But the judgments of Jervis, C. J., and of Williams, J., in *Marshall v. The York, Newcastle, and Berwick Railway Company*, 11 C. B. 655, are precisely in point. If there was no duty here, there could [236] have been none in *Martinez v. Gerber*, 3 M. & G. 88, 3 Scott, N. R. 386.

ERLE, C. J. This was an action by Messrs. Alton & Co. against the Midland Railway Company, charging them with negligence in carrying by their railway from Trent to Nottingham one Baxter, the servant and traveller of the plaintiffs, whereby the servant was injured, and by reason thereof the plaintiffs lost the benefit of his services. Upon the face of the declaration it appears that the relation between the defendants and Baxter arose out of contract: for, the declaration alleges that they were to carry him "for hire and reward to the defendants in that behalf." It is the demurrer to the declaration which raises the point upon which my judgment turns: but it is made still more clear by reference to the plea, by which the defendants allege that they contracted with Baxter to carry him as such passenger as in the

(a) See *Ross v. Hill*, 2 C. B. 877. And see *Ochale and the North Eastern Railway Company*, 15 C. B. (N. S.) 680.

declaration mentioned on the said journey, and that they received him as in the declaration mentioned under and by virtue of that contract, and that they did not contract with the plaintiffs to carry him, and that the matter complained of in the declaration was not a breach of any contract between the defendants and the plaintiffs, but was a breach of the said contract between the defendants and Baxter. The demurrer to that plea admits that the relation between the defendants and Baxter was created by contract. The plaintiffs, therefore, are seeking to recover consequential damages by reason of the breach of a contract between the defendants and a third person. I take the law to be clear that, where a servant is injured by matter *ex delicto*, and his master in consequence loses the benefit of his services, the master may have an action against the wrong-doer for that consequential damage. The distinction upon [237] which I rely is that, in all the cases where the master has recovered damages in such an action, the injury has been occasioned to the servant by the tortious act of the defendant: I find none where the damage has arisen by means of the breach of a contract. I do not go into the origin of the master's right to sue for a wrong done to his servant, or inquire whether, as Mr. Smith puts it (*Master and Servant*, 86), it may have originated at a time when the master claimed a property in the services of his servant. I take the law as I find it: and I find no case where an action has been sustained by the master for consequential damage for an injury done to his servant, where that injury arose from the breach of a contract between the servant and the defendant. *Hall v. Hollander*, 4 B. & C. 660, 7 D. & R. 133, *Martinez v. Gruber*, 3 M. & G. 88, 3 Scott, N. R. 386, and *Gough v. Brian*, 2 M. & W. 770, were all cases of direct wrongs done to the servant. In *Hodsoll v. Stallebrass*, 11 Ad. & E. 301, 3 P. & D. 200, 8 Dowl. P. C. 482, the master recovered for an injury to the hand of his apprentice, whereby loss of service accrued,—the damage alone not being the cause of action, but the illegal act and the damage together. So, in *Gilbert v. Schwennck*, 14 M. & W. 488, the defendant had forcibly taken the child out of the custody of the plaintiff. All these were cases of clear wrongs. Here, however, the action is founded upon a contract entered into between the company and Baxter. I am well aware that there are many cases in which a plaintiff may at his option seek redress either by declaring *ex contractu* or *ex delicto*, and that there are certain advantages, which are incidental to the form of procedure, to be obtained from adopting the latter form. But, where it is necessary to resort to the substance of the cause of action, the distinction between the two has been constantly maintained. [238] See the notes to *Cabell v. Vaughan*, 1 Wms. Saund. 191 d., where it is laid down that the defendant does not lose his plea in abatement by being sued in tort in respect of a matter which is founded on contract. "The same rule applies," says the learned editor, "where the action is founded upon matter *ex quasi contractu*: and therefore, if an action be brought against one only of several persons upon a matter founded in contract, though the form of the action be *case* for malfeasance or nonfeasance, and the plea *not guilty*, yet the defendant must plead it in abatement: *Boson v. Sandford*, Carth. 62, 63; *Buddle v. Wilson*, 6 T. R. 369." And at p. 291 f. he says: "From all the cases, and especially that last cited (*a*), the principle appears to be this, that, where the action is maintainable for the *tort* simply, without reference to any contract made between the parties, no advantage can be taken of the omission of some defendants, or of the joinder of too many, as, for instance, in actions against carriers, which are grounded on the custom of the realm: *Ansell v. Waterhouse*, 6 M. & Selw. 385. But, where the action is not maintainable without referring to a contract between the parties, and laying a previous ground for it by shewing such contract, there, although the plaintiff shapes his case in tort, he shall yet be liable to a plea in abatement if he omit any defendant, or to a nonsuit if he join too many; for he shall not, by adopting a particular form of action, alter the situation of the defendant. On this last ground undoubtedly the case of *Green v. Greenbank*, 2 Marsh. 485, was determined, in which it was held that infancy was a good plea to an action on the case on a warranty" (*b*). The substance is looked to, and not the [239] mere form. So, in Rolle's Abridgment, *Action sur Case* (D.), pl. 3, it is said,—"*Si un hostery vient al un infant, et il ceo con-*

(a) *Britherton v. Wood*, 3 Brod. & B. 54, 6 J. B. Moore, 141, 9 Price, 408.

(b) The nature and extent of the liability of an infant or a married woman cannot be changed by suing *ex delicto* in respect of a claim arising on contract. Per Byles, J., in *Burnard, App., Haggis, Resp.*, 14 C. B. (N. S.) 45.

serve, et ses guests sont robb, uncore nul action gist vers l'infant : " *Crosse and Andree's case*. That being the general line of authority, I think there is very great weight in the observations of the learned judges in *Langridge v. Levy*, 2 M. & W. 519, *Levy v. Langridge*, 4 M. & W. 337, and *Went-bottom v. Wright*, 10 M. & W. 109, as to the inconvenience of laying down a principle which would lead to an indefinite extent of liability. The liabilities of parties by reason of their contracts can be foreseen. As a general rule, they are under their own control. The liabilities arising out of them are bounded by the considerations affecting the two contracting parties. Upon that general view I found my opinion that for the consequential damages claimed on the present occasion the plaintiffs cannot sue. The cases as to costs rest upon the law of procedure. Here, the liability of the defendants, if any, arises out of contract : and there is contract between these parties.

WILLES, J. I am of the same opinion. It must be admitted by the defendants that a long series of authorities has established that a master may sue for loss of services caused by a pure wrong, a trespass, to his servant, as by beating him. On the other hand, it is indisputable that no such action has ever been sustained in a case in which the injury to the servant was not actionable in respect of the civil wrong, but only in respect of a duty arising out of and founded upon a contract with the servant. The liability of the defendants in the case before us is of the latter kind, and [240] falls within the principle of a series of decisions upon which there is no room for doubt. The case does not, I apprehend, fall within the principle contended for on the part of the plaintiffs, for this simple reason, because the rights founded on contract belong to the person who has stipulated for them. Here, the right to be carried safely was stipulated for by the servant : it was a right acquired by him by reason of a bargain with the defendants. To hold that the plaintiffs can maintain this action would be to hold that they could acquire a right by means of a contract to which they were no parties either by themselves or by their agent. It has been strongly, but I think erroneously, urged that the cause of action here is founded on a wrong. The law does not so deal with it : it gives the right to sue in form either in tort or in contract, at the party's election. That puts in a strong light the objection to which I have referred, because the election to sue in tort or in contract is given to the servant. The servant may bring an action against the company founded on the contract, and may so determine the election. If the master might sue, he might elect to treat it as a tort, and so to determine the election otherwise than the person who entered into the contract has determined it. That to my mind reduces the argument for the plaintiffs to an absurdity. Election, it must be admitted, is purely technical, and was intended to give the party a more convenient and compendious remedy. If traced to its origin, there would be found many instances to prove that. I may mention a few of them. First, I will start with the doctrine of implied promises, because, whether the law raises a duty or implies a promise which the parties did not stipulate for, is all one. Take the case of a contract with various stipulations, as in a building contract : and take it that the contract is only partly completed, without any [241] default on the part of the builder. Certain of the work has been done, and certain materials supplied : the law gives the builder his election to declare upon the special contract, or he may say that he has done the work and supplied the materials, and that the defendant promised to pay him the value on request. That was the state of the law when the case of *Beecherton v. Wood*, 6 J. B. Moore, 141, 9 Price, 498, 3 Brod. & B. 54, and the other cases relied on, were decided. But no one would contend that the change in the mode of declaring would affect the legal rights of the parties. That is one instance where an election is given in the mode of procedure. I might travel through an infinite series of legal fictions. Take the case of a man selling the goods of another without his authority. The law allows the party whose goods are so sold to declare in an action for the wrongful conversion, or at his election to sue on the implied promise to pay over the proceeds to him, though in truth there was no such promise. These are cases in which the law has invented fictions to give a more convenient remedy to the party wronged. In the last case, you have an instance of an election which is clogged in this way, —if the plaintiff chooses to bring an action for money had and received, he subjects himself to all the consequences of the defendant's being let in to plead a set-off, infancy, and the like. I now come to the case before us. This is a case in which there could have been no duty but for the contract to carry safely in consideration of a certain payment. The

passenger purchases the duty which the law says arises out of the contract: and he has his election to sue upon the contract, or for the breach of the duty founded on the contract. I will cite one authority for the purpose of illustrating this part of my judgment. I asked in the course of the argument if the executor could sue upon [242] such a contract as this; and Mr. Keane said he thought not. I am disposed to think the answer given right: it is probably like a promise of marriage, which, not being within the statute of E. 4, *moritur cum persona*. But, suppose the personal estate of the servant sustained injury through the defendants' breach of duty, as, if he had taken a quantity of luggage with him, which had been lost or damaged, it is clear his executor might have sued for that damage. For this I find an authority in 1 Williams on Executors, 5th edit. 712, where it is said: "It must be observed that, if the executor can shew that damage has accrued to the personal estate of the testator by the breach of an express or implied promise, he may well sustain an action at common law to recover such damage, although the action is in some sort founded on a tort. Thus, in *Knights v. Quarles*, 2 Brod. & B. 102, 4 J. B. Moore, 532, where an administrator declared in *assumpsit* against an attorney for negligence in investigating a title about to be conveyed to the intestate, and the declaration went on to allege special damage to the personal estate; the defendant demurred; and it was urged on his behalf that the action, though in form *ex contractu*, was in substance *ex delicto*, the breach of promise complained of being no more than a tort arising out of a neglect of duty: but the court were of opinion that there was no ground for the demurrer, an express promise being alleged, a breach of it in the life-time of the intestate, and an injury to his personal property, the truth of which allegations was admitted by the demurrer; that it made no difference in this case whether the promise was express or implied, the whole transaction resting on a contract; that, though perhaps the intestate might have brought case or *assumpsit* at his election, *assumpsit* being the only remedy for the administrator, it was very necessary the action [243] should be maintained, or the defendant might escape out of the consequences of his misconduct, and the intestate's estate suffer an irreparable injury. It was further observed that, if a man contracted for a safe conveyance by a coach, and sustained an injury by a fall, by which his means of improving his personal property were destroyed, and that property in consequence injured,—though it was clear he, in his life-time, might, at his election, sue the coach-proprietor in contract or in tort, it could not be doubted that his executor might sue in *assumpsit* for the consequences of the coach-proprietor's breach of contract." The action was there held to be sustainable at common law because the substance of the matter was contract. I have only one other remark to make. This was a contract for the reasonably safe carriage of the party contracted with. I say *reasonably* safe, because there is a wide difference between the liability of a carrier of goods and that of a carrier of passengers, though I do not found my judgment on this distinction. This is an action founded on a contract, and brought by persons who are no parties to the contract. There is no authority for the maintenance of such an action, and I cannot consent to be a party to its introduction.

BYLES, J. I am of the same opinion. After the very elaborate explanation by my Lord and my Brother Willes of the principle upon which actions of this sort rest, with which I entirely agree, I will only make one or two observations. It is plain upon the declaration and on the plea, that there was no contract, express or implied, between the plaintiffs and the defendants, but that the only contract was between Baxter and the defendants. In most cases of this nature, no doubt, the plaintiff has his election to sue either upon the contract or for the tort: but, by [244] changing the form of action, the right to sue cannot be extended to a stranger. It would lead to alarming consequences if it could. No man can sue for a breach of duty, unless for a breach of a duty to himself. That was decided in *Winterbottom v. Wright*, 10 M. & W. 109. A precedent in 8 Wentworth's Pleading, 397, was there cited, of a declaration in an action against an attorney who had received instructions to make a will for one A. B., whereby a certain estate was to have been devised to the plaintiff, for neglecting to prepare it in time, whereby the said A. B. died intestate, and so the plaintiff lost the estate. That has always been considered a bad precedent (*a*). The attorney owed no duty to the proposed legatee. If she could have maintained an

(a) It bears the signature of Vitruvius Lawes: but Mr. Lawes is said to have discouraged the action.

action, on the same principle her heir or executor would have had the same right. So, in the case of the insufficient anchor, put by Mr. Bovill,—the anchor-smith would be liable to the ship-owner, but not to a passenger who sustained loss in consequence. Suppose the case of a servant employing a surgeon to perform an operation, and sustaining an injury from the surgical-instrument maker having furnished the surgeon with an improper instrument,—would an action lie against the instrument-maker either at the suit of the servant or of his master? And yet the argument on the part of the plaintiffs must go to that length, if the law be as they contend it is. If we depart from the rule stated by my Lord and my Brother Willes, we open a way to a most inconvenient and dangerous extension of responsibility. Thus stands the case upon principle. How is it with reference to the authorities? Mr. Keane cited a case of *Everard v. Hopkins*, 2 Bulstr. 332. But, upon investigating the facts, it will be found that there the contract was [245] made with the master. That case, therefore, is no authority, as far as the decision goes: and the dicta of the learned judges must repose very much on the accuracy of the reporter. No other case bearing directly upon the matter was referred to by the plaintiffs' counsel: and *Winterbottom v. Wright*, 10 M. & W. 109, and *Langridge v. Levy*, 2 M. & W. 519, and *Levy v. Langridge*, 4 M. & W. 337, are authorities the other way. I do not think a more important question than this has come before the court for many years: and I think it is our duty not to intimate the slightest doubt upon it.

MONTAGUE SMITH, J. As I was not present during the whole of the argument, and the matter has been so fully gone into by my Lord and my two learned Brothers, I will only say that, so far as I have been able to acquaint myself with the matter, I entirely assent to their judgment. Mr. Keane contends that the action is maintainable in respect of the public duty, which he says is collateral and parallel to the contract. But I think the whole substratum of his argument is unsound. There is no duty independent of contract: the whole foundation of it is the contract. And the only persons who can sue for the breach of a contract, or for the breach of any duty arising out of the contract, are the stipulating parties

Judgment for the defendants.

[246] JEFFRYES v. EVANS. June 5th, 1865.

[S. C. 34 L. J. C. P. 261; 13 L. T. 72; 11 Jur. N. S. 584; 13 W. R. 864.]

1. A reservation in a lease, of the right of "shooting and sporting" over the land demised, is not limited to "game," strictly so called, but reserves to the lessor the exclusive right to follow and shoot such animals as are in common parlance understood to be the subject of sport—2. In 1857, A. demised to B. a farm called Upton Farm, containing 264 acres, about 40 of which consisted of timber and underwood, with furze-covers in various other parts of the farm. This lease reserved to the lessor "all timber and other trees, mines, minerals, and quarries on the said farm," and also "the exclusive right of shooting, fishing, and sporting on the said farm," with liberty to the lessor, his servants, &c., and others by his authority, at all reasonable times to enter for any of the purposes contained in the reservations therein contained.—In 1860, A. demised Upton Castle and about 60 acres of land adjoining it to C., and also "the exclusive right of shooting and sporting over and taking the game, rabbits, and wild-fowl upon the said premises and also upon the entire manor of Upton," including the 260 acres under lease to B.,—reserving to the lessor "all trees, underwood, thorns, and bushes growing on the land, as well as all mines, minerals, and quarries," &c.; with a covenant for quiet enjoyment, without interruption by the lessor or any person or persons lawfully claiming by, from, or under him, &c.—B., finding the rabbits too numerous, by means of ferrets and guns destroyed a large number of them: he also cut all the underwood on his farm, and grubbed up and destroyed the furze-covers, and thereby materially interrupted and injured C.'s right of sporting:—Held that, inasmuch as these acts on the part of B. were not warranted by the terms of the demise to him, they did not constitute a breach of A.'s covenant for quiet enjoyment in the lease of 1860.

This was an action in which the plaintiff sought to recover damages for, amongst other things, the breach of certain covenants contained in a lease granted to him on

the 25th of September, 1860, by the defendant and one R. D. J. Evans, as trustees of Charles Tasker Evans, an infant.

The declaration stated, that theretofore, by an indenture made between the defendant and Richard Davis Jones Evans, since deceased, of the one part, and the plaintiff of the other part, the defendant and the said R. D. J. Evans demised to the plaintiff a certain messuage or dwelling-house and lands therein described, for a term of seven years, which is not yet expired, *and also the exclusive right at all times during the said term of shooting and sporting over and taking the game, rabbits, and wild-fowl upon the said premises and upon certain other manors and lands in the said indenture mentioned*, excepting and reserving to the defendant and the said R. D. J. Evans, their heirs and assigns, all timber and other trees, underwood, thorns, and bushes growing or to grow on the said premises, with liberty of entering upon any part of the said de-[247]-mised lands and premises, and doing all necessary and convenient acts for the preserving, pruning, felling, and carrying away the said timber and other trees, underwood, thorns, and bushes, making reasonable compensation for all consequential damages or loss to the plaintiff: he the said plaintiff's yielding and paying to the defendant and the said R. D. J. Evans a certain rent in that behalf: that the defendant and the said R. D. J. Evans did thereby covenant with the plaintiff, amongst other things, that he should peaceably and quietly possess and enjoy the said premises so to him thereby demised and granted as aforesaid, for and during the said term, without any interruption by them the defendant and the said R. D. J. Evans or either of them, or any person or persons whomsoever lawfully claiming by, from, or under him, them, or any of them; and also that the defendant and the said R. D. J. Evans should and would at all times during the said term well and substantially repair and keep in repair the roofs, walls, and window frames of the said dwelling-house and offices belonging thereto: that thereupon the plaintiff entered into the said demised premises, with the appurtenances, and became and was possessed thereof for the said term, and the plaintiff had always done and been ready and willing to do everything on his part, and everything had happened, and all times had elapsed, to entitle him to the full benefit of the said covenant, and to maintain this action: Yet that, after the making of the said indenture, and during the said term, one John Rees, then lawfully claiming the right to shoot the rabbits in and upon the said manors and lands through and under the defendant and the said R. D. J. Evans, and having a good title to the same through and under them, entered into and upon the same lands, and shot and killed and carried away large quantities of rabbits [248] there, and evicted the plaintiff from the enjoyment of the said exclusive right of shooting and sporting and taking the said rabbits, so to him demised and granted as aforesaid: That the said John Rees, then also lawfully claiming and in fact having through and under the defendant and the said R. D. J. Evans the right to cut down divers furze-covers, woods, and plantations in and upon the said manors and lands over which the plaintiff had under and by virtue of the said indenture the exclusive right of shooting and sporting as aforesaid, cut down and carried away and destroyed divers quantities of the said furze covers and plantations, and thereby evicted the plaintiff from and disturbed him in the enjoyment of the said right of shooting and sporting in and over the said manor and lands: That, during the said term, the defendant and the said R. D. J. Evans in his life-time, and the defendant since the death of the said R. D. J. Evans, entered upon certain of the said lands and premises thereby demised, for the purpose of preserving, pruning, felling, and carrying away the timber, underwood, trees, thorns, and bushes then and there growing, and in so doing caused damage, loss, and injury to the plaintiff, by destroying the hedges, and subverting the soil, and destroying the grass and herbage, and prostrating the fences and gates, and breaking and leaving open divers gates and fences in and upon the said demised lands and premises, and thereby letting loose and injuring divers horses, cattle, and other animals belonging to the plaintiff, yet the defendant and the said R. D. J. Evans did not, nor did the defendant since the death of the said R. D. J. Evans, although required by the plaintiff so to do, make any compensation whatsoever to the plaintiff for the said damage, loss, or injury so sustained by him as aforesaid, contrary to the said covenant in that behalf: And that the defendant and [249] the said R. D. J. Evans had not in the life time of the said R. D. J. Evans, nor had the defendant since his death, well or substantially or in any way repaired and kept in repair during the said term the roofs, walls, and window-frames of the said dwell-

ing-house and offices belonging thereto, or any of them, although since the commencement of the said term hitherto the said roof, walls, and window-frames had been out of repair, and had required repair, of which the defendant and the said R. D. J. Evans respectively had always had notice: And that by reason thereof the plaintiff had incurred divers expenses and discomfort, and the walls and other parts of the said dwelling-house had been much injured: Claim, 300l.

The defendant pleaded,—first, as to the first breach, that the said John Rees did not enter into the said lands and shoot and kill the said rabbits there, and evict the plaintiff from the enjoyment of the said exclusive right of shooting and sporting and taking the said rabbits, as alleged,—secondly, to the first breach, that the said John Rees did not lawfully claim the right nor had he a good title to shoot the said rabbits in and upon the said manors and lands through and under the defendant and the said R. D. J. Evans, as alleged,—thirdly, to the second breach, that the said John Rees did not cut down, carry away, and destroy the said furze-covers and plantations, and thereby evict the plaintiff from and disturb him in the enjoyment of the said right, as alleged,—fourthly, to the second breach, that the said John Rees had not through and under the defendant and the said R. D. J. Evans the right to cut down the said furze-coverts, woods, and plantations, as alleged,—fifthly, to the third breach, payment into court of 7l. 15s.,—sixthly, to the fourth breach, that he the defendant and the said R. D. J. Evans had, and the defendant had, well [250] and substantially repaired and kept in repair during the said term the roofs, walls, and window-frames of the said dwelling-house and offices belonging thereto.

The plaintiff joined and took issue respectively on all the pleas except the fifth: and as to that plea replied that the sum paid into court was not sufficient to satisfy his claim in respect of the matter therein pleaded to.

The cause was tried before Blackburn, J., at the last Spring Assizes at Haverfordwest, when the facts which appeared in evidence were as follows:—By indenture of lease of the 24th December, 1857, the defendant and R. D. J. Evans, as trustees under the will of the Rev. W. P. Evans, deceased, demised to one John Rees, his executors, &c., for nine years from the 29th of September then last, All that messuage or farm-house, farm, and lands, called Upton Farm, in the parish of Upton, in the county of Pembroke, together with all buildings, yards, gardens, orchards, ways, water-courses, rights of common, and other rights, members, and appurtenances whatsoever to the said farm belonging, “except and always reserved unto the said lessors and the survivor of them, his executors and administrators, and other the trustees or trustee for the time being of the said will, and also unto the person or persons who shall for the time being be entitled to the said premises in reversion expectant on this demise (all of whom are hereinafter designated as the lessors or lessor), all timber and other trees, mines, minerals, and quarries on the said farm, with free liberty of ingress, egress, and re-gress to fell, cut, and work the same respectively, and to cart and carry away the timber and the produce of the said mines and quarries; and also except and reserved unto the lessors or lessor *the exclusive right of shooting, fishing, and sporting on the said farm.*” The lease also provided that “it should be lawful for the [251] lessors or lessor, and their or his agents, surveyors, servants, or others by their or his authority, at all seasonable times during this demise to enter into and upon the said demised premises for any of the purposes mentioned in the reservations hereinbefore contained, or for the purpose of viewing and examining the state and condition thereof,” &c. There was also a covenant that the lessee, his executors, &c., would “at all times during the demise use, cultivate, manure, and manage all the lands thereby demised in a good and husband-like manner, according to the most approved system of husbandry in the neighbourhood, and would at the expiration or other sooner determination of the said term leave the same in good plight and condition;” and also would not “do or suffer to be done any waste, injury, or spoil whatsoever to the hereby demised premises, or any part thereof;” and also would not “at any time during the demise hunt, shoot, fish, or sport in or upon any part of the hereby demised premises, nor permit any other person or persons so to do, except the lessors or lessor and those authorized by them or him.” There was also the usual proviso for re-entry for breach of any of the covenants.

On the 25th of September, 1860, the defendant and R. D. J. Evans granted to the plaintiff a lease of “all that messuage, tenement, and lands, with the appurtenances thereto belonging, called Upton Castle,” for seven years from the 25th of March,

1859, at the yearly rent of 125l. By this lease the exclusive right of fishing and sporting over and taking the game, rabbits, and wild-fowl, not only upon the land occupied with Upton Castle (about 60 acres), but upon the entire manor of Upton (which would include the land in the occupation of Rees, about 26½ acres), was granted to the plaintiff. The lease also contained a reservation of all trees, underwood, thorns, and bushes growing on [252] the land, as well as all mines, minerals, and quarries of every description, with liberty to enter upon the land and do all necessary or convenient acts for the preserving, pruning, felling, winning, converting, and carrying away the said reserved things, making reasonable compensation for all consequential damages or loss; and also liberty to plant and transplant trees, and to sow the seeds of trees in the hedge-rows and wastes, and to fence the same. The lessee covenanted, amongst other things, to pay the rent, rates, and taxes, and to repair, excepting the roofs, walls, and window-frames, and to leave the premises in repair, except, &c. And the lessees covenanted for quiet enjoyment, and that the roofs, walls, and window-frames should be repaired and kept in repair by them.

It appeared that Rees's farm adjoined the sixty acres let to the plaintiff, from which it was separated by a belt of timber and underwood (brambles, holly, and brushwood) from 50 to 70 yards broad, and about a mile and a quarter long, on Rees's land; that, in several of the fields demised to Rees were furze-covers which at the commencement of the plaintiff's term were well stocked with hares, rabbits, partridges, and grouse; and that, shortly after the plaintiff's tenancy commenced, Rees cut all the underwood and grubbed up the furze-covers, thus driving away the game, so as almost entirely to destroy the shooting; and also by himself and his servants shot and destroyed by means of ferrets a large number of rabbits.

Complaints being made to the defendant of these acts on the part of Rees, the defendant wrote to him on the 16th of February, 1861, upon the subject: and in reply thereto Rees wrote,—“It is quite true that I have occasionally shot a rabbit, and so have my sons, but not as a matter of sport, but for the purpose of destroying them. Rabbits are injurious and destructive animals; and they have so increased upon my farm of [253] late they are become intolerable. I therefore do not think that I infringe upon any covenant in my lease by killing them, any more than I should in shooting rooks or wood-pigeons, when destroying my crops. It is also true I have employed men to ferret the rabbits, and am also continuing to grub the furze, which I shall continue to do until they cease to be injurious to me, so long as I do not injure your estate, but on the contrary improve it.”

It was also proved that the defendant, in 1863, entered upon a portion of the land demised to the plaintiff, for the purpose of felling timber and stacking the bark, and that the grass, which had been laid down for hay, was in consequence much trodden down and spoiled, and the fences broken; and, further that, in consequence of the defendant's workmen leaving open a gate which separated a field where some young horses were kept from another field in which were four ponies belonging to the defendant, they got mingled, and one of the ponies received a kick which damaged it to the extent according to the plaintiff's estimate of about 5l.

Evidence was also given that the roofs, walls, and window-frames of the messuage demised to the plaintiff were suffered to be out of repair to such an extent as to render some of the rooms wholly untenable.

On the part of the defendant it was contended that a reservation of “hunting, shooting, fishing, and sporting” does not include rabbits, inasmuch as they are not properly speaking game; that Rees was justified in cutting the underwood and grubbing up the furze, for the better cultivation of the farm, and in shooting and destroying the rabbits, for the protection of his crops; that enough had been paid into court to cover the damages claimed on the third breach, and that the injury to the pony was too remote; and that also the evidence did not sustain the fourth breach.

[254] The learned judge left it to the jury to say,—first, what damages the plaintiff was entitled to recover for the destruction of the rabbits; reserving for the court the question whether it was done by lawful title.

Secondly, whether Rees injured the plaintiff's right of sporting by cutting and destroying the underwood and furze, and, if so, to assess the damage for that separately; reserving the question how on the pleadings the verdict should be entered.

Thirdly, whether the 7l. 15s. paid into court was enough to cover a reasonable

compensation for the consequential damage accruing from the cutting of the timber, including in that the question whether the damage to the pony was under such circumstances that it might have been reasonably contemplated by the parties as a kind of damage likely to arise from the felling of the timber: telling them that, if this turned the scale, to say how much they allowed for that.

Fourthly, whether the roofs and walls were out of repair, and what compensation the plaintiff was entitled to for that; telling them that, if the roof leaked (from defective gutters, as some of the witnesses had suggested), it was doubtless out of repair, and that, if it was no more than ordinary damp, it would not be so.

The jury, in answer to the first question, assessed the damage done to the plaintiff in consequence of Rees "having and exercising" the right to shoot rabbits, at 18l. In answer to the second question, they assessed the damages for Rees injuring the plaintiff's right of shooting by cutting and destroying the underwood and furze, at 18l. In answer to the third question, they found that the plaintiff was entitled to 4l. 15s. beyond the 7l. 15s. paid into court. And, as to the fourth question, they assessed the damages at 25l.

[255] The learned judge directed the verdict to be entered on the several issues, as follows:—For 4l. 15s. on the fifth issue, and for 25l. on the last issue: for the plaintiff on the first issue; and for the defendant on the second issue, with leave to the plaintiff to enter the verdict for 18l. on that issue, if, on the true construction of the lease of the 24th of December, 1857, Rees had from the defendant the right to shoot the rabbits: and on the third and fourth issues, he entered the verdict for the defendant, with leave to the plaintiff to move to enter it on those issues for 18l., if the court should think the issues in fact proved,—but the learned judge intimated in his report that the rule should in that case be drawn up so as to allow the defendant to move in arrest of judgment.

Bowen, in Easter Term last, accordingly obtained a rule nisi to enter a verdict for the plaintiff for 18l., on the ground that, on the true construction of the lease from the defendant to Rees, Rees had the right to kill rabbits; and why the verdict found for the defendant on the third and fourth issues should not also be set aside, and a verdict entered thereon for the plaintiff for 18l., pursuant to the leave reserved, on the ground that the issues were in fact proved, and that, on the construction of the said lease, Rees had a right to cut furze and underwood,—the defendant to be at liberty to contend, if necessary, upon the argument of the rule, that the second breach was bad, on the ground that the acts complained of did not amount to any breach of the defendant's covenant. He submitted that the defendant was responsible for the acts of Rees in destroying the rabbits and grubbing up the furze and underwood; referring to *Spicer, App., Barnard, Resp.*, 1 Ellis & Ellis, 874, 28 Law J., M. C. 176: and that the exception in Rees's lease, of all timber and other trees, did not re-[256]—strain him from cutting and destroying the furze and underwood, the exception being to be construed most strongly against the lessor,—citing *Wynndham v. Way*, 4 Taunt. 316, and other cases in Woodfall's Landlord and Tenant, 8th edit. 120, 121.

H. Giffard, Q. C., Allen, and Hughes, shewed cause. The facts are shortly these:—On the 25th of September, 1860, the defendant granted to the plaintiff a lease of Upton Castle and about sixty acres of land, with the exclusive right of hunting, shooting, fishing, and sporting over about 264 acres of land which was held by one Rees under a lease from the defendant which contained a reservation of "all timber and other trees, mines, minerals, and quarries," &c., and also of the right of "hunting, shooting, fishing, and sporting" over the demised land. Rees's lease was dated the 4th of December, 1857. The first question is, whether Rees was precluded by this reservation in his lease from destroying the rabbits. [Willes, J., referred to *Graham v. Ewart*, 11 Exch. 326.] The reservation, which in law operates as a re-grant,—*Wickham v. Hawker*, 7 M. & W. 63,—is not, it is submitted, confined strictly to game properly so called, but extends to every animal which is usually followed for sport. [Willes, J., referred to Comyns's Digest, *Chaucer*.] The case of *Spicer, App., Barnard, Resp.*, 28 Law J., M. C. 176, 1 Ellis & Ellis, 874, is wholly irrelevant. All that was decided there, was that the tenant of land, the right of sporting over which was reserved to the landlord, having employed the appellants, as his servants, to kill rabbits on the land, the persons so employed were not liable to be convicted, as for a trespass in pursuit of conies, under the 1 & 2 W. 4, c. 32, s. 30. [Willes, J. What is game?] That will vary according to the act in force at the time. Rabbits are game in [257] common

parlance. In the 13 Ric. 2, c. 13, conies are enumerated amongst game. So in the 3 Jac. 1, c. 13, s. 5, and the 22 & 23 Car. 2, c. 25, ss. 2, 5. They are also mentioned in the statute 52 G. 3, c. 93, s. 1, which requires a game certificate to justify the taking them. And the Poaching Prevention Act, 25 & 26 Viet. c. 114, by the interpretation clause (s. 1) includes rabbits under the word "game." From the earliest times, rabbits and conies have been included in the general term "sporting": and here all the ordinary rights of sporting were intended to be reserved by the landlord. In Locke's Game Laws, Introd. xxxii., it is said, that "hare and rabbit warrens, not being free warrens, that is, franchised, have no peculiar privileges, except under the provisions of the 30th section of the 7 & 8 G. 4, c. 29, which makes it a misdemeanor to kill hares or rabbits in such places by night, and exacts a penalty of not less than 5l. for killing them by day." In Cruise's Digest, vol. 3, title xxvii., *Franchises*, s. 23, it is said: "The beasts of warren are hares and rabbits: the fowls of warren are pheasants and partridges: and the effect of a grant of free-warren is to vest in the grantee a qualified property in those beasts and fowls of the above description that are on the lands comprised in the grant, as long as they remain there, and even after they are hunted out of the warren. And, although it is said that a person may have a property in some wild animals, namely, rabbits, *ratione soli*, yet it is admitted that this property is subservient to that of a person having the franchise of free-warren, which is *ratione privilegii*, and suspends it: for, in that case, the property of the wild animals is in the person having the warren, not in the proprietor of the soil,"—citing *Fitz. N. B.* 86, L. note, and *Sutton v. Mo du*, 12 Mod. 144, 1 Ld. Raym. 250. In the case of *Swans*, 7 Co. Rep. 17 b., it is said, that, "when a man hath savage beasts *ratione privilegii*, as by reason of a park, war-[258]ren, &c., he hath not any property in the deer, or conies, or pheasants, or partridges: and therefore, in an action *quare parcum, warrennum*, &c., *fregit et intravit, et tres damas, lepores, cuniculos, phasianos, perdices, cepit et asportavit*, he shall not say 'suos,' for he hath no property in them, but they do belong to him, *ratione privilegii*, for his game and pleasure, so long as they remain in the privileged place." Much learning on the subject is to be found in the judgment of Bayley, J., in the case of the rooks, *Hannam v. Mockett*, 2 B. & C. 934, 4 D. & R. 518. The second breach is that Rees, claiming and having through and under the plaintiff a right so to do, entered upon the land over which the plaintiff had by virtue of the indenture declared on the exclusive right of shooting and sporting, and cut down and destroyed the furze and underwood, and so evicted the plaintiff from and disturbed him in the enjoyment of his said right of shooting and sporting. Assuming that to be a good breach, the question is, whether the grant of a right of shooting and sporting over land implies a covenant that the lessor will not cut down furze and underwood, so as to deprive the game of the natural cover, even though such cutting be done in the ordinary and reasonable cultivation and user of the land. It may be that the lessor covenants impliedly that he will not wilfully destroy or drive away the game: but that is all. [Willes, J. There is another point before you get to that. The right to cut the furze and bushes is claimed by Rees under his lease: and that lease reserves to the lessors "all timber and other trees, mines, minerals, and quarries on the said farm."] It is enough for the defendants to say that the exception out of the demise to Rees, is in terms the same as that contained in the lease to the plaintiff (a).

[259] Bowen and C. E. Coleridge, in support of the rule. The words of the reservation in Rees's lease did not, it is submitted, except the rabbits. Rabbits have never in any sense been considered as game. In Woolrych on the Game Laws, 1, it is said: "In reading the history of the game laws, care must be taken not to confound the creature which is entitled to rank as game, with that which required a certificate (as is still the case), in order legally to take or destroy it. Whatever may now be the rule, these matters were at one time by no means synonymous. Rabbits cannot be shot under some circumstances without paying a tax to the government: but, although protected, especially in a warren, conies were never numbered in the list of game. The same observation will apply to a woodcock and snipe, and to quails and landrails,

(a) The reservation in the lease to the plaintiff is of "all timber and other trees, underwood, thorns, and bushes, growing on the land, as well as all mines," &c. That, however, applies only to the 60 acres demised to the plaintiff and occupied by him with Upton Castle, and not to the 264 acres called "Upton Farm" demised to Rees, over which the plaintiff had merely the right of sporting.

which are still within the rule of the certificate. The statute of 1 W. 4, c. 32, has created a vast alteration in the rights and usages which belong to this subject. The 2nd section defines 'game,' for the purposes of the act. Game shall be deemed to include hares, pheasants, partridges, grouse, heath or moor game, black game, and bustards. And the 5th section expressly saves the law respecting certificates. In considering game, again, the law of warrens must be withdrawn from the general principles: for grouse, although game, are not birds of warren: and conies, *although not game (a)*, are yet entitled to more protection in a warren than elsewhere: and a man may, by virtue of his free-warren, [260] make coney-burrows throughout his manor." Conies in a free-warren have a peculiar protection: see Manwood's Forest Laws, c. 3. In Fitz. N. B. 87, are two writs, for entering a warren and taking conies. In Chitty's Game Law, 128, it is laid down that "rabbits are not in legal acceptance game, nor are they included in any statute relative to it, unless expressly named." In *Rees v. Yaites*, 1 Ld. Raym. 151, it was held that the 4 & 5 W. & M. c. 23, extended only to game, and not to rabbits kept in a private warren. Rabbits are not dealt with as game in the 5 Anne, c. 14. In *The King v. Thompson*, 2 T. R. 18, a conviction on that statute, Ashhurst, J., says: "Whether the party kept a gun for the purpose of killing *game* is a question of law: for an *ignorant* witness in the country might fancy that a woodcock or a rabbit was game." The 52 G. 3, c. 93, Sched. (L.) is important: it imposes a duty for the use of any dog, gun, &c., "for the purpose of taking or killing *any game* whatever, or any woodcock, snipe, quail, or landrail, or *any conies*, &c." So, the Night Poaching Act, 9 G. 4, c. 69, speaks of rabbits as contradistinguished from game: as also do the 1 & 2 W. 4, c. 32, and 7 & 8 Vict. c. 30. Again, the Game Certificate Act, 23 & 24 Vict. c. 90, imposes a duty on a certificate to use any dog, gun, &c., for the purpose of taking or killing "any game whatever, or any woodcock, snipe, quail, or landrail, or any conies, or any deer." Game has never been held to include rabbits. [Montague Smith, J. Do you mean to contend that if Evans were sporting over Rees's land, in the exercise of the right reserved to him, and a rabbit turned up, he could not shoot it? Willes, J. Or a snipe or a woodcock?] This court, in *Padwick, App., King, Resp.*, 7 C. B. (N. S.) 88, entertained grave doubts whether rabbits were within a reservation of "game" like this. *Thomas v. Fredricks*, 10 Q. B. [261] 775, though apparently a decision that, under a contract to make good damage done by game, damage done by rabbits was included, is in reality no authority: it was not a direct decision upon the subject. The words of an exception of this sort are to be taken most strongly against the grantor. In *Gratum v. Ewart*, 11 Exch. 326, the reservation was of the right of "hunting, shooting, fishing, and fowling," in general terms: and, at the close of the judgment, Martin, B., says,—p. 349,—“We think it right to add that, in our opinion, the exclusive right is to shoot *game*, commonly so called, and that it does not extend to *animals* and small birds *not of that description*.” In the report of *Spicer, App., Barnard, Resp.*, in 28 Law J., M. C. 177, Lord Campbell is represented to have said,—"This (*viz.* the killing of the rabbits) was not done as an act of sporting, but for the purpose of protecting the produce of the land. The tenant may kill rabbits for that purpose." And Crompton, J., adds: "You should put it in the lease and tie up the tenant, if you wish to prevent him from killing the rabbits. It is a matter of contract between the landlord and the tenant: under the 12th section (of the 1 & 2 W. 4, c. 32), the tenant had a right to kill the rabbits." As to the cutting of the furze and underwood. The covenant for quiet enjoyment was, "without any interruption by the defendant and R. D. J. Evans or either of them, or any person or persons whomsoever lawfully claiming by, from, or under him, them, or any of them." The acts complained of as an eviction were acts done by Rees, claiming under the defendant. The exception in Rees's lease was merely of "*all timber and other trees*, mines, minerals, and quarries:" there is no exception of furze and underwood. In Platt on Leases, vol. 2, p. 42, it is said: "After much discussion on the point, it seems to be now settled that an exception of [262] the woods, underwoods, coppices, and hedgerows, comprises the soil itself on which they grow: but that an exception of all timber-trees or great wood, *which terms do not include underwood* and herbage, operates on so much only of the soil as may be necessary for their nourishment and support: the soil is not excepted absolutely, but *sub modo* only: and, if the lessor destroy the trees, the land on which they grow will belong to the lessee:" and for these propositions

(a) See *Yaites's case*, 1 Ld. Raym. 151.: per Ashhurst, J., 3 T. R. 21.

several authorities are cited. The covenant amounts to an implied covenant that the land should be kept in a reasonably fit condition for the purpose of sporting. The act of Rees in destroying the furze and underwood was found by the jury to have virtually destroyed that which the defendant professed to grant to the plaintiff. In Bacon's Abridgment, *Waste* (C.), 2, it is said that, "If the tenant cut down timber-trees, or such as are accounted timber, as is aforesaid (oak, ash, and elm), this is waste; and if he suffers the young germins to be destroyed, this is destruction. So it is if the tenant cut down underwood (as he may by law), yet, if he suffers the young germins to be destroyed, or if he stub up the same, this is destruction." [Willes, J. Cutting underwood at due intervals is the only way of enjoying it.] In *Berriman v. Peacock*, 9 Bingh. 384, 2 M. & Scott, 515, Tindal, C. J., says: "According to the old authorities, the general property in trees is in the landlord, and the general property in bushes is in the tenant: although, if he exceeds his right, as by grubbing up or destroying fences, he may be liable to an action of waste. We should be introducing a distinction never drawn before, if we were to decide that when a tenant cuts rather more than he ought, the property in bushes so cut passes to the landlord." The defendant is clearly liable to the plaintiff for any interference with or interruption of his right of sporting, [263] whether by his own act or by that of any person claiming from or under him.

ERLE, C. J. I am of opinion that this rule should be discharged, and that the verdict should stand as entered by my Brother Blackburn. The action is brought to recover damages for the breach of a covenant for quiet enjoyment contained in a lease whereby the defendant and another person, since deceased, demised to the plaintiff, amongst other things, the exclusive right during the term of shooting and sporting over and taking the game, rabbits, and wild-fowl upon, amongst others, lands in the occupation of one Rees, covenanting that the plaintiff should peaceably and quietly possess and enjoy the said premises so to him thereby demised and granted for and during the term, without any interruption by the lessors or either of them, or any person or persons whomsoever lawfully claiming by, from, or under him, them, or any of them. The declaration alleges for breach that, after the making of the indenture, and during the term, Rees, then lawfully claiming the right to shoot the rabbits in and upon the said lands through and under the lessors, and having a good title to the same through and under them, entered into and upon the same lands, and shot and killed and carried away large quantities of rabbits there, and evicted the plaintiff from the enjoyment of the said exclusive right of shooting and sporting and taking the said rabbits so to him demised and granted as aforesaid: and there is a traverse of that allegation. It appeared that the lease under which Rees held his farm (besides a reservation of the timber, mines, and quarries) excepted and reserved to the lessors or lessor "the exclusive right of shooting, fishing, and sporting on the said farm," and also a proviso that it should be lawful for the lessors or lessor, and their [264] or his agents, surveyors, servants, or others by their or his authority, at all seasonable times during the demise to enter into and upon the demised premises for any of the purposes mentioned in the reservations hereinbefore contained, &c. The right of shooting, fishing, and sporting excepted out of that lease, the defendant has granted to the plaintiff. The first question is, whether Rees had under his lease a right to shoot the rabbits on his land. I am of opinion that he had not. I take the reservation of the right of shooting, fishing, and sporting, to be a reservation of the right to follow and shoot such animals as are in common parlance understood to be the subjects of sport. It is contended for the plaintiff, that the reservation is confined to "game" in its strict sense. But the word "game" is not mentioned: and it is a perfectly undefined word, and one which has been used at various times in different senses sometimes narrower, sometimes more comprehensive. If the reservation here had been of the "game" on the estate, perhaps we should have been bound to construe it according to the sense in which the word has been used in most of the modern statutes. But, under the terms of this reservation, I think the lessors clearly had a right to the rabbits. Where a tenant takes a lease of a farm with such a reservation, if he has reason to fear that the number of rabbits will be excessive, he may stipulate for compensation for damage to the crops, or that the landlord shall employ a game-keeper to keep them down, or that he himself shall have liberty to do so, or the like. But there is only one suggestion by Rees in the course of his correspondence with the lessor, that the rabbits are too numerous. The next question arises upon the second breach, which alleges that Rees, lawfully claiming, and in fact

having through and under the lessors, the right to cut down divers furze-covers, woods, and [265] plantations in and upon the lands over which the plaintiff had under and by virtue of the said indenture the exclusive right of shooting and sporting, cut down and carried away and destroyed divers quantities of the said furze-covers and plantations, and thereby evicted the plaintiff from and disturbed him in the enjoyment of the said right of shooting and sporting in and over the said lands. It is contended on the part of the plaintiff that the covenant for quiet enjoyment of the premises demised and granted, was impliedly a covenant not to grub up or destroy the furze and underwood; and so the breach of it was an eviction of the plaintiff from his right of sporting. To this it seems to me there is a short answer. There has been no eviction. The plaintiff has just as much right to shoot and sport over the thirty or forty acres of land which has been so treated as he had before: and that is all the plaintiff covenanted that he should have. If a portion of the land had been sown with turnips or clover, which are favourable to partridges, it would be idle to say that the grantor was guilty of a breach because his tenant in a future year chose to adopt some other mode of cultivation of the land. The same argument applies where thirty or forty acres of furze and underwood out of a farm of 300 acres is cut down for the better cultivation of the farm. If there had been a covenant to keep up the cover, of course it would be a breach of covenant to grub it up. But, upon the whole, I see no breach here of any of the covenants which we have to deal with upon this rule.

WILLES, J. I am of the same opinion. Nothing can be more general than the words of this reservation: it is of "the exclusive right of shooting, fishing, and sporting over the said farm." There is no reason why that should not be generally understood as including [266] anything that is usually hunted for, shot for, and sported after. I would only add that many of the creatures referred to in the books as not falling within the description of game at the present day, were yet included amongst those which belonged to a warren, such as quail, landrail, woodcock, and heron, in the days of hawking. Could it be reasonably contended now that, though the right of sporting were reserved by a demise in general terms, the tenant might shoot woodcocks, quails, and the like? As to the authority I referred to,—*Graham v. Ewart*, 11 Exch. 326,—I have had an opportunity of speaking to my Brother Martin about it; and I find, as I had supposed, that the expression *game* commonly so called, was not intended to limit it to what had in acts of parliament been from time to time called game; but to such things as are usually sported after,—excluding small birds and vermin which are beneath the notice of a sportsman. It seems to me, therefore, that Rees did not under the demise to him acquire a right to kill the rabbits on his farm, and consequently that upon the first point the plaintiff fails. As to the other point, the argument urged on the part of the plaintiff would have been entitled to much weight if the grant had been of the woods and underwoods: though, if it had been a grant of the latter, I should have thought that the tenant might lawfully have cut the underwood in the usual and accustomed way. But that question does not arise here: the grant is of the exclusive right of fishing and sporting over and taking the game, rabbits, and wild-fowl on the land demised and on that under lease to Rees. I apprehend that such a grant as that does not prevent the land owner or his tenants from using the land in the ordinary and accustomed way, provided they do not resort to any expedients for destroying or driving away the game. Cutting furze and underwood in the ordinary course [267] of the cultivation of the land, cannot be said to be a wilful destruction of the game. I will only add that I am not aware of any instance of an action being sustained for the breach of a covenant for quiet enjoyment, where the grantor had that which he professed to grant, and has done no act to disturb the grantee in the possession of it. Here, the grantor had demised the land to Rees, covenanting with him in terms which amount to a re-grant of the right of shooting and sporting: and the right so reserved he has granted to the plaintiff. That which he professed to grant to the plaintiff, the defendant had: and the interruption of that right by the acts imputed to Rees is not such an interruption as the parties have stipulated against. Upon both points, therefore, it seems to me to be quite clear that the defendant is entitled to succeed. The rule must consequently be discharged.

BYLES, J. I do not dissent from the conclusion to which my Lord and my Brother Willes have arrived. I would only observe that quail, woodcock, and the like, do not stand quite in the same position as rabbits. They do not become so numerous as to become a nuisance like rabbits, which seem to have been destroyed here solely because

they were in such excess as to eat up the tenant's crops. As I view the question, it was one of evidence only.

MONTAGUE SMITH, J. I also am of opinion that this rule should be discharged. The reservation in Rees's lease is to be read as a regrant of the right of exclusive shooting and sporting, including the right to kill rabbits. The right so reserved in the lease to Rees is in terms granted to the plaintiff. It seems to me that the killing of the rabbits by Rees was not done lawfully, and therefore that there was no breach by the [268] defendant of the covenant for quiet enjoyment in the lease to the plaintiff. Upon the second point also I think the defendant is entitled to retain the verdict, because it appears to me that the cutting of the furze and underwood, which may have been done in the ordinary course of good management of the farm, was not an interruption of the enjoyment of the incorporeal hereditament granted to the plaintiff. He had the same right to sport over the land as before. If he wished to have the condition of the land as to furze and underwood preserved, he should have expressly stipulated that the present mode of cultivation of the land should not be altered. The reservation out of Rees's lease was in terms the same as the grant to the plaintiff. Rees did what he did (as to the killing the rabbits) unlawfully, and consequently the defendant's covenant with the plaintiff is not broken.

Rule discharged (a).

BIRD v. THE GREAT EASTERN RAILWAY COMPANY. June 13th, 1865.

[S. C. 34 L. J. C. P. 366; 13 L. T. 365; 11 Jur. N. S. 782; 13 W. R. 989.]

1. By a memorandum not under seal, the plaintiff hired of the owner of land the sole and exclusive liberty of shooting and fishing over it for three years. A portion of the land was (pending the term) sold to the defendants, who constructed a line of railway across it, to the great detriment of the plaintiff's right of sporting:—Held, that the plaintiff had not such an interest in the lands as to entitle him to claim compensation under the Lands Clauses Consolidation Act, 1845.—2. Semble, that a grant under seal would have given him no better title.

This was a special case stated for the opinion of the court without pleadings, pursuant to a judge's order. The action was brought under the 68th section of the Railways Clauses Consolidation Act, 1845. The plaintiff, claiming to be entitled to compensation under the circumstances hereinafter stated, gave the company a [269] notice under that section, requiring them to issue their warrant to the sheriff to summon a jury. The defendant, disputing the plaintiff's title to any such compensation, did not issue their warrant within the twenty days, and thereupon the action was brought for the amount of compensation specified in the notice.

The real point in dispute between the parties not being as to the amount of compensation, but as to the plaintiff's title to any compensation at all, it was agreed between them that, in the event of the point being decided in the plaintiff's favour, he should waive the right to the particular sum claimed in his notice, and that the amount of compensation should be ascertained by a reference, in the mode prescribed by the order.

The opinion of the court upon the real points in dispute was therefore requested on the following case:—

1. The Eastern Counties Railway Company were by the Eastern Counties Railway Act, 1861 (24 & 25 Vict. c. ccxxi.), which incorporated the Railways Clauses Consolidation Act, 1845, and the Lands Clauses Consolidation Act, 1845, authorized to make a railway, being No. 4 in section 7 of that act.

2. By the Great Eastern Railway Act, 1862 (25 & 26 Vict. c. ccxxiii.), the Eastern Counties Railway Company has been amalgamated with other companies, and has become the Great Eastern Railway Company (the defendants), on which latter company it is to be assumed, for the purposes of this case, that all the rights and liabilities of the former company have devolved.

3. John Elton Hervey Elwes being seised in fee of all the lands and hereditaments

(a) See the next case.

hereinafter mentioned, a document in writing, not under seal, was on the 3rd [270] of March, 1862, signed by him and the plaintiff, of which the following is a copy:—

“Memorandum of agreement made this 3rd of March, 1862, between John Elton Hervey Elwes, of, &c., hereinafter called ‘the landlord,’ of the one part, and Robert Wilberforce Bird, of, &c., hereinafter called ‘the tenant,’ of the other part, Whereby the said landlord agrees to let all that mansion-house known as Stoke College, in the county of Suffolk, with the offices, buildings, coach-house and stables, lawn, pleasure-ground, and garden, and eighteen acres of meadow or grass land thereto attached, be the same more or less (as late in the occupation of W. W. Winch, Esq.), together with the fixtures, furniture, china, glass, and effects, as more particularly described in an inventory, &c., *together with the sole right of shooting and fishing over the whole estate of Stoke College, and the lands belonging to the same landlord, the same consisting of 3000 acres, more or less, from the 25th day of March instant, for the full space or period of three years,* at and for the clear yearly rental or sum of 275*l.*, payable half-yearly, on the 25th of March and the 29th of September, the first of such half yearly payments to become due and be made on the 29th of September next: And the said tenant agrees to take the house on the terms aforesaid, and to pay the rent as the same shall become due; to use the said premises solely as a private residence, and not to underlet or part with possession of the same without the consent in writing of the said landlord for that purpose first had and obtained; and not to remove or suffer to be removed therefrom under any pretence whatever the whole or any part of the said furniture and effects; to keep and at the expiration of the said tenancy to quit and deliver up possession of the said residence, premises, and furniture as per inventory aforesaid, in as [271] good order, state, and condition as the same now are, fair wear and tear and accidental damage by fire in the meantime excepted; and, in the event of any loss, damage, or breakage, other than hereinbefore provided for, to make good the same or allow a fair compensation, the amount thereof, if in dispute, to be settled by two valuers or their umpire in the usual manner: and, should either party neglect or fail to appoint a valuer within seven days after notice given by the other party, or should such valuer when appointed neglect or refuse to act within the time appointed, or object to the appointment of an umpire, then the valuer already appointed may proceed alone, and his decision shall be final and binding on all parties. The said tenant further agrees at his own expense to keep and leave the said gardens properly stocked and cropped, according to the season of the year, and to keep the roofs and gutters of the premises clear from leaves and snow; not to alter the present arrangement of the garden grounds, lawns, or shrubberies, nor, without obtaining the consent in writing of the said landlord, to lop, cut, or remove any timber or timber-like trees, shrubs, or fences which may be growing or standing on the said premises, except the necessary pruning in garden arrangements; not to mow any of the grass land twice in any one year: to keep down the rabbits on the estate, so as to prevent their becoming so numerous as to be a nuisance to or cause of fair complaint from the tenants of the farms, or, failing this, after due notice from the landlord, to allow the said landlord, his servants or keepers, to enter in and upon the said lands and kill and destroy the said rabbits. The said landlord agrees to keep the said mansion-house and premises, and the water-pipes and pumps in good and substantial repair, and to pay and discharge all rates, taxes, tithes, and other charges [272] payable in respect of the said premises during the said tenancy. It is hereby further agreed that the said tenant shall have the option of giving six months’ notice, viz. on or before the 29th of September, 1864, in writing, to the said landlord, prior to the expiration of the tenancy hereby granted, of renewing the said tenancy for a further period of two years, upon the terms and conditions of the present agreement: and, should he exercise such option, he shall have a further power of extending the tenancy, on the terms aforesaid, for a second period of two years, making seven years in all, by giving notice to the said landlord, in writing, on or before the 29th of September, 1866: and, should the said tenant during the said tenancy decorate or cause to be decorated and painted the ball-room on the said premises, the said landlord agrees to allow the sum of 25*l.* from the half-year’s rent during which such decorations are effected, provided the said tenant should produce vouchers and receipts to prove that a sum of not less than 25*l.* has been expended in such decorations and paintings. Provided always that, in case the said rent or any part thereof shall remain due or unpaid for the space of twenty-one days after the day upon which it shall have become due, or if the said tenant shall commit

a breach of the conditions of this agreement, then and in such case it shall and may be lawful for the said landlord, or his duly-authorized agent, to re-enter and take possession of the said premises, and thereout to remove the said tenant, or any other person or persons therein, without the necessity of bringing an ejectment or taking any legal or equitable proceedings for the recovery thereof: Lastly, it is mutually agreed that the charge for two fair copies of this agreement shall be paid by the said landlord and the said tenant in equal moieties of 2s. each.

4. The defendants, being impowered by the before-[273]-mentioned acts, for the purpose of constructing the said railway, to purchase and take the land which they are herein stated to have purchased, gave to the said John Elton Hervey Elwes a notice under the 18th section of the Lands Clauses Consolidation Act, 1845, stating therein that they required to purchase and take the said land, and demanded from the said John Elton Hervey Elwes the particulars of his estate and interest therein, and of the claims made by him in respect thereof; and the said notice stated the particulars of the land so required, and that the defendants were willing to treat for the purchase thereof and as to compensation to be made by all parties for the damage that might be sustained by reason of the execution of the works.

5. In pursuance of that notice, and by virtue of the powers of their acts of parliament, the defendants purchased of the said John Elton Hervey Elwes part of the land over which the document before set forth purported to agree to let to the plaintiff such right of shooting as aforesaid; and the said purchased land was conveyed to the defendants in fee by the said John Elton Hervey Elwes; and the defendants constructed part of the said railway thereon.

6. The said part of the said railway is on the whole about 2 miles, 1 furlong, and 83 yards long, and contains in area 23 acres, 2 roods, 13½ perches; and it intersects the land over which it was agreed as aforesaid that the plaintiff should have the said right of shooting, so as to leave a considerable part of the said land on each side of the said railway.

7. It is admitted that the shooting on that part of the said land which was not purchased as aforesaid was and is in fact prejudiced and diminished in value by the construction of the said part of the said railway.

8. It is also admitted that the shooting on the said [274] purchased land is in fact prejudiced and diminished in value by the construction of the said part of the said railway.

9. From the time of making the said agreement with the plaintiff to the time of the conveyance to the defendants, the said John Elton Hervey Elwes continued to be seised in fee of all the lands and hereditaments mentioned in the said agreement; and, from the time of the conveyance to the said defendants hitherto, he has continued so seised thereof, except the part so conveyed.

10. If the plaintiff ever was or is entitled in equity to a legal grant of the right of shooting referred to in the said document, nothing, except so far (if at all) as herein appears, has occurred to destroy his right to such grant.

11. It is not admitted by the defendants that the plaintiff was interested in lands, or that the damage and diminution of value herein stated is an injurious affecting within the meaning of the Lands Clauses Consolidation Act, 1845.

12. These were questions on which the parties differed, and were matters for the consideration of the court. The court was to have the power of drawing such conclusions of fact as they might think a jury ought to draw.

The question for the court was whether, under the circumstances herein stated, the plaintiff was entitled to any compensation; and, if to any, in respect of what, is he so entitled.

If the court should be of opinion that the plaintiff was entitled to any compensation, the amount was to be ascertained in the mode prescribed in the said order; and the plaintiff was to have judgment for the amount, with costs of suit. If the court was of opinion that the plaintiff was not entitled to any com-[275]-pensation, judgment of nolle prosequi was to be entered for the defendants, with costs of defence.

Mellish, Q. C. (with whom was Mayd), for the plaintiff(a). The question is,

(a) The points marked for argument on the part of the plaintiff were as follows:—

“1. That the right of shooting on the land mentioned in the agreement is an interest in respect of which compensation can be claimed:—

“2. That, although such right may lie in grant, yet that the agreement gave the

whether the plaintiff is entitled to compensation for the injury which it is conceded has been done to the shooting by the construction of the railway across the land; and it resolves itself into three points, first, whether the right of shooting is such a profit arising out of the land as to entitle the plaintiff to claim compensation under the 68th section of the Lands Clauses Consolidation Act, 1845, for its injurious affection by the works of the company,—secondly, whether, assuming it to be an interest in land, the construction of the railway was an [276] injurious affection within the statute,—thirdly, whether the right of the plaintiff is affected by the fact of its being an equitable and not a legal interest. The right of shooting is part of the value of the land. If the owner of the land has parted with it to a third person, such third person would be entitled to that portion of the compensation which would be given for the shooting. That the plaintiff's interest has been injuriously affected, is conceded. The only question is, whether it is an interest in land within the 68th section of the statute. The circumstance of its being an incorporeal hereditament does not, it is submitted, prevent it from being the subject of compensation. [Willes, J. To entitle a party to compensation under s. 68, is it not necessary that the claimant should have some legal interest in the land?] It is enough that the party has an equitable interest. The 7th section deals with equitable interests, amongst others. A court of equity will consider that to be done which ought to be done. There is no disability or defect of title here: it is only the conveyance which is imperfect, and that a court of equity will remedy. Equity will not allow a title to fail for the want of a seal. In *Moreland v. Richardson*, 22 Beavan, 596, certain persons had purchased family graves in perpetuity in a private burying ground which was afterwards closed by order of the Queen in council: there was no formal grant executed, but their title was merely evidenced by a receipt for the purchase-money, stating the purchase: and it was held that they were entitled to an injunction to restrain the trustees from removing or injuring the graves or grave-stones, &c. [Byles, J. That was in the nature of an easement. Assuming the grant here to have been by deed, would it pass any interest in the land?] It is submitted it would. In *Wickham v. Hawker*, 7 M. & W. 63, it was held that [277] the grant to a person, *his heirs and assigns*, of “free liberty, with servants or otherwise, to come into and upon lands, and there to hawk, hunt, fish, and fowl,” is a grant of a *licence of profit*, and not of a mere *personal licence of pleasure*: and therefore it authorizes the grantee, his heirs and assigns, to hawk, hunt, &c., *by his servants, in his absence*: and such a liberty is therefore a profit à prendre within the Prescription Act, 2 & 3 W. 4, c. 71, s. 2. [Willes, J. This is not the purchase of the right, but a mere licence to exercise it. Would the court of equity direct a legal conveyance of it?] The court of equity would at all events restrain the grantor from doing anything to derogate from his grant. [Willes, J. Could the company set up this agreement as an answer pro tanto to the claim for compensation by the owner of the land?] The value of the land is diminished by the grant of the shooting. [Byles, J. It would be rated at less or more according as the landlord retained or parted with the shooting, if let to a tenant (a).] Various provisions (ss. 99-115) are found in the statute as to rights of common, mortgages, and rent charges, in respect of which the company must

plaintiff a right in equity in respect of which equitable interest compensation can also be claimed:

“3. That the said interest entitles the plaintiff to compensation in respect of the land which was actually taken:

“4. That the adjoining land was injuriously affected by the railway, by reason of its injuring the shooting there, and that the plaintiff's said interest entitles him to compensation in respect thereof:

“5. That, even if no claim can be made for injury to the shooting on land, by reason of the proximity of a railway, if no part of the land is taken: yet, if part of the land is taken, the company must pay for any damage thereby caused to the shooting, as it is one of the natural advantages of the land, which enhances its value:

“6. That the plaintiff being entitled to the shooting for a term, a portion of the compensation (the whole of which, if he retained the shooting, would be payable to the owner of the fee,) is payable to the plaintiff, and the owner of the fee is entitled to so much less.”

(a) See *The Queen v. Williams*, 23 Law Times, 76; *The Queen v. The Inhabitants of Thurlstone*, 1 Ellis & Ellis, 502, 28 Law J., M. C. 106.

deal with the person having the equitable interest. By the interpretation clause, s. 3, the word "lands" is to be construed to extend to "messuages, lands, tenements, and hereditaments of any tenure." In *Sweetman v. The Metropolitan Railway Company*, 10 Law T. (N. S.) 156, it was held that a tenant of premises under an agreement for a lease for the residue of a term of seventeen years, though at law a mere tenant from year to year, is not "a person having no greater interest therein than as tenant from year to year," upon the true construction of the 121st [278] section of the act. It is submitted that the plaintiff here had at all events an equitable interest in the land, and that persons having equitable interests are as much entitled to be compensated as those whose interests are strictly legal.

Bidder (with whom was Bovill, Q. C.), for the defendants (a). The argument resolves itself into three points,—1. That, assuming that the instrument under which the plaintiff claims conveyed to him any legal right, it is not an interest in land within the 68th section of the Lands Clauses Consolidation Act, 1845,—2. That, admitting that it is an interest in land, there has been no injurious affection by the company's works,—3. That, the instrument not being under seal, it conveyed nothing to the plaintiff. 1. *Wickham v. Hawker*, 7 M. & W. 63, shews that a grant of this sort amounts to no more than a mere licence: whether it be a per-[279]-sonal licence of pleasure, extending only to the individual, or a licence of profit, which he may exercise by his servants, still it is only a licence: see *The Duchess of Norfolk v. Wiseman*, Year Book, 12 H. 7, fo. 25, and 13 H. 7, fo. 13, pl. 2; Manwood's Forest Laws, c. 18, s. 3, p. 107. 2. Assuming this to be a profit à prendre, it is submitted that it is not included in the description of an interest in land in s. 68. The interpretation clause, s. 3, provides that "lands shall extend to messuages, lands, tenements, and hereditaments of any tenure." In Viner's Abridgment, *Tenure* (B.), it is said, "Pischary does not lie in tenure: for, the soil may be to one, and the pischary to another, and then the lord cannot distrain,"—citing Br. *Tenures*, pl. 75, who refers to Fitzh. *Scire Facias*, 100. An owner of tithes was held not to be entitled to compensation under an act of parliament containing similar words: *The King v. The Commissioners of the New Outfall*, 9 B. & C. 875, 4 M. & R. 646. Bayley, J., there says: "The 35th section (of the 7 & 8 G. 4, c. lxxxv.) gives the right to compensation to the persons interested in the lands, tenements, or other hereditaments. The rector or vicar is not interested in the land out of which the tithe arises. When the tithe arises, his interest then accrues. The owner of the soil may, if he pleases, use the land in such a manner that it shall not produce tithe, and the rector then can get no tithe. He not having any legal interest in the land out of which the tithe is to arise, in point of law, cannot be considered to have sustained any injury by reason of its non-production. He has no right by law to insist upon the land being used in such a manner that it shall produce tithe. That being so, he is not entitled to compensation under this act of parliament." And Littledale, J., said: "It is insisted that the right of the rector to take tithe being an incorporeal heredita-[280]-ment, he is entitled to compensation, because he is a person interested in an hereditament. I think the right of the rector to take the tithe is not an hereditament within the meaning of that word in this act of parliament. It

(a) The points marked for argument on the part of the defendants were as follows:—

"1. That the plaintiff had no lands or interest in any lands which were taken for or injuriously affected by the execution of the defendants' railway:

"2. That the plaintiff's interest in lands, if any, was not injuriously affected by the execution of the said railway:

"3. That the plaintiff had neither a legal grant nor an equitable right to enforce a grant of the right of shooting over the lands in question:

"4. That, even if the plaintiff had had a legal grant of the said right of shooting, such grant would not give the plaintiff an interest in lands within the meaning of the Lands Clauses Consolidation Act:

"5. That, if the plaintiff had such an equitable right as aforesaid, such an equitable right is not an interest in lands within the meaning of the said act:

"6. That the diminutions in value of the plaintiff's legal or equitable right of shooting (if any) over the lands taken by the defendants, and over the lands not so taken, are not, nor is either of them, an injurious affecting within the meaning of the said act."

certainly is not an hereditament wanted for the purpose of the act. It is true that he may have sustained damage by reason of the commissioners having taken the land for the purposes of the navigation, and thereby rendered it incapable of producing tithe. That is not a damage which the law considers as constituting any injury to the rector. There must be a damage accruing from the wrongful act of another, to constitute a civil injury. If the owner of the land had suffered it to lie waste, and thereby rendered it incapable of producing tithe, the rector would sustain a damage, and yet he could not maintain any action against the land-owner, because the damage would not have been caused by any wrongful act." The ordinary test of the right to compensation in these cases is whether, in the absence of an act of parliament, an action would have lain against the company for doing that which is complained of: *The Caledonian Railway Company v. Ogden*, 2 Macq. 229; *In re Penny and the South Eastern Railway Company*, 7 Ellis & B. 669, 26 Law J., Q. B. 225; *New River Company v. Johnson*, 2 Ellis & Ellis, 435, 29 Law J., M. C. 93. [Byles, J. In *The King v. The Commissioners of the New Outfall*, 9 B. & C. 884, Parke, J., says,—“The act seems to have intended to provide compensation for those who could have maintained an action for the things done by the commissioners, if they had not had the authority of parliament.”] Suppose the owner of the estate had himself made this railway, would he have been liable to an action at the suit of this plaintiff? Many antient authorities on the subject are collected in *Holford v. [281] Baulby*, 8 Q. B. 1000. 3. Then, there being no legal grant of the shooting and fishing, the plaintiff clearly has no right to compensation under the statute. He has by this instrument no interest in any land: at the utmost, he has a right to invoke the aid of a court of equity to have such an interest conveyed to him. The only person here entitled to call upon the company for compensation under the statute was the owner of the land. The company could not set up this agreement in answer to or in mitigation of his claim. It must therefore be assumed that the defendants have paid Elwes the full value of all that he has lost, and full compensation for all damage and inconvenience which he has sustained, by the construction of their railway. It may be that a court of equity would compel him to hand over to the plaintiff a portion of the compensation. In the interpretation clause of the act “lease” is declared to comprehend an “agreement for a lease:” but this is not a lease: it is a mere licence: *Bird v. Higginson*, 2 Ad. & E. 696, in error, 6 Ad. & E. 834. In *Surrenden v. The Metropolitan Railway Company*, 10 Law T. (N. S.) 156, the tenant had a legal interest at least as tenant from year to year, with an equitable interest for seventeen years. Having got compensation in respect of the former, he could not demand a second assessment in respect of the latter.

Mayd, in reply. The case of *The King v. The Commissioners of the New Outfall*, has no application. The rector there could have had no action against the owner of the soil for omitting to cultivate it. Nor is this like the case of *Jefferys v. Ewins*, recently before the court (ante, p. 246). Here the plaintiff's right to go over a large portion of the land has been clearly affected in an injurious manner.

[282] ERLE, C. J. I am of opinion that our judgment in this case must be for the defendants. The question raised between the parties is, whether the plaintiff is a person entitled to compensation under the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), in respect of any lands, or any interest therein, which have been injuriously affected by the execution of the defendants' works. It appears that by a memorandum of agreement of the 3rd of March, 1862, the plaintiff hired of one Elwes for a term of three years a mansion-house and certain lands adjoining which were not affected by the defendants' works, and that he also hired the right of shooting and fishing over the whole estate of Mr. Elwes. The defendants have taken a portion of the last-mentioned land, and have constructed their railway upon it: and the plaintiff insists that thereby his right of shooting is injuriously affected. Now, the right which the plaintiff has under the memorandum of the 3rd of March, 1862, which is not under seal, is a mere licence, and lies only in agreement. The memorandum conveys to him no land, nor any interest in land, which could be injuriously affected by the execution of the defendants' works. All the plaintiff has lies in contract with Mr. Elwes. The great stress of the argument has been, that the parol interest which the plaintiff has under the agreement may at any time through the interposition of a court of equity be converted into an interest under seal, and therefore that the plaintiff has at least an equitable interest in the subject-matter. But I am unable to find any equitable interest in the land. As to what may be the relative rights of the plaintiff and Elwes,

I give no opinion,—whether a court of equity would compel the latter to execute a grant under seal, or what would be its effect, is not a matter for our consideration. The right to specific performance is [283] confined to the parties to the contract. This is clearly laid down by Lord Cottenham in *Tasker v. Small*, 3 Mylne & Cr. 63, where he says: “It was argued at the Bar that the plaintiff was, in equity, invested with all the rights of Mrs. Small, upon the principle, that, by a contract of purchase, the purchaser becomes in equity the owner of the property. This rule applies only as between the parties to the contract, and cannot be extended so as to effect the interests of others. If it could, a contract for the purchase of an equitable estate would be equivalent to a conveyance of it. Before the contract is carried into effect, the purchaser cannot, against a stranger to the contract, enforce equities attaching to the property.” Here, whatever the rights as between Elwes and the plaintiff, the defendants are strangers to them. They have come to the party entitled to the land, and have compensated him for the land they have taken, and have so acquired a title to the land with all its incidents, amongst others, a right to the birds in the air and the fishes in the water thereon. That is the ground upon which I rest my opinion; and it is sufficient to sustain a judgment for the defendants. Even if the plaintiff had had an interest under seal, there is much in the argument of Mr. Bidder to shew that the company would not be liable to make compensation to him. He takes by his contract the right of shooting if there be game, and of fishing if there be fish. But there is no contract on the part of the landlord to keep up the quantity of game or of fish. No doubt an action would lie against Elwes, if, after having let the right of shooting and fishing, he wilfully did something to destroy the fish or to prevent the access of the game to the land. But no such question arises here: and, upon the ground above mentioned, I am clearly of opinion that the claim of Major Bird against the railway company is unfounded.

[284] WILLES, J. I am of the same opinion. The plaintiff is a person who has contracted with the owner of the soil to have for three years the exclusive right of shooting and fishing over the land. I will assume that he has done so by a valid and effectual contract. In what relation does a man who has acquired a right to the exclusive shooting stand with regard to the owner of the land? The owner of the land has not contracted that he will not enjoy the land in any lawful and ordinary way which does not go directly to the destruction of the game. There are many authorities in the books as to rights to sport over the land of another. Mr. Bidder, in his able argument, has referred to several cases in relation to rights of fishing: and there are many more instances to be found in the time of the forest laws, which are collected in Com. Dig. Chase, besides one well-known case as to free-warren, in 1 Wms. Saund. Where these rights existed, there were stringent provisions of the law to prevent them from being injuriously affected by the owner of the land. But the books are wholly silent as to one who has a mere licence to shoot or to fish over another man's land, having any right to restrain the owner of the soil in the ordinary and reasonable use of it; always excepting the malicious or intentional destruction or driving off of the game. I am quite at a loss to see how the fact of making a railroad across the land could affect the plaintiff's right of shooting any more than the making of an ordinary carriage-road, or that it must necessarily be an injury in the sense of giving a right of action. I am far from saying that such acts might not amount to injuria as well as damnum. But I must protest against its being supposed to be enough to shew a mere conveyance of part of the land by the landlord to a railway company, in order to give the plaintiff a right of [285] action even against his landlord, without shewing some covenant on the part of the latter not to disturb or interfere in any way with the game. Assuming, therefore, that the difficulty suggested by my Lord did not exist, we must not be supposed to have intimated an opinion that the facts here stated would give the plaintiff either a cause of action or a right to claim compensation. I concur with my Lord in thinking, for the reasons he has given, that this claim is not sustainable.

BYLES, J. I am of the same opinion: and my judgment entirely reposes upon the meaning of the words “any interest in any lands,” in the 68th section of the Lands Clauses Consolidation Act, 1845. The memorandum of the 3rd of March, 1862, may be a licence,—of profit as well as pleasure: but it conveys to the licensee no estate: not the smallest particle of an interest in land passes to him under it at law. It is said he may go to a court of equity and perfect his legal title. I am not

sure that he could. I must, however, confess myself incompetent to form a decided opinion on that subject. But it lies on the plaintiff to shew that he could, before we can decide in his favour upon the ground that he has an interest in land either at law or in equity. If the plaintiff were entitled to compensation, he might be so if he had been one of a hundred licensees. I desire to say nothing to lead to an inference that there is any other mode in which the plaintiff can claim a compensation for what he has lost. It is enough to say that he has no remedy under the 68th section of the Companies Clauses Consolidation Act.

MONTAGUE SMITH, J. I am of the same opinion. I think the plaintiff had no interest in the land, within the meaning of the 68th section of the statute. He claims [286] in respect of a right of sporting: but that right seems to me never to have been created: it never existed as a separate subject-matter of property or interest in the land at all. To create such a right, there must be a deed under seal. Here there is nothing but a contract with the owner of the land that he will grant such a right. It all lies in contract. There is no hereditament existing here: no interest which is severed from the ownership of the land, and so vested in the plaintiff as to entitle him to say that, in respect of that interest, as distinguished from the ownership of the land, he is entitled to compensation. The owner of the land remains in full possession of all the rights incident to such ownership, subject only to a contract to create this interest.

Judgment for the defendant.

CATER v. WOOD. June 3rd, 1865.

1. The plaintiff bought of the defendant "the *household furniture, pictures, utensils in trade,*" &c., of a public-house, "as per inventory taken by W. W.," for 262l., upon a representation by the defendant that the receipts of the house were £80 per month, which representation turned out to be false. In an action for this misrepresentation, the declaration alleged the agreement to be for the purchase of the *goodwill*, furniture, fixtures, &c.:—Held, that the declaration substantially stated the true nature of the agreement, and that, at all events, the court would, if necessary, amend it.
2. The court has power, under the 222nd section of the Common Law Procedure Act, 1852, to amend the record, where leave to move to enter a verdict is reserved, notwithstanding the judge at the trial expressly refuses to allow an amendment or to reserve leave to amend.

This was an action for a false and fraudulent representation on the sale of a public-house.

The declaration stated that the defendant possessed a public-house and premises called the Gibraltar, situate at Boxley, in the county of Kent, and there carried on the business of a publican and licensed [287] victualler, and also there had certain furniture, &c., and that he the defendant, with intent to deceive and defraud the plaintiff, falsely and deceitfully represented to the plaintiff and induced him to believe that his the defendant's trade was much more extensive than it really was, more particularly in this, that the business was worth 80l. per month, and by means of the said false and deceitful representation induced the plaintiff to enter into an agreement whereby the plaintiff agreed to give the defendant 200l. and 62l. for the goodwill of the said trade, and for the purchase of the furniture, fixtures, &c., and to pay for stock in trade not more than 25l.; that the plaintiff paid the 262l., and entered and paid 25l. 19s. 8d. for the stock in trade: whereas, in truth the defendant's business was worth much less than 80l. per month, as the defendant well knew: and by reason of the premises the said trade was and is wholly useless to the plaintiff, and the plaintiff incurred divers losses on the said business, and had been put to divers costs in the execution of the said agreements and in the discovery of the aforesaid fraud of the defendant, and in the moving of his goods, &c., and had been deprived of the benefit of the use of the money so spent, and his interest in the said public-house was of no value to the plaintiff, and the plaintiff was otherwise damaged: Claim 500l.

The defendant pleaded not guilty, whereupon issue was joined.

The cause was tried before Pollock, C. B., at the last Spring Assizes at Maidstone. A witness who negotiated the purchase of the business on behalf of the plaintiff, proved the representation as to the value of the business as alleged in the declaration,

and other witnesses proved that, instead of 80l. per month, the takings did not average 10l. The written agreement was put in, when it appeared to be only an agreement [288] for the sale of "the household furniture, fixtures, utensils in trade, &c., as per inventory taken by William Wood," no mention whatever being made of "goodwill."

It was thereupon submitted on the part of the defendant that there was nothing to go to the jury, all the defendant agreed to sell being certain specified articles.

The Lord Chief Baron, yielding to the objection, directed a nonsuit, reserving to the plaintiff leave to move to enter a verdict for 100l. damages, but declined to amend the record, or to leave it to the court to do so.

The Hon. G. Denman, Q. C., in Easter Term last, accordingly obtained a rule nisi to enter a verdict for the plaintiff for 100l., on the ground that there was evidence to go to the jury in support of the declaration either in its present form, or to be amended by the court under the 222nd section of the Common Law Procedure Act, 1852.

Sir G. Honyman now shewed cause. The declaration in substance charges that, by means of a fraudulent and deceitful representation, the defendant induced the plaintiff to purchase, amongst other things, the "goodwill" of the public-house in question. The agreement which was put in makes no mention of goodwill. It is an agreement specifically for certain household furniture, fixtures, utensils in trade, &c., as per inventory. The plaintiff purchased these very things. Does the use of the word "fixtures" import goodwill? [Byles, J. Does the agreement import that the purchaser shall sell beer on the premises in question, or the vendor?] The purchaser, no doubt. But, suppose the defendant had opened a beer-shop next door to [289] the Gibraltar, would he have been liable to an action? [Byles, J. This is not an action *ex contractu*, but *ex delicto*. Willes, J. All difficulty, if any there be, may be cured by an amendment of the declaration, by setting out the agreement in its terms.] The Lord Chief Baron expressly declined to reserve to the plaintiff leave to amend. [Willes, J. He could not restrain the general power of the Court to amend, under the 222nd section of the Common Law Procedure Act, 1852, where leave to move is reserved.]

Denman, Q. C., and Willoughby, were not called upon to support the rule.

ERLE, C. J. I am of opinion that the rule should be made absolute to enter a verdict for the plaintiff for 100l. It appeared that the plaintiff entered into an agreement with the defendant whereby the former was to pay to the latter 262l. on his delivering up to him the possession of the public-house and premises, together with the household furniture, fixtures, utensils in trade, &c., as per inventory taken by William Wood. It also appeared that the 262l. was paid, and the plaintiff let into possession; and it appeared upon the evidence, and was found by the jury, that the defendant represented the takings of the public-house to be 80l. per month, and that that representation was fraudulent and untrue. The evidence was, that the defendant falsely and fraudulently represented the value in respect of the business carried on upon the premises, when bargaining for a sale of the fixtures and utensils in trade therein. There can be no doubt that an action will lie against him for that. It is true, the word "goodwill" is not found in the agreement which was drawn up embodying the terms of the contract between the parties. There could be no difficulty in [290] framing a declaration which would be unobjectionable upon this contract. I incline to think this declaration good as it now stands. But, at all events, the case is one in which the court has power to amend, and in which we ought, if it were necessary, to exercise it.

The rest of the court concurring,

Rule absolute.

MOAKES v. NICOLSON. May 31st, 1865.

[S. C. 34 L. J. C. P. 273; 12 L. T. 573. Adopted, *Shepherd v. Harrison*, 1871, L. R. 5 H. L. 127. Referred to, *Gabarron v. Kreeft*, 1875, L. R. 10 Ex. 281.]

1. Coals were sold at Hull, and shipped on board a vessel chartered by the buyer, to be paid for in cash against bill of lading in the hands of the seller's agent in London:—Held, that no property passed to the buyer until the condition was ful-

filled, and that, the price being unpaid, the seller was entitled to intercept the delivery.—2. Held, also, that a third person, who had agreed with the vendee to purchase the coals of him, by a verbal contract entered into before the quantity was ascertained and shipped, could be in no better position than the original vendee.

This was an action of trover. The declaration stated that the defendant converted to his own use and wrongfully deprived the plaintiff of the possession of his goods, to wit, coals, and thereby the plaintiff was hindered and prevented from performing a contract which he had made with a certain firm trading under the style of Daniel Barker & Co. for the delivery to them of the said coals for a certain price: and the plaintiff, being unable by reason of the premises to deliver the said coals to the said Daniel Barker & Co., had become and was liable to make the said Daniel Barker & Co. compensation for the plaintiff's breach of the said contract: and the plaintiff had lost all the profits which he would have made had he performed the same: Claim, 250*l*.

The defendant pleaded—first, not guilty.—secondly, that the said goods were not, nor were nor was any of them, or any part thereof, the plaintiff's, as alleged. Issue thereon.

[291] The cause was tried before Keating, J., at the first sitting at Westminster in Easter Term last. The facts were as follows:—The plaintiff is a coal broker and ship-agent, and the defendant a ship and insurance broker, both carrying on business in London. The action was brought to recover 129*l*. 18*s*. 6*d*., the value of 170 tons, 8 cwt., of South Yorkshire steam coal, which had been seized and converted by the defendant, acting as the agent of one Josse, of Grimsby, coal-agent, under the following circumstances:—

On the 9th of December, 1864, one Pope, a coal merchant in London, who was then at Hull, agreed with Josse, then also at Hull, for the purchase of a cargo of steam-coal, to be shipped on board a screw steam-ship called the "Isle of Arran," which had been chartered by Pope. The following is a copy of the charterparty:—

"Hull, December 9th, 1864.

"It is this day mutually agreed between R. T. Dails & Co., agents to the owners of the 'Isle of Arran,' of 138 tons gross register, and 30 horse-power, or thereabouts, and F. Pope, coal merchant, Limehouse, London, that the first-named party is to let, and the second-named party is to hire, the above-named steamship for the space of three calendar months, reckoning from the day on which she is delivered over to the charterer at Goole, 10th December, 1864, in a perfectly good and efficient state; and to be by charterer or assigns employed for the conveyance of lawful merchandize, as follows,—Between good and safe ports on the east coast of Ireland, not north of Newcastle or Warkworth Harbour: it being agreed that no salt or other injurious cargoes affecting iron vessels be shipped. And in consideration of these premises, it is agreed that the said owners shall receive from F. Pope as charterer, for the hire and service of the said steam [292]-ship, at the rate of 50*l*. for every fourteen days, which pay shall commence from such day on which the steamer be placed at the charterer's disposal as above, and be made in the following manner,—every fourteen days in advance, in cash: the first fourteen days' hire to be paid in cash on signing this charter. And it is hereby agreed between the contracting parties, that the charterer is to find the crew and engineers, pay their wages, victualling. The charterer will have to find coals, oils, tallow, and waste, port charges and pilotage, labourage loading and discharging, light and dock-dues, and all expenses appertaining to the cargo he may put on board. The owners are bound to keep the vessel and engines in perfect order during the period in which she is employed by the charterer: but, if any damage should occur either to the ship or machinery, which may occupy more than forty-eight hours to repair, the time so occupied will be allowed by the owner in due proportion to the charter money stipulated; and the captain and engineer's certificate jointly shall be satisfactory evidence as to the time occupied in repairing: but, should the vessel be driven into port or to an anchorage by stress of weather, or from any accident to the cargo, such detention or loss of time shall be at the charterer's risk and expense. If the vessel should either be delivered or occupied by the charterer three days previous to or after the expiration of the stipulated period, such time to be allowed for at the rate of hire above named. The acts of God, Queen's enemies,

fire, and all and every other danger and accidents of machinery, or of the seas, rivers, or navigation, of whatever nature and kind, always excepted. Should any difference of opinion arise between the parties to this contract, either in principle or detail, the same to be referred to arbitration to two competent parties, one to [293] be chosen by each contracting party, with power to call in a third person as referee; the majority of opinions hereafter to be final and binding. The owner to have a lien upon all freight and cargo for any hire that may be in arrear. And, in the event of the said hire not being paid as above, it is agreed that the owners or their agents shall have the power of taking possession of the said steamer and terminating this charterparty, but still holding the charterers liable for the said hire of 50l. for every fourteen days. Penalty for non-performance of this charter, estimated damages. It is further agreed that the usual commission of 5 per cent. on this charterparty is due by the owners to R. T. Dails & Co., on signing thereof. The captain and engineers to be appointed by the owners or their agent, but to be paid by the charterer at current wages.

“R. B. DAILS & Co.”

The “Isle of Arran” proceeded to Grimsby, and was loaded by Josse with the coals in question; and on the 20th of December Pope received in London the following letter, invoice, and bill of lading:—

“Anglo French Transit Company,
“Royal Dock Chamber, Grimsby,
“19th December, 1864.

“Dear Sir,—The ‘Isle of Arran’ is loaded, and will sail during the night. I shall telegraph you her sailing in the morning. I inclose copy of the account, 23l. 8s. 3d. expenses, and 93l. 15s. 11d. amount of invoice.

“H. JOSSE.”

“Grimsby, December 19, 1864.

“Mr. F. Pope, London,	To H. Josse, Dr.
“To 170 tons, 8 cwt. best S. Y. steam-coal, at 9/9 . . .	£83 1 5
To 22 tons ,, ,, ship’ use . . .	10 14 6
	£93 15 11

“[294] H. Worms, represented)

by H. Josse, Great Grimsby. J Shipped in good order and well conditioned for Mr. H. Worms, by Mr. H. Josse, as agent, in and upon the good ship called the ‘Isle of Arran,’ whereof is master for this present voyage G. Hailstone, and now riding in the dock Grimsby, and bound for Gravesend, 170 tons, 8 cwt., equal to keels of steam-coals, being marked and numbered as in the margin, *and are to be delivered* in the like good order and well conditioned at the aforesaid port of Gravesend (the act of God, the Queen’s enemies, piracy, fire, and all and every other dangers and accidents of the seas, rivers, and navigation of whatever nature or kind soever excepted) *unto Mr. F. Pope or order*, on being paid freight and demurrage for the said coals as per charterparty, with primage and average accustomed. In witness whereof the master or purser of the said ship hath affirmed to three bills of lading, all of this tenor and date, the one of which three bills being accomplished, the other two to stand void.

“GEORGE HAILSTONE.

“Great Grimsby, December 19, 1864.”

One only of the three bills of lading was stamped, and that was retained by Josse: the second was transmitted to Pope; and the third was subsequently forwarded to the defendant.

The “Isle of Arran” arrived at Gravesend with the coals on board on the 7th of January, 1865, when the captain was served with the following notice:—

“5 Jeffry’s Square, St. Mary’s Axe,
“2nd January, 1865.

“To the master of the steam-ship called the ‘Isle of Arran,’ and to the owners of the said vessel, and to any others whom it doth or may concern:

“As agent duly authorized for and on behalf of Mr. [295] Henry Josse, of Great Grimsby, merchant, the seller of the cargo of coals, say 178 tons of coals shipped per

the said ship 'Isle of Arran,' at Grimsby aforesaid, for Gravesend, I do hereby give you and each of you notice that Mr. F. Pope, of London, merchant or wharfinger, the buyer of the said cargo, has not paid the price of the said goods in cash according to his contract, although payment thereof has been lawfully demanded, and by reason of the premises the said F. Pope must be deemed to have stopped payment: And on behalf of the said Henry Josse I do hereby stop the said goods in transitu: and I hereby demand and require of you to deliver the said goods to the said Henry Josse or to me on his behalf, and to no other person or persons. "W. NICOLSON."

In consequence of the receipt of this notice, the captain of the "Isle of Arran" refused to deliver the coals to Pope or to the plaintiff, to whom Pope had sold them on the 12th of December, and who produced to him the copy bill of lading indorsed by Pope. Subsequently the cargo was unshipped by the defendant: whereupon this action was brought.

Josse swore that he sold the coals to Pope for cash against bill of lading, to be delivered by him in London. Pope, who was called as a witness on behalf of the plaintiff, swore that the sale was at a credit of thirty days: but, on his cross-examination, he admitted that he had not paid any part of the money, and that he was on the eve of bankruptcy.

On the part of the plaintiff it was contended that the coals having been delivered on board a vessel chartered by the buyer, the property thereby passed to him, and that the transit was at an end on the arrival of the vessel at Gravesend.

On the other hand, it was submitted, that, regard [296] being had to the terms of the contract, no property would pass to Pope until the arrival of the cargo at Gravesend and payment of the price: and that the shipment of the coals on board the "Isle of Arran," though chartered by him *et al.*, was not a delivery to Pope, so as to vest the coals in him as owner.

It was left to the jury to say what were the terms of the contract. They found that the sale was for cash against bill of lading in the hands of the seller's agent in London.

A verdict was thereupon, by the direction of the learned judge, entered for the plaintiff for 136l. 8s., leave being reserved to the defendant to move.

Hawkins, Q. C., accordingly, in Easter Term last, obtained a rule nisi to enter a verdict for the defendant, on the grounds, that, upon the facts admitted and proved, the defendant was entitled to the verdict, that the defendant had a right to stop the coals in transitu, and that neither Pope nor the plaintiff had any right to the property and possession of the coals at any time before this action was brought.

Keane, K. C., and Barnard, now shewed cause. There was a complete delivery of the coals to Pope when they were delivered on board the vessel chartered by him. The "Isle of Arran" was demised to Pope: the transit therefore was at an end when the coals were shipped. The property and the possession had both passed, and the vendor could have no right to intercept them. [Willes, J. The coals were delivered subject to a condition that the property was not to pass until payment.] The answer to that is, that they were delivered on board the buyer's vessel, to one who was the buyer's servant, the document of title [297] being made out in his name. [Willes, J. They were put on board under a contract made under such circumstances that it was no contract at all.] The vendor might, no doubt, as in *Turner v. The Trustees of the Liverpool Docks*, 6 Exch. 543, have so framed the bill of lading as to reserve to himself the *ius disponendi*: but he has not taken that precaution. In *Josse v. Swann*, 17 C. B. 84, it was held that, where from all the facts it may fairly be inferred that it was the intention of the seller to pass the property in goods shipped to order, the mere circumstance of the bill of lading being taken in the name of the seller, and remaining undorsed, will not prevent its passing. Here, every act of the seller is inconsistent with what the defendant now contends. [Willes, J. *Josse v. Swann* hardly touches this case. Here, the goods were absolutely delivered to the buyer, and vested in him, unless the words "payment against bill of lading in the hands of my agent in London" created a condition subsequent, by which in default of payment the coals were to re-vest in the seller.] There is nothing here, it is submitted, which could amount to a condition subsequent. It would be manifestly unjust to allow the defendant, who

(a) See *Falk v. Fletcher*, 18 C. B. (N. S.) 403.

has put Pope in a position to pass himself off as the true owner of the coals, to turn round and claim them against a bonâ fide purchaser from Pope.

J. A. Russell, and Thesiger in support of the rule. The contract under which the coals were put on board the "Isle of Arran," was, that they should be paid for in cash against the bill of lading; and the only bill of lading now in question is that which was retained by the seller and transmitted to his agent in order to get the cash in pursuance of the terms of that contract. The result is, either that the property in the coals [298] never vested in Pope at all, or vested only subject to the condition that it should re-vest in the seller on non-performance of the condition. Until Pope obtained the stamped bill of lading, he could acquire no property at all. The finding of the jury concludes the matter. If the plaintiff chose to deal with Pope in the absence of the only document that could give him title, he must take the consequences. He cannot be in any better position in regard to title than Pope himself stood in. In the cases relied on for the plaintiff, the bill of lading had been handed over: here it was retained. [Erle, C. J. The plaintiff bought without a bill of lading?] He bought on the 12th of December. The bill of lading was dated the 19th. Whether or not the property vests in the buyer in all cases depends upon the terms of the contract: see *Wilmshurst v. Bowker*, 2 M. & G. 792, 3 Scott, N. R. 272 (in error, 7 M. & G. 882, 8 Scott, N. R. 571; *Brandt v. Bowlby*, 2 B. & Ad. 932; *Bromne v. Hare*, 4 Hurlst. & N. 822; *Blackburn's Contract of Sale*, 135. Here, the terms of the contract clearly negative the passing of any property until the price was paid and the bill of lading handed over. [Willes, J., referred to *Smith's Mercantile Law*, 5th edit. 464 et seq., where the authorities are discussed.]

ERLE, C. J. I am of opinion that the rule to enter the verdict for the defendant should be made absolute. Moakes brings his action on the ground that the property in the cargo of coals seized by the defendant belonged to him. It appears that the coals were sold by Josse to Pope, and by Pope to Moakes. One material question is, whether Moakes could have any better title to the coals than Pope had. I think not. That is undoubtedly not clear as a general proposition; because, if Josse had so dealt with Pope as to put him [299] in the position of an ostensible owner, by intrusting him with the documents of title, it might be that Moakes might have acquired a title to the coals though his vendor Pope had none. But no such point can arise here, because by the terms of the contract it was distinctly understood between Josse and Pope that the property in the coals was only to vest in the latter upon the payment by him of cash against the bill of lading; and this condition never was complied with. This being so, whilst the coals remained an unascertained quantity, Moakes enters into a contract with Pope, under which in my opinion he took precisely the same title as Pope had as between him and Josse. The sole question therefore is, what was the intention of the parties. The property could not pass out of Josse unless there was a sale by him with the intention that the property should pass to the vendee. Now, it was clearly the intention of Josse,—and the jury have so found,—to retain the property until his agent in London should receive the cash against the bill of lading. If that was the clear intention of Josse, the property did not pass. That this was the contract is clear from the correspondence. The delivery of the coals on board a ship chartered by Pope has no effect whatever in passing the property. If the intention was that the ship should be regarded as the warehouse of Josse until the happening of the event contemplated, viz. the payment of the price, the putting the coals on board did not alter the position of the contracting parties. At the time Moakes made his contract with Pope, there had been no delivery, and no bill of lading existed. He therefore cannot say that he was misled by Pope's being permitted to hold himself out as the true owner. Upon the whole, therefore, I think no property passed to Pope, and that the now plaintiff cannot be in a better position than Pope.

[300] BYLES, J.(a). I am of the same opinion. I must confess I had at first entertained some doubt, because I thought the sale to the plaintiff took place after the shipment and after the bill of lading had been handed to Pope. But it turns out that that is not so. The coals in question were not loaded, nor even distinguished from the rest of the coals in the vendor's yard. It is plain, therefore, that no property passed at the time of the sale. And it would seem from the cases cited that none

(a) Willes, J., had gone to Chambers.

passed at the time of the shipment. The putting the coals on board the "Isle of Arran" was clearly not intended by the parties to be a delivery so as to vest the property in the vendee. According to the evidence and the finding of the jury, the captain was a sort of supercargo: the goods were not to become the property of Pope until the conditions of the contract were satisfied. Apart from the representations of the vendor, therefore, it is plain that the plaintiff could have no property in the coals. The case appears to me to be perfectly clear and free from doubt.

KEATING, J. I am of the same opinion. The course adopted by the vendor to retain the property in the coals and the control over them, was undoubtedly somewhat slovenly and unbusiness-like. But that his intention was that the property in the coals should not pass to the vendee until payment, is clear beyond all question. The finding upon that is quite in accordance with the evidence. That being so, nothing which took place afterwards has at all altered the rights of any of the parties. I characterize the proceeding as slovenly and unbusiness-like, because circumstances might have occurred which might have placed the vendor in a precarious position as to the [301] property in the coals; for, though he may have supposed he amply secured himself by stamping only one of the bills of lading and retaining that one in his own possession, yet, if the unstamped bill of lading which was transmitted to Pope had been produced to the plaintiff at the time he bought the cargo, and the plaintiff had acted upon it, a question would have arisen which might have placed the defendant's right in some jeopardy. But, at the time the plaintiff bought and paid for the coals, the subject-matter of the contract had not been ascertained.

Rule absolute.

M'CALL v. TAYLOR. May 27th, 1865.

[S. C. 34 L. J. C. P. 365; 12 L. T. 461; 11 Jur. N. S. 529; 13 W. R. 840. Referred to, *Harvey v. Cane*, 1876, 34 L. T. 66. Referred to, *R. v. Harper*, 1881, 7 Q. B. D. 79. Distinguished, *R. v. Bowerman*, 1890, 63 L. T. 534.]

Held that an instrument in following form,—"Four months after date pay to my order the sum of three hundred pounds, for value received," addressed to and formally accepted by the defendant, but having no date and no drawer's name,—was neither a bill of exchange nor a promissory note.

This was an action upon an instrument in the following form, which was declared on as a bill of exchange and also as a promissory note:—

"£300 0 0.

[No date.]

"Four months after date, pay to my order the sum of Three hundred pounds, for value received.

[No drawer's name.]

"To Captain Taylor,
"Ship 'Jasper.'"

Across this document was written, in the handwriting of the defendant, the words "Accepted, William Taylor."

There was also a count for goods sold and delivered, and the ordinary pleas.

The cause was tried before Byles, J., at the sittings at Guildhall after the last Hilary Term. The plaintiff was a ship-chandler and provision-merchant. The defendant was the captain (and it was suggested owner [302] also) of the ship "Jasper." It appeared that the plaintiff had, in September, 1862, pursuant to orders received through one Milne, the ship's broker, delivered goods to the amount of 299l. 19s. 2d. on board that vessel for San Francisco, and had received in payment a bill at six months accepted by one Bailey, which bill was not paid at maturity; and that the instrument declared on was given to the plaintiff by Milne about six months afterwards. It also appeared that Bailey had been debited for the goods in the plaintiff's books, and that an invoice had been delivered charging Bailey as the debtor. There was no evidence whatever to shew that the defendant had any interest in the goods.

The learned judge intimating a pretty strong opinion that the instrument in question was not a bill of exchange, it was submitted for the plaintiff that it was

a promissory note, for which reliance was placed on *Crutchley v. Clarence*, 2 M. & Selw. 90.

On the part of the defendant it was insisted that the instrument declared on was not a bill of exchange, being wanting in that which is essential to constitute a bill of exchange, viz. a drawer and a payee: and, further, that it was not either in form or in substance a promissory note,—referring to *Stoessiger v. The South Eastern Railway Company*, 3 Ellis & B. 549, 23 Law J., Q. B. 293.

Upon the count for goods sold and delivered, the learned judge left it to the jury to say upon whose credit the goods were delivered on board the “Jasper,”—that of the defendant, or of Bailey,—reserving for the court the question whether the instrument could properly be declared on either as a bill of exchange or as a promissory note. The jury returned a verdict for the defendant (a).

[303] Hannen, in Easter Term last, pursuant to the leave reserved, obtained a rule nisi to enter a verdict for the plaintiff, on the ground that the document declared on was a promissory note. He referred to *Crutchley v. Clarence*, 2 M. & Selw. 90, and *Armfield v. Allport*, 27 Law J., Exch. 42. He submitted that, though informal, it might, like a document drawn in favour of a fictitious payee, be treated as a promissory note payable to bearer.

Day now shewed cause. The goods for which the instrument was given were not delivered to the defendant, but to another person; and the plaintiff's journal and ledger, and also the invoice delivered of the goods, all shewed that the defendant was not the person to be charged: there is no reason, therefore, why the court should exercise any astuteness in favour of the plaintiff. The simple question is, whether the instrument amounts to a promissory note. It is submitted that it clearly does not. So far as it professes anything, it professes to be a bill of exchange wanting the name of a drawer. It is addressed to the defendant, and is accepted by him. The words “pay to my order” cannot mean the order of the defendant. In truth, it is an incomplete bill of exchange, and nothing else. The defendant does not promise to pay any sum on the demand of any person, or at any particular [304] time: and there is no indorsement. [Willes, J. The document seems sufficiently to explain itself. It is an authority to some person to put his name to it as drawer. No one has done so. It is therefore not a complete instrument. Byles, J. My strong impression at the trial was, that it was neither bill of exchange nor note: but I thought it better to reserve the point.] *Stoessiger v. The Great Eastern Railway Company*, 3 Ellis & B. 549, 23 Law J., Q. B. 293, is precisely in point. There, a parcel delivered to a railway company for carriage contained 9l. 10s. in cash, and an instrument bearing a bill of exchange stamp, in the following terms,—“Three months after date pay to me the sum of 11l. 10s., value received. To Mr. Cruttenden,” &c.: and written across it was an acceptance by Cruttenden. The parcel was addressed to Goold, a creditor of Cruttenden; and the intention was that Goold should put his name to the instrument as drawer. In the course of transmission the parcel was opened, and the instrument and the money it contained were abstracted. In an action against the company for the loss, it was held that the instrument was a “writing,” and not a “bill, note, or security for money,” within the meaning of the Carriers Act, 11 G. 4, & 1 W. 4, c. 68, s. 1; but that it could not be considered of value, so as under that section to exempt the company from their common-law liability as carriers. Lord Campbell, in giving judgment, says: “I am clearly of opinion that it is not a bill of exchange, for it has neither drawer nor payee: and it is not a promissory note, because it does not contain a promise to pay any one, and it is entirely inconsistent with Cruttenden's intention that any person who got possession of it should put his name to it as drawer.” The rest of the court agree that the instrument was neither bill nor

(a) In the course of the discussion at the trial, the learned judge adverted to a case in this court, the name of which he could not at the moment remember. It was probably *Brown v. De Winton*, 6 C. B. 336. It was there held that, although no precise form of words is necessary to constitute a promissory note, still it ought to have all the essentials of a contract. Thus, a note payable to the maker's own order, is not per se a negotiable instrument within the 3 & 4 Anne, c. 9, s. 1; a payee must be expressly named, or must appear by necessary implication. But, when a note in that form is indorsed in blank, and put in circulation by the maker, it becomes in effect payable to the bearer.

note: and Erle, J., says,—"This was an instrument in an imperfect state." [305] It is utterly impossible to distinguish that from the present case.

Hannen, in support of the rule. Though imperfect as a bill of exchange, this instrument may well have effect given to it as a promissory note, as it must have been intended by the party to be, viz. an engagement to pay the amount to a *bonâ fide* holder on demand. The plaintiff might have put his name to it as drawer; and, if he had done so, the defendant would have had no answer. That is clear from *Crutchley v. Clarence*, 2 M. & Selw. 90, *Crutchley v. Mann*, 5 Taunt. 529, 1 Marsh. 29, and numerous other cases. It is the same thing, as Le Blanc, J., observes in the former case, as if the defendant (the acceptor) had made the bill payable to bearer. [Byles, J. What was wanting in *Crutchley v. Clarence* is present here: the marginal note is equivocal.] The name of the person sued is there: and it is held that he gives authority to any one who is a *bonâ fide* holder, to fill up the blank. "As the defendant has chosen," says Lord Ellenborough, "to send the bill into the world in this form, the world ought not to be deceived by his acts. The defendant, by leaving the blank, undertook to be answerable for it when filled up in the shape of a bill." It is upon the same principle that a bill drawn in favour of a fictitious payee may be declared on as a bill payable to bearer. In *Fielder v. Marshall*, 9 C. B. (N. S.) 606, an instrument purporting on the face of it to be a bill of exchange drawn by A., payable to the plaintiff or order, was accepted by B., and handed to the plaintiff in satisfaction of a claim for rent due to her from A. In the place where the direction to the drawee is usually found, the name and address of *the payee* were inserted. The whole instrument (except the drawer's name) was in the handwriting of B. It [306] was held that the payee was entitled to recover upon it as the promissory note of B. [Byles, J. The address in the corner was treated as no address at all. The instrument could not be a bill of exchange. It could only be Marshall's promissory note. The court construed it so as to give effect to the obvious intention of the parties. Montague Smith, J. There were both maker and payee named there.] There cannot be any difference in principle between a blank left for the name of a drawer, and a blank for the payee, or which is the same thing, a fictitious payee. Erle, C. J., in that case says: "It appears to me that the right way to deal with it is this, to treat the direction to 'Mrs. Emma Fielder' at the foot of the bill as a mere informal repetition of the words in the body of it, 'pay to Mrs. Emma Fielder.' The effect of so construing it is, that the defendant, who accepts the bill (!), thereby promises to pay the amount at maturity to Emma Fielder. Feeling that we are at liberty so to construe the instrument, I have much satisfaction in giving effect to what must have been the intention of the parties, by holding that the plaintiff is entitled to recover." In the course of the argument, Willes, J., referred to a case of *Miller v. Thompson*, 3 M. & G. 576, 4 Scott, N. R. 204, where it was held that an instrument in the form of a bill of exchange, drawn upon a joint-stock bank by the manager of one of its branch banks, by order of the directors, might be declared upon as a promissory note; Tindal, C. J., in giving judgment, saying,—“It appears that the directors for whom the instrument in question purports to be drawn by their manager, are members of the company whose name and character are presented on the face of it, and that the company is not a corporation, but a mere private association. We must, therefore, look upon it as an instrument drawn by one of several [307] members of a firm, purporting that the sum therein mentioned shall be paid by the firm at a given time and place. In effect it is a promissory note, and nothing else. To constitute a bill of exchange, it is essential that there should be two parties, a drawer, and a person upon whom the bill is drawn (a). I am clearly of opinion that this is a promissory note.” And the learned judge (Willes, J.) adds, “If there be sufficient on the face of the instrument to indicate a promise to pay, it is a promissory note.” In *Peto v. Reynolds*, 9 Exch. 410, the plaintiff's agent at Cameroons, in Africa, drew an instrument in the form of a bill of exchange, but addressed to no one: across which the defendant's agent wrote an acceptance in the defendant's name, and delivered the bill to the plaintiff's agent, for value received. In an action on the bill, the plaintiff attempted to prove that the bill was presented to the defendant, when he promised to pay it. It being doubtful, however, from the evidence whether the defendant had made an absolute or merely a conditional promise to pay the bill, the court, in granting a new

(a) And a person to whom the money is to be paid?

trial, though disposed to think that the instrument was not a bill of exchange, declined to give an express opinion on the point: but it was held by Parke, B., Alderson, B., and Martin, B., that, if the instrument was not a bill of exchange, *it was clearly a promissory note*, if there was evidence of an absolute promise to pay it. In *Armfield v. Allport*, 27 Law J., Exch. 42, the circumstances were very similar to those of the present case. It was there held that an instrument drawn in the form of a bill payable to bearer, even if accepted in blank, and afterwards filled up by the drawer, may be declared on by the indorsee as a promissory note made by the drawer and indorsed by [308] the drawee (a). In Byles on Bills, 8th edit. 73, it is said: "If the bill be not made payable either to any payee in particular, or to the drawer's order, or to bearer in general, it would seem, according to the opinion of the majority of the judges (in *Mout v. Gibson*, 1 H. Bl. 608), to be payable to bearer; but, according to the opinion of Eyre, C. J., in the same case, it is mere waste paper:" and reference is made to *Rex v. Randall*, Russ. C. C. 185, where a bill payable to _____ or order was held not to be a bill of exchange, because there was no payee; and to *Rex v. Richards*, R. & R. C. C. 193, where the prisoner drew a bill upon the treasurer of the navy payable to _____ or order, and signed it in the name of a navy surgeon, and it was held that, to constitute an order for payment of money, there must be some payee, and that a direction to pay to _____ or order was not sufficient.

ERLE, C. J. I am of opinion that this rule should be discharged. The instrument in question is declared upon as a bill of exchange and also as a promissory note. It was in this form, "Four months after date, pay to my order the sum of three hundred pounds, for value received," and it was addressed to the defendant, but it had no date and no drawer's name. Across it was written an acceptance by the defendant. The question is, whether the holder of this document has a right to declare on it either as a bill of exchange or as [309] a promissory note. It is clearly not a bill of exchange; and in form it is not a promissory note. If I could be clearly satisfied that I should be giving effect to the intention of the parties by holding this instrument to be a promissory note, I would endeavour so to construe it. But I am aware of no case, and the industry of the learned counsel has discovered none, which warrants us in holding this to be either the one or the other. It is an inchoate and imperfect instrument. If the holder had authority to make it a complete instrument either as a bill or a note, he was at liberty to do so: but, if he had no such authority, he might if he attempted to do so render himself liable to a charge of forgery. The case of *Stoessiger v. The South Eastern Railway Company*, 3 Ellis & B. 549, 23 Law J., Q. B. 293 seems to me to be precisely in point, without going into any of the other cases. Nothing is clearer to my mind than that, in the ordinary case of an acceptance with the drawer's name in blank, it is important, in order to constitute a contract, that it should be known who is to be the drawer. It may have been important here that the instrument should be filled up as a bill drawn by the owner of the ship or the broker upon the captain. And it may be that the plaintiff had no authority to add his name as the drawer. But, whatever may have been the particular circumstances under which this document was given, I act upon the case I have referred to. As it stands, the thing is inchoate and incomplete, and affords no foundation for the holder to sue upon it.

WILLES, J. I am entirely of the same opinion.

BYLES, J. I am of the same opinion. I thought at the trial, and still think, that the instrument in question could not be declared on either as a bill of ex-[310]-change or as a promissory note. It is not like a bill accepted in blank.

MONTAGUE SMITH, J. I also think this case is not distinguishable from *Stoessiger v. The South Eastern Railway Company*. There, upon an instrument precisely similar to this, except that there it was dated, Lord Campbell says: "It is not a bill of exchange; there is neither drawer nor payee. Nor is it a promissory note to pay any one who might happen to be the bearer: that Cruttenden should become liable

(a) It is not easy to discover what was decided by this case. In a considered judgment, the Lord Chief Baron is reported to have said: "A man who writes his name across a stamped paper *as acceptor*, there being a direction to him upon the paper, is liable; he gives his authority to *anybody* to draw upon him when it may be convenient to do so, or when the person to whom the paper is given may think it advisable to apply it for this purpose."

generally to the bearer, was quite contrary to his intention." So here, I think we should be going entirely against the intention of the defendant if we were to hold him liable upon this instrument as upon a promissory note payable to bearer.

Rule discharged.

HURST v. THE GREAT WESTERN RAILWAY COMPANY. June 10th, 1865.

[S. C. 34 L. J. C. P. 264; 12 L. T. 634; 11 Jur. N. S. 730; 13 W. R. 950.]

The mere taking of a ticket for a journey by railway does not amount to a contract on the part of the railway company, or impose upon them a duty, to have a train ready to start at the time at which the passenger is led to expect it.

This was an action in which the plaintiff sought to recover a compensation in damages for delay and detention on a railway journey.

The first count of the declaration stated that the defendants were carriers of passengers by railway from Cardiff to Newcastle-upon-Tyne for reward to the defendants in that behalf, that the plaintiff was received by the defendants as a passenger to be carried on their railway, and ought to have been conveyed by them by a certain train or series of trains, without any unreasonable delay, from Cardiff to Newcastle-upon-Tyne; and alleged for breach that the defendants made de-[311]-fault in so carrying and conveying him, and that the plaintiff was thereby detained at Gloucester for twenty-four hours, and was not conveyed to and did not arrive at Newcastle aforesaid until twenty-four hours after a reasonable time for carrying him there had elapsed; whereby the plaintiff incurred hotel expenses, suffered inconvenience from exposure and cold, was put to expense in sending telegrams to his family, and neglected his business, &c.

The second count stated that the plaintiff was received by the defendants as a passenger to be by them carried from Cardiff to Gloucester within a reasonable time, and on the terms, amongst others, that the defendants would use all reasonable care to convey the plaintiff to Gloucester within a certain fixed time, and in time for the plaintiff to go from Gloucester to Newcastle-upon-Tyne by a certain other train about to start from Gloucester to Newcastle-upon-Tyne within a reasonable time after the said certain fixed time; and alleged for breach that the defendants did not carry the plaintiff to Gloucester within such reasonable time, and that the plaintiff did not arrive at Gloucester until after the departure of the train from Gloucester to Newcastle, whereby the plaintiff was detained at Gloucester for twenty-four hours, &c. Claim, 200l.

The defendants pleaded to the first count,—1. A traverse of their being such common carriers as alleged,—2. A traverse of the plaintiff's being such passenger to be conveyed within such time as alleged,—thirdly, not guilty. There were similar pleas to the second count. Issue.

The cause was tried before Mellor, J., at the last Spring Assizes for the county of Northumberland. The plaintiff was a mining engineer at Durham. On Saturday, the 17th of December last, he went to the defendants' station at Cardiff, for the purpose of proceeding to Newcastle by a train from Milford which [312] should arrive at Cardiff at 4.34 p.m., proceeding thence to Gloucester, where it joins the mail-train from Bristol, and passes thence through Birmingham and Derby to Newcastle, arriving there at 8 o'clock on the following morning. At the Cardiff station, he inquired of the clerk in the booking-office if he could book to Newcastle by the train which was then about due, and was told that he could. He thereupon took a ticket upon which was printed the following words,—“Great Western Railway. Cardiff to Newcastle, via Midland Railway. First Class.” Nothing was then said about the train being delayed: but the plaintiff was afterwards informed by one of the officials at the station that the Milford train had broken down at Swansea; and it did not arrive until 6 o'clock. The mail-train for Birmingham leaves Gloucester at 8.17; and the Milford train was due at Gloucester at 7.5: it did not, however, arrive at Gloucester until 8.45, when the corresponding train had already started. The plaintiff was consequently obliged to wait until the following day. In the meantime he telegraphed to his family at an expense of 8s. Not choosing to remain at Gloucester, the plaintiff and a friend proceeded to Cheltenham, which is about seven

miles on the road, where they stayed at an hotel, joining the mail-train on the following evening, and arriving at Newcastle at about 8 o'clock on the Monday morning. The expenses incurred by the plaintiff at the hotel at Cheltenham amounted to 30s.

The plaintiff claimed 1l. 18s. for his hotel bill and telegram, 10l. 10s. for the loss of a day, and also damages for the annoyance and inconvenience of being detained from his home on the Sunday, catching a cold, &c.

Some correspondence took place between the plaintiff and the secretary and the solicitor of the company, [313] which evinced a desire on the part of the company to meet the plaintiff's grievance fairly, but at the same time repudiated his legal right to compensation, and referred to the time-bills, in which it was expressly stated that the company did not guarantee the arrival or departure of the trains at the exact times stated therein, but that they would do their best to insure punctuality. *The time bills were not put in.*

On the part of the defendants, it was submitted that there was no case to go to the jury, there being no contract on the part of the company by the ticket that a train should arrive so as to meet a corresponding train.

The learned judge declined to nonsuit the plaintiff, but reserved leave to the defendants to move to enter a nonsuit if the court should be of opinion that there was no evidence to go to the jury. And in his summing-up he told the jury that the contract proved was simply to carry the plaintiff from Cardiff to Newcastle, via the Midland railway: that, upon that contract, the defendants were bound to carry the plaintiff to Newcastle within a reasonable time, and if there was any justification or excuse it should come from them; and that, if there was unreasonable delay, they were liable to the extent of the consequences naturally arising therefrom,—for the expenses at the hotel, and the telegram, for the loss of a day if the jury thought that resulted from the plaintiff's arriving at Newcastle on Monday instead of Sunday morning, and also, if they thought fit, a reasonable sum for the inconvenience and discomfort arising from the twenty-four hours' detention at Cheltenham.

The jury returned a verdict for the plaintiff, assessing the damages at 7l. 3s., being 5l. 5s. for loss of time, and 1l. 18s. for the hotel expenses and the telegram.

E. James, Q. C., in Easter Term last, pursuant to the [314] leave reserved, obtained a rule nisi to enter a nonsuit, on the ground that there was no evidence of any cause of action, or for a new trial on the ground that the verdict was against the weight of evidence [Erle, C. J., observed that the question seemed to be whether expectation founded upon past experience could constitute a contract.]

Temple, Q. C., and C. Crompton, now shewed cause. The damages being under 20l., the second branch of the rule cannot be sustained. The only question therefore will be, whether there was any evidence to go to the jury of a breach of contract or a breach of duty on the part of the defendants. The contract was to carry the plaintiff from Cardiff to Gloucester in time to meet the train there the same evening for Newcastle, or to carry him to Newcastle from Cardiff in a reasonable time,—which reasonable time was to be estimated by the usual course of travelling on that line. At Cardiff the plaintiff is told by the station-master that he can proceed through to Newcastle by a train which was due at Cardiff at 4.34 p.m. He accordingly took his ticket, and in due course should have reached Gloucester at 7.5, in which case he would be in ample time for the train which left Gloucester at 8.17, and should have arrived at Newcastle early on the Sunday morning. In consequence, as the plaintiff learned from one of the company's servants at Cardiff, of a break down at Swansea, the train from Milford which should have reached Cardiff at 4.34, did not arrive until 6 at Cardiff, and did not reach Gloucester until long after the corresponding train had departed. In *Denton v. The Great Northern Railway Company*, 5 Ellis & B. 860, the Great Northern Railway Company, whose line communicated with the line of the North Eastern Railway Company at Milford Junction, had [315] arrangements by which their trains starting from Peterborough at 7 p.m., and going to Milford Junction, there met a train of the North Eastern company running from Milford Junction to Hull, by which passengers from Peterborough to Hull were forwarded. The Great Northern Company published monthly time-tables, in which they stated, in the usual way, that the 7 p.m. train from Peterborough carried to Hull. At the end of a month after the Great Northern time-tables for the ensuing month were prepared in this form and printed, but before they were published, the North Eastern

Company discontinued the train from Milford Junction to Hull. The Great Northern Company made no alteration in their time-tables already printed, but published and circulated them after they knew that there was no such train. The plaintiff having seen one of the time-tables, made his arrangements, on the faith of it, to go from Peterborough to Hull by the 7 p.m. train. He came to Peterborough in time, went to the station, and then for the first time learned that he could go no further than Milford Junction by that train. He was delayed in his journey, and sustained damage, for which he sued the Great Northern Company. On a case stated, without pleadings, it was held that he was entitled to recover, on the ground that the circulation of the time-tables amounted to a representation on the part of the defendants that there was a train, which was false to the knowledge of those making it, and calculated to induce the plaintiff to act as he did,—and, per Lord Campbell, C. J., and Wightman, J., to a contract on the part of the company with those who should come to the station, to forward them as stated in the time table. In *Hamlin v. The Great Northern Railway Company*, 1 Hurlst. & N. 408, also, it was held that an action lay for a breach of the contract contained in the time-bill. [Willes, J. Since [316] the case of *Denton v. The Great Northern Railway Company*, the railway companies have protected themselves by inserting a notice in their time bills, to the effect that they do not guarantee the arrival or departure of the train at the exact time stated in the time-bill, but will do their best to insure punctuality.] They have not done so here: the ticket was the only contract; and by that the company undertook to convey the plaintiff to Newcastle at all events within a reasonable time. Was it reasonable to detain him until the Monday morning? [Byles, J. In *Denton v. The Great Northern Railway Company*, the complaint was that there was no train at all: here it is that the train was later than it ought according to the ordinary course to have been. You must go the length of contending that an action lies against the company every time a train is late, and any passenger sustains an injury therefrom. Montague Smith, J. Do the company warrant the punctual arrival of the trains?] They at all events warrant such an amount of punctuality as will enable a passenger to catch the particular train they profess to correspond with. [Willes, J. I must confess I am at a loss to discover such a contract upon the face of the ticket.] The contract is proved by the ticket, coupled with the representation of the company's servant that the plaintiff could book to Newcastle by the train about to start. [Willes, J. The time-table would have shewn what the real contract was: and that the plaintiff did not produce.] The learned judge told the jury that they could not take notice of the time bills, the defendants not having put them in or proved knowledge of them on the part of the plaintiff, and that the only contract was that contained in the ticket. Whether or not the journey was performed within a reasonable time, was purely a question for the jury: and they have found that it was not.

[317] E. James, Q. C., and T. Jones, were not called upon to support the rule.

ERLE, C. J. I am of opinion that this rule should be made absolute to enter a nonsuit. I think there was no evidence of any breach of duty or breach of contract on the part of the company. The whole substance of the plaintiff's case is that he took a ticket at Cardiff, to be carried by the Great Eastern Railway Company to Newcastle-upon-Tyne, via the Midland Railway: and the grievance is that the train from Milford by which he was to proceed on that journey, instead of arriving at Cardiff so as to start at its accustomed time, 4.34 p.m., did not reach Cardiff until 6 o'clock, and in consequence passengers wishing to go through to Newcastle missed the corresponding train at Gloucester, and could not be carried on until the evening of the next day. The substance of the complaint therefore is that the company were guilty of a breach of duty or a breach of contract, because the Milford train arrived at Cardiff an hour and a half behind its usual time. I am of opinion that the mere taking of a ticket does not amount to a contract on the part of a railway company, or impose upon them a duty, to have a train ready to start at the time at which the passenger is led to expect it: and, in order to maintain an action, it is incumbent on the plaintiff to shew either a breach of contract or a breach of some legal duty. If there were any such contract here, it would appear from the time-bills published by the company: and if the plaintiff (whose duty it was to do so) had put in the time-bill, we should have seen what the real contract was, viz. that the company do not warrant that their trains shall arrive with punctuality at the times indicated at the different stations. There clearly was nothing like a special contract in [318] the talk with the officials on the platform at Cardiff. A mere casual conversation with a

person whose duty it is to open and shut the carriage-doors or the like cannot amount to evidence of a special contract with the company. And even that conversation here merely amounted to this,—“The train is behind time; and we hear that there has been a break-down at Swansea.” It is perfectly consistent with all the evidence here that the company have done all they contracted to do. When a plaintiff complains of a breach of duty, he is bound to produce reasonable evidence to shew that there has been such breach of duty. Notwithstanding the able argument we have heard to-day, I can see no such evidence, and therefore feel bound to give my judgment in favour of the company.

WILLES, J. I am of the same opinion. The reason why the plaintiff sustained the damage he complains of is that the train by which he should have proceeded did not arrive at Cardiff at the time it was expected to arrive, and consequently did not depart from Cardiff so as to arrive at Gloucester in time for the plaintiff to transfer himself at that place to the train which would have carried him on that evening to Newcastle. The question therefore is, whether the company entered into any contract with the plaintiff, or were under any legal duty to have a train at Cardiff ready to start at such time as would have enabled the plaintiff to go on by the corresponding train from Gloucester to Newcastle. That depends upon the effect which is to be given to two facts. The first is, that the plaintiff had taken a ticket for Newcastle. The second is that, in the ordinary course of things, the train should have started from Cardiff at 4.34 p.m. As to the ticket, all that that indicates is that the plaintiff shall be carried from Cardiff to Newcastle by [319] the next train starting from Cardiff for Gloucester (where the defendants' line ends), and thence on by the next train starting from Gloucester for Newcastle at such time as it was possible to overtake it. It is simply a ticket for the plaintiff's conveyance from Cardiff to Newcastle. There is no statement on the face of it to shew how he is to be taken there, except the words “via Midland Railway.” Now, the law attaches to such a contract as this (assuming the ticket and the surrounding circumstances to amount to a contract), that it is to be performed within a reasonable time. The ticket, therefore, does not help the plaintiff. The only other circumstance to be considered is the evidence that the train should have started from Cardiff at 4.34, that is, that the ordinary time for the departure of that particular train was 4.34. Whether the train was due at Cardiff in the sense that it was warranted to be there at that time, or as a mere representation that it was usually there at that time, depends upon the consideration of whether any duty was cast upon the company that the train should arrive punctually. Clearly there is no such duty cast upon the company by law: if any such duty exists, it must be proved by competent evidence. Reliance was placed upon the statement of the authorized agent of the company that the train would start at 4.34, and would carry the plaintiff through to Newcastle. The question is, whether that was a warranty, or only a representation coupled with a stipulation that the punctual arrival and departure of the train were not warranted by the company. That would appear from the time bill; and I apprehend it was clearly for the plaintiff to give that in evidence. He should have proved it by the mode which as between the company and a passenger was held to be the proper mode of proof in *Denton v. The Great Northern Rail-[320]-way Company*. If the time-bill had been produced here, there would probably have been an end of the plaintiff's case. It would, doubtless, have shewn that there was an absolute repudiation of a warranty of punctuality. Upon the whole, I think the merits as well as the law are with the defendants.

BYLES, J. I must confess I have arrived at the same conclusion, and that not without having had ample time for consideration. The case is one of considerable importance; for it affects every ticket issued for a journey of any length. I see no evidence here of guarantee or absolute promise of correspondence with any other trains: and there is the best possible reason for saying there was none, for the plaintiff has not alleged it in his declaration. He states that he was received by the defendants as a passenger to be carried on their railway, and ought to have been conveyed by them by a certain train or series of trains, without any unreasonable delay, from Cardiff to Newcastle. It may be that that was proved. The only evidence which the plaintiff gave was the ticket. That contains no guarantee upon the face of it. At the utmost, it only proves a contract to carry the plaintiff from Cardiff to Newcastle without unreasonable delay. If the plaintiff wished to prove more, he should have produced the time-table. Possibly that might have proved his case. It is also

possible, and indeed highly probable, that he had very good reasons for not producing it. The absence of that document, however, has left us in the dark. The foundation, therefore, upon which the plaintiff's case reposes is wanting. I cannot entertain any doubt whatever that the plaintiff ought to have been nonsuited.

MONTAGUE SMITH, J. I am entirely of the same [321] opinion. I see no evidence of any contract on the part of the company to carry the plaintiff from Cardiff to Newcastle within a reasonable time, simpliciter, but to carry him with reference to the usual course of the company as contained in their time-bills. There was no absolute contract to carry the plaintiff so as to meet a particular train at Gloucester; but at most a representation that in the ordinary course he might expect to meet it. If the correspondence were any evidence of the time-bills, it is clear that there was no express condition that the times of arrival and departure of the trains were not guaranteed. If the company did warrant the exact arrival and departure of every train, of course no accident, however unforeseen, except the act of God, would be an answer. But it is quite clear that the company here contracted with reference to their time-bills; and they should have been produced.

Rule absolute to enter a nonsuit.

PHELPS v. THE LONDON AND NORTH WESTERN RAILWAY COMPANY.
May 26th, 1865.

[S. C. 34 L. J. C. P. 259; 12 L. T. 496; 11 Jur. N. S. 652; 13 W. R. 782. Adopted, *Maclean v. Great Western Railway*, 1871, L. R. 6 Q. B. 620. Referred to, *Roche v. Cork and Passage Railway*, 1889, 24 L. R. Ir. 256.]

"Ordinary luggage," for which a railway company is responsible, does not include title-deeds belonging to a client, which an attorney is carrying with him in his bag or portmanteau for the purpose of producing on a trial in a local court; or bank-notes (to a considerable amount) carried by him for the purpose of meeting the contingencies of the suit.

This was an action brought by the plaintiff, a solicitor, against the London and North Western Railway Company, to recover damages for the delay and expense he had sustained through the negligence of the defendants' servants on two several occasions where he [322] was a passenger on their line, in consequence of the temporary loss of his luggage.

The cause was tried before Byles, J., at the sittings in London after last Hilary Term. The facts were as follows:—The plaintiff was a solicitor at Lunston, in Kent. In July, 1863, he was retained for the defendants in an action brought in the county-court of Montgomeryshire holden at Machynlleth, and accordingly proceeded thither by the London and North Western railway, taking with him a portmanteau, in which, besides his necessary clothing, he had certain deeds and writings belonging to his client, and which were essential to his defence in the proceedings in the county-court, and 65l. in Bank of England notes, which he took for the purpose of paying money into court if that should be desirable, or of paying the amount of the judgment in the action if his client should be defeated. On his arrival at Shrewsbury, where it was necessary to change to another train, the plaintiff saw his portmanteau on the platform: but, when he reached his journey's end, the portmanteau was not to be found. Not being prepared to produce the deeds, he was compelled to apply to the judge to adjourn the cause, which was allowed on payment of costs. After remaining several days at Machynlleth in hopes of recovering the portmanteau, he was compelled to return to town without it. It was ultimately discovered at the lost luggage office, and restored to the plaintiff in safety.

In May, 1864, the plaintiff had occasion again to attend the same county court, touching the same matter, and was again a passenger by the defendants' line, taking with him the same deeds in a leather bag. On his arrival at Machynlleth, the leather bag was not to be found, and the plaintiff was in consequence again obliged to apply for an adjournment of the cause, which was granted upon the same terms as before.

[323] The plaintiff claimed compensation in this action for his loss of time, and tavern and other expenses on the first occasion, and the expenses he had incurred in

consequence of the two postponements of the trial, and also the expense of the two journeys which had thus been rendered abortive.

The defendants pleaded a plea founded upon the Carriers Act, 11 G. 4 & 1 W. 4, c. 68; and also a plea that the contents of the portmanteau and bag were not passengers' luggage within the meaning of the 66th section of their special act (a)¹.

The first plea was demurred to, on the ground that the Carriers Act applies only to the loss and not to damage resulting from the mere temporary detention of property (b).

On the part of the defendants it was contended that the plaintiff was not entitled to carry as "ordinary luggage" deeds and Bank of England notes, and that the claim in respect of the fruitless journeys (or at all events so much thereof as related to his journeys from Lunsford) and the postponements of the trial was too remote, as not being in the nature of damages which could reasonably be supposed to have been in the contemplation of the parties at the time of entering into the contract.

The learned judge thereupon left it to the jury to [324] say,—first, what damages the plaintiff had sustained, assuming that he was entitled to carry the deeds and bank-notes as personal luggage without paying for them,—secondly, what if he was not so entitled. The jury assessed the damages upon the first hypothesis at 44l. 1s., and upon the second at 20l.

A verdict was entered for the plaintiff for 44l. 1s., leave being reserved to the defendants to move to reduce it to 20l. or to such other sum as the court should think right.

Kemplay, in Easter Term last, accordingly obtained a rule nisi to reduce the verdict to 20l. or such other sum as the court should direct, on the grounds,—first, that the deeds, documents, and Bank of England notes were not the plaintiff's ordinary luggage which he was entitled to carry without paying for the same,—secondly, that the alleged loss of his journeys was too remote to be recoverable as damages against the defendants, and not such a damage or loss as the defendants could fairly and reasonably have contemplated.

Huddleston, Q. C., and Prideaux, now shewed cause. The question is what is a passenger's "ordinary luggage," within the meaning of the 66th section of the 9 & 10 Vict. c. civ. That it is not confined to necessary clothing for the person, is plain. A barrister travelling on circuit might perhaps be allowed to carry his wig and gown, and possibly a No. of Reports (a)²; a sportsman going to the moors, his gun; a medical man, his instruments and bandages; an artist, his box of colours and his easel. Why, then, should an attorney be precluded from carrying in the same way deeds and documents, and money to meet the exigencies of [325] the suit he is engaged in? It has been decided in this court that merchandize cannot be carried as personal luggage; *Cahill v. The London and North Western Railway Company*, 10 C. B. (N. S.) 154, in error, 13 C. B. (N. S.) 818. [Willes, J. The House of Lords have since decided the same way, upon an appeal from a decision of the Irish court of Common Pleas (a)³, without being made acquainted with our decision: *Belfast and Ballymena Railway Company v. Keys*, 9 House of Lords Cases, 556.] In *The Great Northern Railway Company v. Shepherd*, 8 Exch. 38, it was held that a carrier of passengers for hire is at common law only bound to carry their personal luggage; and therefore, if a passenger has merchandize among his personal luggage, or so packed that the carrier has no notice that it is merchandize, he is not responsible for its loss. Parke, B., there says that the term personal luggage "comprises clothing and such articles as a traveller usually carries with him for his personal convenience; perhaps even a small present, or a book for the journey, might be included in the term; but certainly not

(a)¹ The 9 & 10 Vict. c. civ., s. 66, enacts that "every passenger travelling upon the railway in a first-class carriage may take with him his *ordinary luggage* not exceeding 1 cwt., and every passenger travelling in a second-class carriage may take with him his ordinary luggage not exceeding 60 lbs weight, and every passenger travelling in a third-class carriage may take with him his ordinary luggage not exceeding 40 lbs. weight, without any charge being made for the carriage."

(b) See *Hearn v. The London and South Western Railway Company*, 10 Exch. 793. This plea was ultimately abandoned.

(a)² See *Munster v. The South Eastern Railway Company*, 4 C. B. (N. S.) 676.

(a)³ *Keys v. The Belfast and Ballymena Railway Company*, 8 Irish Com. L. Rep. 167.

merchandise, or materials bought for the purpose of being manufactured and sold at a profit,"—citing Angell on Carriers, § 115; Story on Bailments, 526, 5th edit. note. The definition given by Story, in § 499, is this: "By baggage, we are to understand such articles of necessity or personal convenience as are usually carried by passengers for their personal use, and not merchandise or other valuables, although carried in the trunks of passengers, which are not designed for any such use, but for other purposes, such as a sale, and the like." The learned editor of the 7th edition of that valuable work adds to this section, "But it has been said that, although passenger car-[326]-riers are not liable for merchandise when packed up with a traveller's baggage, if the baggage be lost; yet, if the merchandise be so packed as to be obviously merchandise to the eye, and the carrier takes it without objection, he is liable for the loss." The term baggage has been thought to include personal jewellery (*McGill v. Rowland*, 3 Barr. Penn. 451; and see *Booke v. Pickwick*, 4 Bingh. 218, 12 J. B. Moore, 447; *Norris v. Ben Stet. Steamboat Company*, 4 Bosw. 226); a watch in a trunk, valued at 94 dollars (*James v. Foorbes*, 10 Ohio R. 145; but see *Bonnet v. Marshall*, 9 Humph. R. 621); a set of carpenter's tools, to a reasonable amount (*Porter v. Hildebrand*, 2 Harris, Penn. R. 129); a pair of pistols (*Woods v. Devin*, 13 Ill. R. 746); *Davis v. The Southern Michigan Railroad*, 22 Ill. R. 281); money in a trunk to a reasonable amount bona fide intended for travelling-expenses and personal use. (*Jordan v. The Fall River Railroad Company*, 5 Cush. R. 70; *Illinois Central Railroad v. Copeland*, 24 Illinois, 332; the sum of 439 dollars was thought to be an unreasonable sum in *Davis v. Michigan, etc., Railroad*, 22 Illinois, 278); although on this point the decisions are not uniform: see *Grant v. Newton*, 1 E. D. Smith, 95, where the contrary is held; and see *Bonnet v. Marshall*, 9 Humphrey's R. 621. But not large sums of money, such as are carried merely for transportation, and not for convenience on the way (*Orange County Bank v. Brown*, 9 Wendell, 85); nor articles of merchandise, not intended for personal use: such as, 'thirty-eight pairs of new shoes, sixty pairs of stock for boys' shoes, and two papers of shoe-nails' (*Collins v. Boston and Maine Railroad*, 10 Cush. 506); nor for a box of jewellery carried as and for merchandise: *Richards v. Westcott*, 2 Bosw. 589" (a). As to the re-[327]-moteness of the damages, the

(a) The learned editor (Edmund H. Bennett) adds in a note to this section,—
 "In *Dibble v. Brown*, 12 Geo. 217, Nisbett, J., said: 'It remains, however, to inquire what is to be understood by baggage for which they are thus liable. And we are not guided in this inquiry by adjudications which settle a definite rule of universal application. From their usual course of business, when they carry a passenger, a contract is implied to carry also his baggage. They are presumed to be compensated in the fare for his transportation, and, I can very well believe, well compensated, because the amount of travel is greatly increased by the comfort and convenience of carrying baggage, and would be lessened, if for his baggage a passenger was required to pay freight. It is curious to remark, as I do en passant, that the law takes more care of a man's luggage than it does of his life and limbs: for the former, the carrier is liable as insurer against loss, except by the act of God and the public enemies; for the safety of the latter, he is bound only to extraordinary care and diligence. But, to return: to what articles, under the denomination of baggage, does this implied contract extend? Judge Story informs us that by baggage we are to understand such articles of necessity or personal convenience as are usually carried by passengers for their personal use, and not merchandise or other valuables, although carried in the trunks of passengers, which are not designed for any such use, but for other purposes, such as a sale and the like.' Story on Bailments, § 499. In *Orange County Bank v. Brown*, 9 Wendell, 115, 116, Judge Nelson says 'A reasonable amount of baggage, by custom or the courtesy of the carrier, is considered as included in the fare for the person: but courts ought not to permit this gratuity or custom to be abused, and, under pretence of baggage, to include articles not within the sense or meaning of the term, or within the object or intent of the indulgence of the carrier, and thereby defraud him of his just compensation, and subject him to unknown and illimitable hazards.' In *Hawkins v. Hoffman*, Bronson, J., says: 'An agreement to carry ordinary baggage may well be implied from the usual course of business: but the implication cannot be extended a single step beyond such things as the traveller usually has with him as part of his luggage. It is doubtless difficult to define with accuracy what shall be deemed baggage within the rule of the carrier's liability. I

more convenient rule seems to be that suggested by Crompton, J., in *Smeele v. Foord*, 1 Ellis & Ellis, 602. "I doubt," says that learned judge, "whether in these cases it is the duty of the judge to lay down more to the jury than that the [328] plaintiff is entitled to such damages as are the natural consequences of the breach of contract. The question what are such natural consequences is, I think, in each case rather for the jury than for the judge, just as it is for them, not for him, to assess the amount of damages."

[329] Kemplay, in support of the rule. The ordinary luggage of a passenger, whether by coach, by railway, or by steam-boat, must be that which he requires for his personal use and convenience. That cannot extend to deeds, even if the passenger's own property. [330] Still less can it embrace deeds which belong to a third person. There is nothing in the language of Story, or in that of Lord Wensleydale in the case

do not intend to say that the articles must be such as every man deems essential to his comfort; for, some men may carry nothing, or very little, with them when they travel, whilst others consult their convenience by carrying many things. Nor do I mean to say that the rule is confined to wearing apparel, brushes, razors, writing-apparatus, and the like, which most persons deem indispensable. If one has books for his instruction or amusement by the way, or carries his gun or fishing-tackle, they would undoubtedly fall within the term baggage, because they are usually carried as such. This is, I think, a good test for determining what things fall within the rule: 6 Hill's N. Y. R. 589, 590. It has been decided that, under the term baggage, merchandize, as silks or other fine articles, are not embraced (25 Wend. 458); nor large sums of money (9 Wend. 85); nor samples of merchandize (6 Hill's N. Y. R. 586). A watch is embraced, according to the Ohio courts: 10 Ohio R. 145. So far as these rulings go, the doctrine may be considered as settled, and it must be considered as settled in all cases falling within the reason of those rulings. When, however, all this is done, the subject is disencumbered of but little of the difficulty which environs it. Nor does the text of Story, or the opinions of Judges Nelson and Bronson, relieve it of embarrassment. When we settle down with Judge Story, upon the proposition that, by *baggage* is to be understood 'such articles of necessity or personal convenience as are usually carried by passengers, for their personal use,' we are still without a rule for determining what articles are included in baggage: for, such things as would be necessary to one man would not be necessary to another: articles which would be held but ordinary conveniences by A., might be considered incumbrances by B. One man, from choice or habit, or from educational incapacity to appreciate the comforts or conveniences of life, needs perhaps a portmanteau, a change of linen, and an indifferent razor: whilst another, from habit, position, and education, is unhappy without all the appliances of comfort which surround him at home. The quantity and character of baggage must depend very much upon the condition in life of the traveller,—his calling, his habits, his tastes, the length or shortness of his journey, and whether he travels alone, or with a family. If we agree further with Judge Story, and say that the articles of necessity or of convenience must be such as are *usually* carried by travellers for their personal use, we are still at fault, because there is in no State in this Union, nor in any part of any one State, any settled usage as to the baggage which travellers carry with them for their personal use. The quantity and character of baggage found to accompany travellers, are as various as are the countenances of the travellers. The negative part of Judge Story's definition, with more precision, furnishes a rule *pro tanto*. Baggage, he says, does not embrace merchandize, or other valuables not designed for personal use, but which are designed for other purposes, such as a sale or the like. We may safely say that it does not embrace merchandize or other articles which are intended to be sold. But it is not to be understood, I apprehend, that no article is embraced which may be classed with merchandize, or which is a valuable, other than such as is usual for personal use. Regard must be had to the quantity and value of the articles. A trunk of laces, for instance, although light and small in bulk, clearly is excluded. Their value would exclude them. The risk imposed upon the carrier is not that contemplated in the implied contract to carry *baggage*, and to be responsible for it. The liability in such a case would be wholly disproportioned to the compensation which he is presumed to derive from the fare of passengers. Besides, it is a fraud upon him to subject him to so great a hazard, without warning him of its existence."

referred to, which militates against that construction. To allow a man to carry his own deeds about with him as "ordinary luggage," would be imposing an intolerable burden upon railway companies.

ERLE, C. J. (stopping Kemplay). I think the rule must be made absolute to reduce the verdict to 20l. The question is confined to the damage claimed in respect of the deeds which the plaintiff was carrying on a journey to a court where litigation was going on in which those deeds were of importance to the plaintiff's client, and of the money which was also necessary with reference to the same object, viz. the plaintiff's professional duty. The loss in reference to these was not in my judgment a loss connected in any way with luggage intended for the personal use of the plaintiff on his journey. It is agreed on all hands that it is impossible to draw any very well-defined line as to what is and what is not necessary or ordinary luggage for a traveller; that which one traveller would consider indispensable, would be deemed superfluous and unnecessary by another. But the general habits and wants of mankind must be taken to be in the mind of the carrier when he receives a passenger for conveyance: and the law makes him responsible for all such things as may fairly be carried by the passenger for his personal use. When something is carried which [331] is manifestly not for personal use, or that which a traveller would ordinarily carry for his personal comfort or convenience, the carrier's responsibility ceases. For the articles which the plaintiff here was carrying, not for his own use, but for the service of another person, the company are not chargeable.

WILLES, J. I am of the same opinion.

BYLES, J. I am of the same opinion. A man's title deeds and securities do not, I think, fall within the description of "ordinary luggage." But, when those deeds and securities belong to another person, I think the case is clearer still. The responsibility of railway companies would be most alarmingly increased, if it were held that they could be charged with the safety of things like these. In this case, I see no distinction between the money and the deeds: though, under other circumstances (as my Brother Willes suggests to me), there might be a distinction.

MONTAGUE SMITH, J., concurred.

Rule absolute to reduce the verdict to 20l.(a).

[332] HANS PETER MOLLER AND OTHERS v. JECKS. May 29th, 1865.

Timber was consigned by the plaintiff's ship "Johan" to the defendant, and landed and delivered to him in a harbour by the statute for the regulation of which certain dues were payable thereon by him. The defendant failing to pay these dues, the "Johan" was detained for nine days by the harbour authorities, at the expiration of which time the master obtained her release by paying the demand himself:—Held that, —assuming that the defendant was by the statute liable to pay the dues, and that the detention of the vessel was justifiable,—the plaintiff was only entitled to recover the amount he had paid for the dues, but not damages for the time the vessel was detained; inasmuch as he might at once have procured her release by payment of the money.

This was an action upon a charterparty. The first count of the declaration stated that the plaintiffs and the defendant agreed by charterparty that the plaintiff's ship the "Johan" should with all convenient speed sail and proceed to Gefle (in the Gulf of Finland), or so near thereto as she might safely get, and that the defendant should

(a) See *Snow v. Watkins*, 1 C. B. (N. S.) 267. There, one Hulme, who had formerly been clerk to the plaintiff, an attorney, was subpoenaed as a witness in an action brought by his late employer to recover the amount of a bill of costs. Hulme put up at a public house of entertainment at Westminster kept by the defendant, bringing with him a bag containing, amongst other things, a letter-book belonging to the plaintiff. Whilst at the defendant's house, Hulme became indebted to the defendant for lodging and refreshments, and quitted without paying his bill, leaving behind him the bag with the letter-book, which the defendant refused to deliver up to the plaintiff on demand, claiming a lien for his bill against Hulme. And it was held that the claim of lien was valid.

And see *Butch v. The Eastern Counties Railway Company*, 16 C. B. 13.

there load her with a full and complete cargo of deals, battens, or other lawful merchandise, and that, being so loaded, she should therewith proceed to Great Yarmouth or Lowestoft, or as near thereunto as she might safely get, always afloat, and there deliver the same on payment of freight at certain rates therein agreed, and that the defendant should have fourteen days (Sundays excepted) for loading the said ship and discharging, and ten days on demurrage over and above the said laying days, at 3l. per day; that afterwards the said ship sailed to Gefle aforesaid, and was there loaded by the defendant with a full and complete cargo as agreed; that afterwards, on signing the bills of lading of the said cargo, the said ship was ordered to Lowestoft, and the plaintiff thereupon carried the said cargo in the said ship to Lowestoft aforesaid, and there delivered the same to the defendant as agreed; that all conditions were fulfilled, and all things were done and happened, and all times elapsed necessary to entitle the plaintiffs to have the said charterparty performed by the defendant on his part, and to maintain this suit: and that the defendant kept the said ship on demurrage ten days beyond the periods as agreed upon for loading and discharge as aforesaid, and thereby became liable to pay to the plaintiff 30l. for demurrage as aforesaid, but had not paid the same.

[333] There was also a common count for demurrage, a count for money and harbour-dues paid for the defendant, a count for work done and materials provided, and a count upon accounts stated.

The defendant, besides a traverse of all the material allegations in the declaration, pleaded, as to so much of the plaintiff's claim as related to the alleged keeping by the defendant of the ship on demurrage, that the plaintiffs hindered and prevented the said ship from being unloaded, and by their own acts and defaults caused the said ship to be detained, to wit, for the time during which the defendant was alleged to have kept the said ship on demurrage: and, as to the claim for money paid for harbour-dues, the defendant paid into court 9l. 14s. 3d. Issue, and damages *ultra*.

The cause was tried before Cockburn, C. J., at the last Spring Assizes at Norwich. The facts which appeared in evidence were as follows:—The plaintiffs are the owners of the Swedish vessel "*Johan*," whereof the plaintiff Hans Peter Möller is master. The defendant is a timber-merchant at Norwich. On the 25th of July, 1864, Messrs. Hinde & Gladstone, of London, merchants, as agents for the defendant, chartered the "*Johan*" on a voyage from London to Gefle to load a cargo of deals and battens, and to proceed therewith to the ports of Great Yarmouth or Lowestoft, as ordered on signing bills of lading. By the terms of the charterparty, the cargo was to be brought alongside and taken from alongside by the merchants, according to the custom of the respective ports. By indorsement on the bill of lading, it appeared that seven working days were consumed in loading the cargo at Gefle.

The "*Johan*" in due course proceeded to Lowestoft, where she arrived and was reported at the Custom [334] House on the 14th of October, 1864. She proceeded on that day to a place of discharge called Lucas's Wharf, where she had been ordered by one Rounce, who acted both for the ship and for the defendant. This, it appeared, was a mistake: on the following day the ship was ordered by the defendant to proceed to the Great Eastern Railway Wharf, where she remained until the 17th, when she was ordered by the defendant to proceed to his own wharf on the other side of the harbour. On the 18th the unloading commenced: but, in consequence of the defendant not having provided the necessary hands to receive the cargo from alongside, pursuant to the charterparty and the custom of the port, but requiring the crew to carry the deals, &c., from the ship on to the quay, the cargo was not entirely landed until the 25th, making seven working days (exclusive of the day of arrival) beyond the fourteen laying days allowed by the charterparty. The freight was paid on the 26th.

By the act for the regulation of the harbour of Lowestoft (7 & 8 Vict. c. xlii.), certain dues are payable on the landing of goods there; and vessels are not allowed to clear out without a pass from the merchant to indicate that the dues have been paid. It was the duty of the consignee under that statute to pay these dues (which amounted to 9l. 14s. 3d.); but, as he failed to do so, though repeatedly urged by the captain of the "*Johan*," the captain, after a detention of nine days, paid them himself. For this the plaintiff claimed demurrage at 3l. per day for those nine days.

On the part of the defendant it was contended that the harbour authorities had no right under the statute to detain the ship for dues payable in respect of cargo;

and, further, that, if they had, the captain might have paid the money and called upon the defendant to reimburse him, but could not by omitting to adopt that [335] course entitle himself to demurrage for so long as he chose to stay.

Under the direction of the learned judge a verdict was entered for the defendant, leave being reserved to the plaintiff to move to enter the verdict for him for 27l. if the court should be of opinion that the defendant was liable for the nine days' detention, and that the harbour authorities had a right to detain the vessel until the dues were paid.

Keane, Q. C., in Easter Term last, accordingly obtained a rule to shew cause why a verdict should not be entered for the plaintiff for 27l. on the ground that the defendant was liable for the detention of the vessel after discharge of the cargo, during so many days as the statutable duties on the cargo were unpaid. To shew that the dues in question were payable by the consignee of the cargo, and that the ship was liable to detention for their non-payment, he relied mainly upon the 93rd and 111th sections of the local act. Section 93 enacts "that there shall be paid to the said company of proprietors (a), or to such person or persons as they shall appoint to collect and receive the same, for and upon all goods, wares, and merchandize conveyed inwards or outwards, or imported or exported to or from the said harbour, or carried upon the said rivers, lake, broad, dyke, cuts, and navigation, in sea-borne vessels, such rates or duties as the said company of proprietors shall order or direct to be paid, not exceeding the rates or duties contained in the schedule to this act annexed marked (A.), *that the said rates and duties shall be paid by the master or commander, or other person or persons having the command or charge of any ship or sea-borne vessel in which the same shall* [336] *be imported, exported, or carried, or by the merchant or merchants or other person or persons conveying, exporting, or importing, or carrying such goods, wares, and merchandize, or into whose custody or possession the same shall be delivered, or by whom the same shall be shipped respectively,* upon the delivery or shipping of the same respectively." And the 111th section enacts "that, in case any master or commander, owner or owners of any ship or other sea-borne vessel, charged and chargeable with any rates or charges allowed to be taken and demanded by this act, shall refuse to pay the same, then and in such case it shall be lawful for the directors of the said company, or such person or persons as they shall appoint to be their collector or collectors, receiver or receivers, or any or either of them, from time to time to go on board any such ship or vessel to demand, collect, and receive the same, and, *on the non-payment thereof, to take and distress every ship or vessel,* and all her tackle, apparel, and furniture, or any part thereof, either on board or on shore, and the same to detain until he or they be paid and satisfied the said rates and charges: and, in case of any neglect and delay in payment thereof, then it shall be lawful for the said directors, or such person or persons as they shall have appointed, and shall from time to time appoint as aforesaid, their collector or collectors, receiver or receivers, to cause the same to be appraised by one or more sworn appraiser or appraisers, or other sufficient persons, and afterwards to sell the said distress and distresses, and therewith to satisfy himself or themselves, as well for and concerning the said rates and charges so neglected or delayed to be paid, and for which such distress and distresses shall be taken as aforesaid, as also for his or their reasonable charges in taking, keeping, appraising, and selling such distress, rendering to the master, commander, or owner of the [337] said ship or vessel in, to, or from which such distress shall be so taken or belong, the overplus (if any there shall be) on demand, and, if any owner, consignee, or consignee respectively of any coals, timber, goods, wares, or merchandize chargeable with any of the rates or charges mentioned in this act, or allowed to be taken under the provisions of this act, shall neglect or refuse to pay any of the said rates or charges before such coals, goods, timber, wares, or merchandize shall be shipped or removed from the place where the same shall be landed (as the case may be), it shall be lawful for the said directors, or their receiver or receivers, collector or collectors, to detain the said coals, timber, goods, wares, and merchandize till the said rates and charges, together with the reasonable costs and charges of keeping the said coals, timber, goods, wares, and merchandize, shall be paid and satisfied: and, in case such coals, timber, goods, wares, and merchandize shall happen to be removed before the rates or charges payable for the same shall be fully paid, then it shall be lawful for the said directors, or their collector or collectors, receiver

(a) "The Company of Proprietors of the Norwich and Lowestoft Navigation."

or receivers, to distrain and take any goods or chattels of the owner, consignor, or consignee respectively, and to detain and sell the same in manner hereinbefore mentioned; or the said company shall and may prosecute any action or actions at law for recovery of the said rates or charges."

O'Malley, Q. C., and A. K. Stephenson, now shewed cause. By the local act, two sets of tolls or dues are payable, one in respect of the vessel (s. 96), the other in respect of the merchandize on board (s. 93); and full effect will be given to the words of the 111th section of the local act, by holding that the ship may be detained for the former, and the goods distrained for [338] the latter. The officers of the harbour had no right to detain the ship for the dues payable by the consignee of the timber. And, even if they had, the plaintiff should have paid the money at once, and called upon the plaintiff to reimburse him, instead of waiting nine days, and so imposing a larger burthen upon the defendant. Besides, there was no evidence of actual detention. [Erle, C. J. No doubt, if the vessel had attempted to leave the harbour, she would have been stopped. Willes, J. "Demurrage" means a compensation for delay or detention of the ship by reason of the cargo not being taken out of her according to the terms of the charterparty. The claim here is for something altogether different.] There is no count applicable to it.

Keane, Q. C., and Markby, in support of the rule. The verdict is to be entered for the plaintiff for 27l. if the defendant was the person who ought to have paid the dues in question, and the harbour authorities had power to detain the vessel by reason of his default. That was the only matter reserved for the consideration of the court. If any objection had been taken to the frame of the record, the plaintiff would have applied for an amendment. That the dues in question were payable by the consignee of the cargo is clear from the act of parliament and the custom of the harbour of Lowestoft. [Erle, C. J. Under s. 93, the master, it would seem, is chargeable. He may recover the amount from the consignee. Here, the consignee has paid it. I cannot see what more the plaintiff can have.] Is it reasonable that a foreign captain coming to an English port, without money, it may be, and without credit, should be called upon to pay another man's debt? The plaintiff clearly was entitled to wait a reasonable time to see if the defendant would pay [339] the dues and release his ship. [Erle, C. J. At whose expense?] At the expense of the party in default.

ERLE, C. J. I am of opinion that this rule should be discharged. I do not think it necessary to give any adjudication upon the construction of the statute. On the part of the defendant it has been insisted, that by the 93rd section of the act the dues are charged upon the ship; and that by s. 111 the ship was liable to detention to enforce payment. I do not say that this contention is well founded: but, for the purpose of this judgment, I assume it to be right; and, so assuming, I think the plaintiff has failed to establish his right to the 27l. The harbour authorities, it appears, made a claim on the plaintiff for 9l. 14s. 3d. for harbour-dues payable in respect of the cargo, which were properly, as between the parties, payable by the defendant. The proper course for the captain to have pursued was to pay the sum demanded, and sue the defendant as for money paid to his use. That was the appropriate remedy: and the declaration here contains a count for money paid; and under that the defendant has paid the money. The matter now in dispute is, whether the plaintiff can call upon the defendant to pay 3l. a day for the detention consequent upon his allowing the demand to remain unliquidated. There is no count in the declaration that is appropriate to such a claim. Assuming that the defendant ought to have paid it, the form of declaring would be in case for the breach of a statutory duty whereby a burthen was cast upon the plaintiff. But I cannot see a sign of actual damage which has resulted to the plaintiff from the defendant's breach of duty. If the plaintiff had paid the money, there would have been no detention. I do not mean to lay it down as an universal proposition that the re-payment of the money [340] in all cases cures the breach of duty. I give this judgment with some dissatisfaction, because it does not very clearly appear either from the learned judge's notes or the statements of the respective counsel how the case was put at the trial. But I am unable to find any evidence to sustain such a count as I have supposed.

WILLES, J. I also think the rule should be discharged. I understand the reservation to have been, whether on the record as it stands, or as it might be framed by any amendment, the plaintiff is entitled to recover the 27l. As the record stands, the plaintiff clearly is not entitled to recover that sum. There is a count for demurrage:

and there is a count for money paid. As to the latter, money has been paid into court. If any amendment were made, it would be by expanding the count for money paid into a special count claiming damages against the defendant for not having paid harbour-dues which we assume he ought to have paid. Having read the notes of the learned judge attentively, and listened to the arguments at the Bar, I see no evidence upon which such a count could be sustained. It appears that the cargo was all cleared out of the ship by the 25th of October, and the freight, &c., paid to the master on the 26th. The defendant, erroneously it may be, objected to pay the 9l. 14s. 3d. for dues payable for landing the cargo. The master might and ought to have paid those charges and sailed out of the harbour, resorting to his remedy against the merchant afterwards. A man has no right to aggravate damages against another by the course of proceeding adopted by the plaintiff here. It seems to me that the amendment, if made, could at the most only entitle the plaintiff to nominal damages, and therefore it ought not to be made at all.

BYLES, J. I am of the same opinion. I say nothing [341] as to the construction of the statute. Upon the declaration as it stands, it is plain that the plaintiff cannot recover the 27l. And it is not a case for amendment.

MONTAGUE SMITH, J. I also disclaim giving any opinion upon the construction of the statute: because, assuming that the harbour authorities had a right to detain the plaintiff's vessel for non-payment of the dues payable in respect of the cargo, I think the plaintiff is clearly not entitled to recover the 27l. The form of the rule induces me to think that it was not the mere question as to the construction of the statute that was intended to be reserved for the court. The plaintiff had no right to keep the ship at Lowestoft until the defendant paid the dues. There may be cases where a party might have a right to recover substantial damages for the defendant's failure to pay money, where the sum which the plaintiff was called upon to pay in consequence of the defendant's default was a very large one. But, on looking through the evidence here, I see nothing to warrant the damages which the plaintiff claims. He might as well have paid the money on the first day as on the ninth. He was probably liable as well as the consignee. He has got his money back, if he was not; and I do not see what further damage he has sustained.

Rule discharged.

[342] IN THE MATTER OF AN ARBITRATION BETWEEN WILLIAM NEWTON AND JOSEPH HETHERINGTON. June 2nd, 1865.

1. A lease contained a proviso that, in case any disputes and differences should arise between the parties, they should be referred to two arbitrators, one to be chosen by each party, and that, if either of them should neglect to name an arbitrator on his part within seven days after notice of the appointment of an arbitrator by the other, the arbitrator so appointed should act for both: and it was further agreed that "the submission of the said parties to the award of the said arbitrators or arbitrator might at the instance of either party be made a rule of court."—Disputes having arisen, the lessor appointed an arbitrator in writing, and gave notice in writing to the lessee that he had done so: the latter did not appoint an arbitrator on his part; whereupon, after due notice, the arbitrator appointed by the lessor proceeded *ex parte*, and made an award:—Held, upon the construction of the 17th section of the Common Law Procedure Act, 1854, that, upon filing the appointment, with an affidavit by the lessor verifying his signature thereto, the submission might be made a rule of court. —2. Held also, that, by the combined effect of the 17th and 26th sections, an affidavit by the attesting-witness to the lease was not necessary.

By an indenture of lease of the 12th of October, 1859, between William Newton of the one part, and Joseph Hetherington of the other part, it was witnessed that, in consideration of the rent therein reserved, and of the covenants and agreements therein entered into by Hetherington, Newton did demise and lease unto Hetherington, his executors, &c., certain rooms in a certain mill situate in Store Street and Lark Street, in Manchester, together with certain premises adjoining, and certain fixtures thereto belonging, for twenty-one years from the 25th of March, 1859, at the rent of 200l. per annum: and, amongst other covenants, it was provided that "for the purpose of settling disputes, it was thereby agreed and declared by and between the said

J. Hetherington and W. Newton, that, in case any disputes or differences concerning any matter or thing thereinbefore mentioned or expressed or intended to be referred to arbitration, or any other dispute or difference between the said J. Hetherington and the said W. Newton, or between their respective heirs, executors, administrators, or assigns touching or concerning the said lease, or any of the covenants or agreements therein contained, or touching or concerning any matter or thing to be done, observed, or performed by any person or persons by virtue of the said [343] lease, the subject-matter of every such dispute or difference should be referred and left to the arbitration of three indifferent persons, one to be named by each party in dispute, and the third by the two so first chosen, and the award of such three arbitrators or of any two of them should be binding and conclusive on all parties; and, if either party should neglect to name an arbitrator on his or their part within seven days after notice in writing from the other of the said parties requiring him or them so to do, then the dispute should stand referred to the person who should have been named by the party giving such notice: and, in either of the said cases, the determination of the arbitrators or arbitrator should be final and conclusive on both the said parties in regard to the matter aforesaid, and their and his respective heirs, executors, administrators, and assigns: and it was further agreed that the submission of the said parties to the award of the said arbitrators or arbitrator might at the instance of either party be made a rule of any of Her Majesty's courts of record at Westminster."

Differences having arisen between the parties in reference to the payment of certain poor-rates and township and highway-rates, Mr. Newton, on the 26th of October, 1864, caused the following notice to be served on Mr. Hetherington:—

"Manchester, 26th October, 1864.

"Sir, —Disputes and differences concerning certain matters and things arising out of the lease bearing date the 12th day of October, 1859, and made by me to you, of rooms in a certain mill and of land in Lark Street and Store Street, in the city of Manchester, in the county of Lancaster, with steam-power, for the term of twenty-one years from the 25th day of March, 1859, having arisen between me and you, I desire to have the same settled by arbitration, in terms of the [344] proviso in the said lease in that behalf contained. I therefore hereby give you notice that I have this day appointed Mr. E. Corbett, of Manchester, surveyor, to be the arbitrator on my behalf: And I hereby give you further notice within seven days from the service of this notice on you to name an arbitrator to act on your behalf in the matter of the said disputes and differences: And I hereby give you further notice that, if you shall neglect to name an arbitrator to act on your behalf within seven days after the service of this notice on you requiring you so to do, then the aforesaid disputes and differences between me and you will, according to the proviso in the said lease in that behalf contained, stand referred to the said Edward Corbett alone, whose determination thereon will be final and conclusive."

The appointment of Corbett as arbitrator for Newton, was as follows:—

"To Mr. Edward Corbett.

"Manchester, 26th October, 1864.

"Sir, —I hereby appoint you arbitrator to act on my behalf in respect of certain disputes and differences which have arisen between me and Mr. Joseph Hetherington, of Manchester, machinist, arising out of certain provisions in a lease bearing date the 12th day of October, 1859, for the term of twenty-one years from the 25th day of March, 1859, of certain rooms and land, with steam-power for the working of the premises comprised in the said lease. And I beg to inform you that, by a notice in writing bearing even date herewith, I have called upon the said Joseph Hetherington to nominate and appoint an arbitrator to act on his behalf in respect of the before-mentioned disputes and differences existing between us. I inclose you the lease.

"WILLIAM NEWTON."

[345] Hetherington did not within the time limited or at any time appoint an arbitrator to act on his behalf, and Newton, on the 9th of November, called upon Mr. Corbett to proceed as sole arbitrator. Accordingly, Mr. Corbett on the same day appointed the 12th for proceeding with the reference, and gave Hetherington due notice of the time and place so appointed. Hetherington not attending on that

day, a peremptory appointment for the 14th was served upon him, and afterwards a further notice that the arbitrator would on the 17th proceed *ex parte*. Hetherington still neglecting to attend, the arbitrator proceeded, and, on the 10th of January, 1865, made his award in favour of Newton for 128l. 10s. 5d.

Upon an affidavit of these facts, and verifying the signature of Hetherington to the counterpart lease,

Crompton Hutton, in Easter Term last, obtained a rule calling upon Hetherington to shew cause why the indenture of the 12th of October, 1859, containing an agreement for submission to arbitration, and the appointment of an arbitrator made in pursuance thereof, should not respectively be made a rule of this court.

R. G. Williams now shewed cause. It is the submission that is to be made a rule of court. The question is whether there is here any such submission to arbitration as can be made a rule of court either under the 9 & 10 W. 3, c. 15, or under the Common Law Procedure Act, 1854. The 1st section of the 9 & 10 W. 3 expressly provides that it shall be lawful for the parties to a reference "to agree that their submission of their suit to the award or umpirage of any person or persons should be made a rule of any of His Majesty's courts of record which the parties shall choose, and to insert such their agreement in their submission, or the [346] condition of the bond or promise whereby they oblige themselves respectively to submit to the award or umpirage of any person or persons, which agreement being so made and inserted in their submission or promise, or condition of their respective bonds, shall or may, upon producing an affidavit thereof made by the witnesses thereunto, or any one of them, in the court of which the same is agreed to be made a rule, and reading and filing the said affidavit in court, be entered of record in such court, and a rule shall thereupon be made by the said court that the parties shall submit to and finally be concluded by the arbitration or umpirage which shall be made concerning them by the arbitrators or umpire, pursuant to such submission." There is no such affidavit here. The 17th section of the 17 & 18 Vict. c. 125, enacts that "every agreement or submission to arbitration by consent, whether by deed or instrument in writing not under seal, may be made a rule of any one of the superior courts of law or equity at Westminster, on the application of any party thereto, unless such agreement or submission contain words purporting that the parties intend that it should not be made a rule of court." That section does not repeal the statute of W. 3, but only extends its operation to instruments which do not contain a provision for making them rules of court. Then the 26th section of the Common Law Procedure Act,—which provides that "it shall not be necessary to prove by the attesting-witness any instrument to the validity of which attestation is not requisite, and that such instrument may be proved by admission or otherwise, as if there had been no attesting witness thereto,"—does not apply to a case where the production of an affidavit by an attesting-witness is required as a condition precedent. The proviso in this lease contemplates that it is some other document that is to be made a [347] rule of court. In *Ex parte Glasgow*, 5 Harl. & Colt. 442, it was held that, where parties to a deed covenant to refer disputes which may arise to arbitrators to be chosen by them, and on disputes arising appoint arbitrators, *the submission is by parol*, and therefore cannot be made a rule of court under the 17th section of the Common Law Procedure Act, 1854. Pollock, C. B., delivering the judgment of the court after time taken to consider, says: "There is an obvious distinction between an agreement to refer to an arbitrator *to be appointed* any matter of difference which may thereafter arise, and an agreement to refer to an arbitrator named a matter which has already become the subject of dispute. If there be a general agreement to refer future disputes to one or more persons to be appointed, and in pursuance of that disputes are referred, the submission is by parol, although the agreement is by deed; and a parol submission cannot be made a rule of court." It is impossible to distinguish that case from the present. [Erle, C. J. Here, the appointment is in writing.] One of the parties appoints an arbitrator, and calls upon the other to appoint. He omits to do so. There is no agreement in writing by the two to appoint that one arbitrator: therefore, there is no complete submission in writing. And there is no affidavit verifying the signature even of the one who purports to appoint.

C. Hutton, in support of his rule, referred to s. 13 of the Common Law Procedure Act, 1854 (a).

(a) Which enacts that, "when the reference is or is intended to be two arbitrators,

[348] ERLE, C. J. I am of opinion that this rule should be made absolute. The 9 & 10 W. 3, c. 15, s. 1, and the Common Law Procedure Act, 1854, authorize the making of a submission *in writing* a rule of court. The instrument upon which the question arises here contains a submission upon a contingency,—in the event of any difference or dispute arising between the parties, one is to appoint an arbitrator, and by notice to call upon the other to appoint one on his part, and then the two are to appoint a third, and the award is to be made by the three or by any two of them: but, in the event of one party, on receiving notice of the appointment of an arbitrator by his adversary, refusing or neglecting to appoint one on his behalf, the arbitrator already appointed is to be the arbitrator of both, and his award is to be final and binding. I will assume, on the authority of *Ex parte Glasgow*, 3 Hurlst. & Colt. 442, that, to make this a complete submission, an arbitrator should be appointed *in writing*. *Parkes v. Smith*, 15 Q. B. 297, is a distinct authority to shew that this is a submission which may be made a rule of court. It was there held that a covenant by indenture (of partnership), that any differences which might thereafter arise between the parties touching the matter of the indenture should be, and they were thereby, [349] referred to an arbitrator named, constituted a submission which might be acted upon and made a rule of court under the statute 9 & 10 W. 3, c. 15, when such differences arose. The only distinction between that case and this is, that there the name of the arbitrator was inserted in the deed, whereas here the deed contains a submission to arbitration without naming the arbitrator. In pursuance of the stipulation in the indenture, one party has named an arbitrator, and has called upon the other to name one on his part; the latter refuses to do so: and the question is whether we can take notice by affidavit that the contingency has happened upon the happening of which the arbitrator appointed by one party was to be the arbitrator authorized to act for both. I am of opinion that we can. We therefore make the deed, with the appointment verified by affidavit, a rule of court, under the authority of the statutes. It is very like the ordinary case of the appointment of an umpire on two arbitrators differing. It is only upon the contingency of the arbitrators disagreeing that the umpire is to be appointed to act. In that case the submission may be made a rule of court, though there be no writing (except the recital in the award) to shew that the arbitrators have disagreed. The rule must be made absolute.

WILLES, J. I am of the same opinion. The first objection,—that there is no affidavit by the attesting-witness,—is founded upon the notion that this is an application under the 9 & 10 W. 3, c. 15. But the combined effect of the 17th and 26th sections of the Common Law Procedure Act, 1854, makes it unnecessary to have an affidavit by the attesting-witness, it not being necessary to the validity of the lease that there should be an attesting-witness. The second ob-[350]-jection is, that the affidavit does not allege that the appointment of the arbitrator by Newton was signed. That becomes only an obstructive objection, when the 46th section of the Common Law Procedure Act, 1854, is referred to; which provides that, “upon the hearing of any motion or summons, it shall be lawful for the court or judge, at their or his discretion, and upon such terms as they or he shall think reasonable, from time to time to order such documents as they or he may think fit to be produced, and such witnesses as they or he may think necessary to appear and be examined *vivâ voce* either before such court or judge, or before the master, and, upon hearing such evidence, or reading the report of such master, to make such rule or order as may be just.” The court may apply that provision to any rule that comes before it. Mr. Williams does not suggest that the signature was not attached to the document,

one appointed by each party, it shall be lawful for either party, in case of the death, refusal to act, or incapacity of any arbitrator appointed by him, to substitute a new arbitrator, unless the document authorizing the reference shew that it was intended that the vacancy should not be supplied; and if on such reference one party fail to appoint an arbitrator, either originally or by way of substitution as aforesaid, for seven clear days after the other party shall have appointed an arbitrator, and shall have served the party so failing to appoint with notice in writing to make the appointment, the party who has appointed an arbitrator may appoint such arbitrator to act as sole arbitrator in the reference, and an award made by him shall be binding on both parties as if the appointment had been made by consent: provided, however, that the court or a judge may revoke such appointment, on such terms as shall seem just.”

and therefore we will assume that it was. As to the third objection, which was founded upon the case of *Ex parte Ghansher*, 3 Hurlst. & Colt. 442, it is enough to say that that case is inapplicable, because there the submission was by parol. Here, it is clear that there was an appointment in writing, which by the agreement of the parties was to become the appointment of both, on the refusal of one upon due notice to appoint an arbitrator on his part.

BYLES, J., and MONTAGUE SMITH, J., concurring,

Rule absolute, "upon filing in the offices of the Masters of this court the said original appointment, with an affidavit by the said William Newton verifying his signature to the same,"—without costs on either side.

[351] RYLANDS AND ANOTHER v. KREITMAN. June 10th, 1865.

A contract for the sale of cotton of a given quality is not performed on the part of the seller, by a tender of a larger quantity, out of which the buyer is required to select those bales which answer the description of the cotton contracted for.

This was an action for not accepting cotton according to contract.

The first count of the declaration alleged that the defendant bought of the plaintiffs 500 piculs of China cotton at 19 $\frac{3}{4}$ d. per lb., guaranteed "fair," and to be delivered in the month of June, 1864; in case of dispute, the matter to be referred to two respectable brokers, as to quality, and allowance to be made: the cotton to be delivered to the buyer in merchantable condition: Breaches, non-acceptance, and notice that the defendant would not accept.

The second count stated the contract as in the first, and alleged that the defendant gave such further time for delivery as might be necessary for making the cotton merchantable: Breaches, non-acceptance, and notice that the defendant would not accept: Claim, 600l.

The defendant pleaded, —first, to the first count, non assumpsit,—secondly and fourthly, to the two breaches in the first count, that the plaintiffs were not ready and willing to deliver the cotton required by the contract,—thirdly, a traverse of the allegation of notice that the cotton was ready to be delivered,—fifthly, mutual waiver of the contract,—sixthly, that a dispute arose before breach, which was referred to two brokers, who awarded that the cotton was not merchantable, and that the plaintiffs would not make the same merchantable or deliver other cotton in its stead,—seventhly and twelfthly, a traverse of the breaches in both counts,—eighthly, to the last count, a traverse of the contract and notice,—ninthly, to the last count, that the plaintiffs were not ready and willing to deliver,—tenthly, a traverse of notice to the defendant [352] that the plaintiffs were ready to deliver,—eleventhly, a traverse that the plaintiffs were ready and willing to make the cotton merchantable.

The plaintiffs joined issue on all the pleas, and also replied to the second plea that they were ready to deliver the cotton, and, to the fourth plea that, at the time of the notice given by the defendant, it was not necessary that the cotton should be ready for delivery. Issue.

The cause was tried before Mellor, J., at the last Spring Assizes at Liverpool. The facts were as follows:—On the 10th of May, 1864, the plaintiffs contracted to sell to the defendant 500 piculs of China cotton at 19 $\frac{3}{4}$ d. per lb., to be delivered in the month of June next, with a stipulation that, in case of dispute, the matter should be referred to two respectable brokers, as to quality, and allowance to be made. On the 4th of June, the sellers declared 287 bales of China cotton by the "Offer," and 20 bales by the "Jane Leach." The quality was objected to, and the matter referred to arbitrators. The 287 bales by the "Offer" were found not to be in merchantable condition: and of the 20 bales by the "Jane Leach," five were not merchantable, but fifteen were: the rest was not made merchantable until the end of July. An attempt was made to prove a declaration of a further quantity before the end of June: but this the jury negatived. The defendant refused to accept any part of it; and the 500 piculs were afterwards re-sold, 420 piculs at 18d. and 80 piculs at 18 $\frac{1}{4}$ d. per lb.

Two cotton-brokers of experience proved that the usage of the trade on contracts of this sort was, that the seller might deliver the cotton in one or several quantities within the stipulated time; and that, if the seller is not in a position to complete the

full quantity within the time limited, the buyer has the option, after [353] giving notice, to go into the market and complete it, claiming any difference against the seller.

On behalf of the defendant it was submitted that there was no evidence of readiness and willingness on the part of the plaintiffs to deliver the cotton within the time limited by the contract, the cotton declared not being made merchantable in the month of June; and that the usage spoken to by the plaintiffs' witnesses did not shew that the defendant was bound to select the sound out of the unsound of the twenty bales tendered ex "Jane Leach."

For the plaintiffs it was insisted that the defendant was at all events bound to accept the 15 bales.

The learned judge told the jury that the question for them was, whether the plaintiffs were ready and willing and able to deliver 500 piculs of China cotton to the defendant, of fair quality and in merchantable condition, in the month of June; observing that the plaintiffs, by the usage of the trade, were not bound to deliver all at once. He further told them that notice that the cotton was ready for delivery must be given; and he left it to them to say (if it was a question for them) whether the notices given were sufficient.

The jury found that at no time in the month of June were the plaintiffs able to deliver more than fifteen bales in a merchantable condition, and that the second notice was not proved.

A verdict was thereupon entered for the defendant, leave being reserved to the plaintiffs to move to enter the verdict for them for 10l. 1s. 6d. if the court should think that they were under the circumstances entitled to recover in respect of the fifteen bales.

E. James, Q. C., in Easter Term last, obtained a rule nisi accordingly.

[354] Mellish, Q. C., and G. Williams, now shewed cause. It may be conceded that the plaintiffs proved a custom obliging the buyer on a contract like this to take part of the quantity contracted for, allowing the seller to tender the rest afterwards: but that custom does not authorize the seller to bind the buyer by a tender of a large number of bales, and cast upon him the responsibility of selecting out of them those which are merchantable. Here, the plaintiffs make a declaration of 307 bales; and they tender 287 bales by the "Offer," and 20 by the "Jane Leach": of these, only 15 of the latter were in a merchantable condition. Could it be said under these circumstances that the plaintiffs were *ready* to deliver the cotton according to the contract? In *Cunliffe v. Harrison*, 6 Exch. 903, in an action for goods sold and delivered, to recover the price of ten hogsheads of claret, it appeared that the defendants, having verbally ordered certain hogsheads of the plaintiff, the latter, in October, sent them fifteen, whereupon the defendants, by letter, informed the plaintiff that they had requested ten only should be shipped, and that they could take that number only on their proving satisfactory, and that they would hold the other five on the plaintiff's account. In answer to this, the plaintiff replied by letter, which, after stating that he regretted that any misunderstanding as to the defendants' order should have taken place, and after stating that other vintages were inferior, and that the wine sent was of superior character, concluded thus,—"You will ascertain in the Spring whether you have room for it; and you have seen that we are not stringent with old customers as to credit." The defendants placed the wine in a bonded warehouse in their own names, and shortly afterwards tasted the wine, and disapproved of it, and gave the plaintiff notice in the early part of April that they would not take any part of it. It was held, first, [355] that, supposing there was a written contract by which the defendants were bound to take ten hogsheads of claret, the contract was not executed, as *fifteen*, and not *ten*, had been delivered, and no particular ten had been selected out of the fifteen; and, secondly, that there was no acceptance within the 17th section of the Statute of Frauds, inasmuch as the defendants under the contract had the option of rejecting the wine in the Spring, and they had availed themselves of that option. Parke, B., there says: "The delivery of fifteen hogsheads, under a contract to deliver ten, is no performance of that contract: for, the person to whom they are sent cannot tell which are the ten that are to be his; and it is no answer to the objection to say that he may choose which ten he likes, for that would be to force a new contract upon him." And Martin, B., says: "Assuming that there was evidence of a contract for ten, and that the defendants had expressed themselves satisfied with the quality of the wine, and had agreed to take ten out of the fifteen, I am of opinion that the plaintiff could not maintain this action for the ten; for, I think that the ten ought to have been

separated from the fifteen." That is confirmed by *Lerry v. Green*, 8 Ellis & B. 575, in error, 1 Ellis & Ellis, 969. There, in an action for goods sold and delivered, with a plea of never indebted, it appeared that the defendant ordered of the plaintiffs certain specified quantities of particular kinds of crockery, to be sent to him by railway. The plaintiffs sent a crate containing a smaller quantity of the particular goods, also other goods not ordered, and of such a nature as to be distinguishable from the others: and they sent one invoice debiting the defendant with the contents of the whole crate. The defendant refused to receive them, assigning as his reason that they were out of time. At the trial it was objected [356] that the defendant was not bound to take any part of the goods, because of the manner in which they were sent, accompanied by goods not ordered. Leave was reserved to enter a nonsuit on this ground, subject to which a verdict was found for the plaintiff for the price of the goods which corresponded with the order. Upon the argument of the rule, the court of Queen's Bench was divided in opinion: but the Exchequer Chamber, on appeal, made the rule absolute. That is a much stronger case than this. Willes, J., there says: "The question here is the same as would have been raised if the action had been brought for not accepting, viz. whether the goods sent were those which the defendant had ordered, and was bound to pay for. Now, in an action for not accepting, the plaintiffs could not have supported an averment that they were ready and willing and offered to deliver those goods so ordered: they could only have averred that they offered to deliver part of those goods, together with certain others. Such an averment would be bad in substance. That would seem to follow from the decision in *Dixon v. Fletcher*, 3 M. & W. 146. It may be, no doubt, that there are some cases in which an addition of other articles to the goods ordered might make no substantial difference: and a jury might consider those others as mere dunnage, added for the sake of secure package. But I think it is impossible to look in that light at the articles added here, considering their nature, and that they were put in at a stated price. Adopting the view taken by Lord Campbell, C. J., and not laying down any general rule, I think that, in such a case as this, where the goods were all in one parcel, and entered in one invoice, so that the purchaser, if he accepted his own goods, would incur the risk of being held to have accepted the whole, he was not bound to accept at all." And Bramwell, J., says: "I think that, if the defend[357]-ant had accepted the goods ordered by him, he would have run great risk of being held to have accepted the other goods sent with them. At all events, he could hardly understand the plaintiffs to say, in effect, 'Take out of the crate what you ordered; if you do not like to have the rest, let them lie where you please, or remove them to some convenient distance.' He could not but think that the plaintiffs made him a tender either of the whole or none, or of goods ordered by him, with a stipulation that he must select them from among the whole, and send back the rest. He was not under any obligation either to accept the former tender, or to undertake the obligation and trouble imposed upon him by the latter. He was entitled to an unconditional tender: and, such a tender not having been made, he was at liberty to refuse to accept." So here, the defendant was entitled to an unconditional tender of such cotton as the plaintiffs were prepared to deliver to him in accordance with the contract.

E. James, Q. C., Russell, and Herschel, in support of the rule. These contracts are entirely sui generis, and must be construed by the light of the usage. Cotton is always understood to be delivered in a merchantable condition: sometimes it is "to be made merchantable." The practice is, to give the buyer notice of the arrival of the ship, and if, of 500 bales contracted for, 300 are found to be unmerchantable, and 200 merchantable, he is bound to take the 200; and, if the 300 can be made merchantable within the stipulated time, he must take them also. It is for the buyer to take or to reject. Here, the seller was ready in June to deliver 15 bales which were merchantable. These the purchaser was bound (coupling the custom with the contract) to accept. It was not the less a fulfilment of the contract on the part of the seller, that these 15 were accompanied by 5 more which the buyer [358] was not bound to accept. Those cases cited have no material bearing on this. In *Cunliffe v. Harrison*, 6 Exch. 903, the question was whether there was an acceptance of the claret within the 17th section of the Statute of Frauds. In *Lerry v. Green*, 8 Ellis & B. 575, 1 Ellis & Ellis, 969, the defendant was put to some difficulty and risk in the selection of the goods which he had ordered from those which he had not: and some members of the court intimated an opinion, that, if no difficulty in the selection and no risk had been imposed

upon the defendant by the mode of executing the order, they would have held him bound to take those goods which he contracted for. [Willes, J. I have tried several such cases; and I have always told the jury to find for the defendant if they thought any substantial difficulty was imposed upon him; and, if not, to find for the plaintiff.]

ERLE, C. J. I am of opinion that this rule should be discharged. There is no doubt about the law as applicable to this subject. If the vendor in performance of a contract sends more goods than the buyer engages to receive, and trouble or risk is thereby imposed upon the latter in ascertaining what is and what is not in accordance with the contract, the buyer is not bound to accept.

BYLES, J.(a)¹. I am of the same opinion. The only question is, whether or not the vendors were ready and willing within the month of June to deliver any part of the cotton contracted for. I am of opinion that they were not.

MONTAGUE SMITH, J., concurred.

Rule discharged.

[359] ROBERT MORRIS AND LYDIA, his Wife, v. MOORE. June, 10th, 1865.

Since the Common Law Procedure Act, 1852, s. 40, a count for breaking and entering the premises of *the husband* may be joined with a count by the *husband and wife*, for assaulting and imprisoning the wife.

The first count of the declaration was for assaulting the plaintiff Lydia, and giving her into custody upon a false and unfounded charge: the second was for breaking and entering the rooms of the husband, and destroying his furniture, &c. On the first count the plaintiffs claimed 100l., and in the second Robert Morris claimed 10l. The jury assessed the damages at the trial separately.

Powell, Q. C., now moved to arrest the judgment, on the ground that the joinder of these two counts was not warranted by the 40th section of the Common Law Procedure Act, 1852, which enacts that, "in any action brought by a man and his wife for an injury done to the wife, in respect of which she is necessarily joined as co-plaintiff, it shall be lawful for the husband to add thereto claims in his own right; and separate actions brought in respect of such claims may be consolidated, if the court or a judge shall think fit: provided that, in the case of the death of either plaintiff, such suit, so far only as relates to the causes of action, if any, which do not survive, shall abate." Upon this clause Mr. Day observes.—"The above enactment is limited to actions 'for an injury done to his wife.' It permits the husband to add to the joint cause of action claims arising to himself in his own right. The section does not in terms limit the claims which may be thus added to those he has *in respect to the injury done to the wife* (as for a surgeon's bill); and it might thence be argued that the husband may not only add counts against the defendant for the *special damage* he has sustained in respect of the injury to the wife, but [360] also counts for *goods sold and delivered* or *money lent* by himself. But the intention of commissioners in recommending the change affected by this section (a)², seems to have been, that claims arising to the husband in respect of the injury to the wife, and those alone, should be included in the joint action." (b) [Willes, J. Mr. Whiteside's Act (the Irish Common Law Procedure Act) allows debts due to the husband to be joined. The better opinion seems to be that this act applies to wrongs only.] These claims clearly could not have been joined before the passing of the Common Law Procedure Act, and there appears to have been no attempt to join them since, until the present.

ERLE, C. J. The words of s. 40 are wide enough to embrace this: and the general tendency of modern legislation is to prevent such objections.

The rest of the court concurring,

Rule refused.

(a)¹ Willes, J., had gone to Chambers.

(a)² First Report, p. xi.

(b) Day's Common Law Procedure Act, p. 42.

[361] MURPHY v. SMITH. May 31st, 1865.

[S. C. 12 L. T. 605.]

To render a master liable for an injury to one in his employ, through the negligence of another person also in his employ, it must be shewn that the latter was placed by the master in such a position of trust and authority as to be fairly considered as his representative in the establishment.

This was an action brought by the plaintiff, a boy about sixteen years of age, to recover from the defendant damages for an injury alleged to have been sustained by him in consequence of the negligence of a person in the defendant's employ, who was said to be his deputy-foreman or manager.

The cause was tried before Keating, J., at the second sitting in Middlesex in Easter Term last. The facts which appeared in evidence were as follows:—The defendant was the proprietor of a lucifer-match manufactory. One Simlack was his foreman or general manager: and under him was a workman named Debor, who in Simlack's absence assumed the management of the establishment. The plaintiff had been engaged by Simlack. One portion of the process of making lucifer-matches consists in the mixing of the compound in which the ends of the matches are dipped. This consists of a variety of chemical substances, one of which is chloride of potass. The mixture is free from danger until the chloride of potass is put to it; and then it requires to be stirred by an experienced hand, or it is liable to explode. It was no part of the plaintiff's duty to touch this mixture. He, however, on the occasion in question, stirred up the compound with a stick after the chloride of potass had been added: and the consequence was that an explosion took place, and the plaintiff was very seriously injured.

It was proved that Debor was standing by at the time: but it did not appear that the plaintiff was doing what he did under Debor's direction. There was no evidence to shew that the general manager, Simlack, was absent from the premises at the time.

[362] Under these circumstances, it was submitted on the part of the defendant that there was no evidence for the jury, the accident being the result of the negligence (if any) of a fellow-workman, for which the master would not be legally responsible.

The learned judge reserved the point: and he asked the jury whether they thought the accident was caused by the negligence of Debor, and whether he was at the time acting as the manager of the establishment.

The jury answered both questions in the affirmative, and returned a verdict for the plaintiff, damages, 20l.

Montague Williams, in Easter Term last, obtained a rule nisi to enter a verdict for the defendant, or a non-suit, on the grounds,—first, that there was no evidence of Debor's being acting manager, so as to take him out of the class of fellow-servants, secondly, that, even if he were, there was no evidence of negligence on his part.

Tindal Atkinson, Serjt., and Philbrick, now shewed cause. There was abundant evidence that Debor, who was acting as the defendant's manager at the time, was guilty of negligence in permitting a child of tender years to do that which could only be done safely by a person of experience. The general rule undoubtedly is, that a servant has no redress against his master for an injury sustained by him in consequence of the negligence of a fellow-servant or workman. "Where, however," says Mr. Smith, Master and Servant, 2nd edit. 150, "a master employs boys and girls, or inexperienced workmen, and directs them to act under the superintendence, and to obey the orders of a deputy, whom he puts in his place, it may be they are not, within the meaning of the rule, employed in a com-[363] mon work. They are acting in obedience to the express commands of their employer, and if he, by the carelessness of his deputy, exposes them to improper risks, it may be that he is liable for the consequences. A girl, only nine days in the defendant's employ in a clay-mill, was unaware of the risks from machinery. A., acting under the defendant as manager of the works, put her to remove some waste clay while the rollers were in motion. A. ought to have done this himself: and it ought not to have been done at all till the movement of the rollers was suspended. The little girl, in attempting to remove the waste clay, in obedience to A.'s order, sustained a severe injury from the rollers: for which she brought an action against the master: and he was held liable: *O'Byrne v. Burn*,

16 Sec. Ser. (Scotch Rep.) 1025. Speaking of this case, in *The Bartonskill Coal Company v. Reid*, 3 Macq. 266, 295, Lord Cranworth, C., says: "This might have been quite right. It may be that, if a master employs inexperienced workmen, and directs them to act under the superintendence and to obey the orders of a deputy whom he puts in his place, they are not, within the meaning of the rule in question, employed in a common work with the superintendent. They are acting in obedience to the express commands of their employer, and, if he by the carelessness of his deputy exposes them to improper risks, it may be that he is liable for the consequences." The facts of this case clearly bring it within the qualification of the rule there stated. In *Clarke, App., Holmes, Resp.*, 7 Hurlst. & N. 937, the plaintiff was employed by the defendant to oil dangerous machinery: at the time the plaintiff entered upon the service, the machinery was fenced, but the fencing became broken by accident: the plaintiff complained of the dangerous state of the machinery, and the defendant promised him that the [364] fencing should be restored: the plaintiff, without any negligence on his part, was severely injured, in consequence of the machinery remaining unfenced: and it was held by the Exchequer Chamber, affirming the judgment of the court of Exchequer, that the defendant was liable for the injury. "No doubt," says Cockburn, C. J., "when a servant enters on an employment from its nature necessarily hazardous, he accepts the service subject to the risks incidental to it; or, if he thinks proper to accept an employment on machinery defective from its construction, or from the want of proper repair, and with knowledge of the fact enters on the service, the master cannot be held liable for injury to the servant within the scope of the danger which both the contracting parties contemplated as incidental to the employment. The rule I am laying down goes only to this, that the danger contemplated on entering into the contract shall not be aggravated by any omission on the part of the master to keep the machinery in the condition in which, from the terms of the contract or the nature of the employment, the servant had a right to expect that it would be kept." And Byles, J., said: "The case of *Priestly v. Fowler*, 3 M. & W. 1, introduced a new chapter into the law: but that case has since been recognized by all the courts, including the court of error and the House of Lords. So that the doctrine there laid down, with all the consequences fairly deducible from it, are part of the law of the land. But the principles laid down in *Priestly v. Fowler*, and all the examples there given of their application, relate to the conveniences and casualties of ordinary or domestic life, and ought not to be strained so as to regulate the rights and liabilities arising from the use of dangerous machinery. It is in most cases impossible that a workman can judge of the condition of a complex and dangerous machine, [365] wielding irresistible mechanical power; and, if he could, he is quite incapable of estimating the degree of risk involved in different conditions of the machine: but the master may be able, and generally is able, to estimate both. The master again is a volunteer, the workman ordinarily has no choice. To hold that the master is responsible to his workman for no absence of care, however flagrant, seems to me in the highest degree both unjust and inconvenient. On the other hand, to hold that the master warrants the safety and proper condition of the machine, is equally unjust to the master; for, no degree of care can insure perfect safety: and it is equally inconvenient to the public, for who would employ such machines if he were an insurer? It seems to me that the true rule lies midway between these extremes, and I therefore agree in the conclusion arrived at by the Lord Chief Justice." A dangerous machine is very analogous to a dangerous compound: and the observations made by the judges in that case there are equally applicable here. [Byles, J. I do not think the majority of the court there coincided with what was said by two of the judges.] The question was for the jury.

Watson, in support of the rule. In *Paterson v. Wallace*, 1 Macq. 748, it was held that a master is bound to take all reasonable precautions to secure the safety of his workmen; more especially if the work be of a dangerous character, and the persons engaged proverbially reckless: and this is said by Lord Cranworth to be the law of England no less than that of Scotland. But the law of England does not make a master responsible for an injury resulting to a workman from the negligence of a fellow-servant: *Wignore v. Jay*, 5 Exch. 354; *Gallagher v. Piper*, 16 C. B. (N. S.) 669. [Willes, J. In *Paterson's Compendium of Eng[366]-lish and Scotch law*,—a work always spoken of with the highest commendation,—p. 273, the law of the two countries is said to be the same in this respect.] There was extremely slender evidence

that Debor was manager of the defendant's works : and none whatever that the plaintiff was set to this work by Debor. For aught that appeared, the accident was the result of the boy's own mischievous act. [Byles, J. That would be for the jury.] There was no evidence which ought to have been submitted to them.

ERLE, C. J. I am of opinion that this rule should be made absolute. This is an action to recover damages for an injury sustained by the plaintiff through an explosion of certain combustible materials in the defendant's factory. It appears that the plaintiff, a boy of tender years, was engaged in stirring the mixture in a vessel in the presence of Debor : and, according to the evidence, Debor was clearly guilty of negligence in permitting an inexperienced person to do this, and would have been liable. But the action is brought against Debor's master : and the question for our determination is, whether the master is responsible : the law being clear, that a damage caused to a workman by reason of the negligence of a fellow-workman imposes no liability upon the master. That was very elaborately discussed here in *Gallagher v. Piper*, 16 C. B. (N. S.) 669, where all the cases are collected, and the rule as to the master's liability for employing incompetent persons or furnishing insufficient materials was very much considered. The question is, whether Debor is to be considered as the vice-principal of the factory. I avoid the word "manager," which is an ambiguous one, and may mean either a person retained generally to represent the principle in his absence, or one who has the superintendence of a [367] particular contract or job, in which latter case he would be in no different position from that of a fellow-workman. That was the case of *Gallagher v. Piper*, where the plaintiff had to look to Mahony, the foreman of the scaffolders under Phear, for the necessary materials to construct the scaffolding. Phear, whose omission to supply sufficient materials caused the injury to the plaintiff, was held to stand in the position of a fellow workman, and not of one who was put to represent the defendants as a vice-principal. Assuming that Debor was the person whose negligence caused this accident, is the master responsible? There was evidence for the jury that Simlack was placed by the defendant in the position of a vice-principal. If the case had rested there, I should have been inclined to think that the verdict ought to stand. The contract for the plaintiff's service was made with Simlack. Debor was a workman whose duty it was to mix the materials which exploded. Was there any evidence to fix the defendant as having put Debor to represent him at the factory? The evidence on the subject is the statement of the plaintiff, who said that Simlack was the foreman of the works : and that, when Simlack was away, Debor took his place. Is that any evidence that Debor was a person appointed to represent the defendant? The only other evidence was that, at the time the explosion took place, Simlack was not at the factory, and that Debor was. Is that any evidence that Debor had the authority I speak of? For aught that appears, Simlack might have been at another part of the premises at the moment. Upon the whole, I am clearly of opinion that the accident was the result of Debor's negligence, and that he is not shewn to have filled any other position in relation to the plaintiff than that of a fellow-workman.

[368] WILLES, J. I am entirely of the same opinion.

BYLES, J. I also concur with my Lord, and do not think it is necessary to add anything.

KEATING, J. I am of the same opinion. There was abundant evidence for the jury of negligence on the part of Debor : but I much doubt whether there was any evidence upon which the jury could reasonably act, to shew that he was at the time filling the position of manager or representative of the defendant, the common employer. I put it to the jury whether he was so or not, and they found in the affirmative. But, when carefully looked at, it will be found that the evidence is of the minutest possible description. It did not appear that Simlack, the foreman, was away from the premises at the time, or that Debor was there in charge of them. If he had been left in general charge of the premises, he probably would not have been engaged in mixing the ingredients. There was, upon the whole, I think, no evidence upon which the jury could reasonably act.

Rule absolute to enter a nonsuit.

[369] EX PARTE ELIZA HALL. April 27th, 1865.

1. The rule of Michaelmas Term, 1862, as to the form of affidavits on acknowledgments taken under the statute 3 & 4 W. 4, c. 74, is directory only.—2. *In re Cooper*, 18 C. B. (N. S.) 220, confirmed.

Pulling, Serjt., moved that the registrar might be directed to receive and file an acknowledgment taken in America under the 3 & 4 W. 4, c. 74, together with the affidavit of the due taking thereof.

The officer had objected to receive the affidavit, on the ground that it was not divided into paragraphs and numbered, nor drawn up in the first person, pursuant to the rule of Michaelmas Term, 1862.—See 13 C. B. (N. S.) 2.

Per Curiam. That rule is directory only, and was intended so to be.

There was a further objection, viz. that the affidavit had not been sworn in exact compliance with the rule of Hilary Term, 14 G. 3. As to this the learned Serjeant referred to *Ex parte Mann*, 7 Scott, 14, *In re Cooper*, 18 C. B. (N. S.) 220, and the rule of Hilary Term, 1863, 13 C. B. (N. S.) 404.

The Court, upon the authority of *In re Cooper*, allowed the documents to be filed, the Lord Chief Justice intimating that “magistrate,” in the rule of Hilary Term, 14 G. 3, meant any person duly authorized to administer oaths at the place where the acknowledgment is taken.

Fiat.

[370] IN RE MARY GRAHAM. May 25th, 1865.

An order for the conveyance of property by a married woman, under the 3 & 4 W. 4, c. 74, s. 91, will only be made with reference to a contemplated purchase.

Bridge, upon an application that Mrs. Graham might be at liberty to convey certain property without the concurrence of her husband, under the 3 & 4 W. 4, c. 74, s. 91, on the ground that he had several years ago deserted her and his residence was unknown,—part only of the property having been agreed to be sold,—asked for an order embracing the remaining part when it should be sold.

ERLE, C. J. That which you ask has never been done, and it would be highly inconvenient to make an order otherwise than with reference to a contemplated purchase.

BYLES, J. The words of the 91st section point to some specific case.

The rest of the court concurring,

Rule as to the general order refused.

[371] EX PARTE SUSANNAH ANDREWS. June 5th, 1865.

Conveyance of separate property by married woman, where living apart by sentence of judicial separation, without alimony, &c.

O'Malley, Q. C., moved for a rule under the 3 & 4 W. 4, c. 74, s. 91, to enable Mrs. Susannah Andrews by deed or surrender to dispose of certain property, to which she was entitled under the will of her deceased father, without the concurrence of her husband, on the ground that he was living separate and apart from her by decree of judicial separation pronounced by the court for Divorce and Matrimonial Causes on the 8th of June, 1864. The affidavit stated that no alimony had been awarded to the lady, that her husband did not contribute anything towards her support, and that he had refused to concur.

Per Curiam. All the conditions to entitle Mrs. Andrews to what she asks seem to have been complied with.

Fiat.

End of Trinity Term.

[372] CASES ARGUED AND DETERMINED IN THE COURT OF COMMON PLEAS, AND IN THE EXCHEQUER CHAMBER, IN TRINITY VACATION, IN THE TWENTY-EIGHTH AND TWENTY-NINTH YEARS OF THE REIGN OF VICTORIA.

The judges who usually sat in banco in this term were,—Willes, J., Byles, J., and Keating, J.

COLLES AND OTHERS v. EVANSON. June 19th, 1865.

A plea, under the 145th section of the Bankrupt Law Consolidation Act, 1849, to an action for breaches of covenants in a lease, —that the defendant (the lessee) became bankrupt, that the assignees declined to take the lease, and that, within fourteen days after notice thereof, the defendant executed a surrender (under seal), of the demised premises to the lessors, and tendered to them such surrender, and offered to deliver up the possession of the premises to them, —is bad, for not shewing the impossibility of a literal compliance with the conditions of the section: as that the lease was lost or destroyed, or the like.

The first count of the declaration stated that, by an indenture of lease made between the plaintiffs of the one part, and the defendant of the other part, dated the 9th of March, 1833, the plaintiffs demised and leased to the defendant a certain dwelling house and [373] premises, to hold for a term of 1000 years from the 25th of March, 1833, at the rent during the said term of 100l. per annum, to be paid by two equal half-yearly payments of 50l. each, on every 25th of March and 29th of September in each and every year during the said term, over and above all taxes, charges, and impositions whatsoever (quit-rent, and crown-rent excepted): and the defendant thereby covenanted and agreed to and with the plaintiffs that he the defendant should and would from time to time during the term thereby granted well and truly pay unto the plaintiffs, their heirs and assigns, &c., the said reserved rent of 100l. on the said days appointed for the payment thereof as before mentioned, over and above all such taxes, charges, and impositions as aforesaid: and also that he the defendant, his executors, administrators, and assigns, at their own proper costs and charges (but in the joint names of himself or themselves, and of such person as from time to time during the said tenancy they the plaintiffs, their heirs and assigns, or the majority of them, should in writing nominate and appoint, such person being one or other of the said lessors, the plaintiffs, their respective heirs or assigns), should forthwith effect, and thenceforth from time to time and at all times during the continuance of the said term maintain, with the Globe Insurance Company, or any other insurance company to be approved of by the consent in writing first obtained of the majority of them the plaintiffs, their heirs and assigns, some one of the insurance companies having an office in the city of Dublin, as long as there should be such, to be preferred, a policy of insurance whereby and wherein the said thereby demised house, together with all buildings and other insurable erections then or thereafter about to be thereunto added so as to form connected parts thereof, might and should [374] be insured against any loss by the casualties of fire, to the amount of 1500l. at the least, and wherein and whereby the said thereby demised coach-house, stable, and detached offices, together with all buildings and other insurable erections then or thereafter about to be thereunto added, so as to form connected parts thereof, might and should in like manner be insured against any loss by the casualties of fire to the amount of 200l., both insurances together amounting to the sum of 1700l.: and in case that he the defendant, his executors, administrators, and assigns, should leave unpaid the annual sum or other premium necessary to maintain such insurance as aforesaid for the space of twenty-four hours, to be computed, &c., or should not from time to time at the request of them the plaintiffs, their heirs and assigns, produce a receipt or other voucher for the payment of such insurance for the then current year, then it should be lawful for them or any of them the plaintiffs, their heirs or assigns, to pay the same to the insurance company aforesaid, or to any other insurance company as aforesaid, and forthwith double the amount of such insurance premium so to be paid to have, recover, and receive (with all costs consequent upon such payment as aforesaid), of and from him the defendant, his executors and assigns: Aver-

ment, that, although the plaintiffs had done all things necessary, and all things and conditions had happened and been performed necessary, and all times had elapsed and passed necessary, to entitle the plaintiffs to have the said covenants performed and observed, and to have the defendant do and perform the several matters and things thereafter alleged not to have been done or performed by him, and to maintain the action for the several breaches and causes of action thereafter mentioned: Breach, that half-yearly payments of the said rent, amounting in the whole to the [375] sum of 100l., were due and unpaid: and that, although an insurance against loss by the casualties of fire was effected by the defendant, or his assigns, with such insurance company as was in the said indenture provided for, and otherwise in accordance with the provision of the covenant in that behalf thereinbefore set forth; yet the defendant and his assigns on two different occasions left unpaid the annual sum or premium necessary to maintain such insurance for the space of twenty-four hours and upwards, computed as aforesaid: and thereupon the plaintiffs, in pursuance of the powers reserved to them by the said indenture in that behalf, on each of the said two occasions paid the amount of such annual sum or premium, amounting on each occasion to the sum of 4l. 5s., to the said insurance company, and all things were done and happened, and all times elapsed necessary to entitle the plaintiffs to receive from and be paid by the defendant double the amount of such annual sum or premiums so paid, amounting in the whole to the sum of 17l., but the defendant had not paid the same.

Fourth plea, to the first count,—that, after the making of the said indenture of lease in the declaration mentioned, and before the said half-yearly payments of the rent in the said first breach of the first count in that behalf mentioned respectively became due and payable, and also before the said two annual sums or premiums in the said second breach of the said first count mentioned respectively became due and payable, the defendant, being a debtor within the meaning of, and being subject to, the statutes then in force concerning bankrupts, duly petitioned the court of bankruptcy for the Exeter district (within which district the defendant had resided for the six months next immediately preceding the time of filing such petition) for adjudication of bankruptcy against him-[376]-self, and such petition was before the times aforesaid duly filed of record in the said district court of bankruptcy according to the statutes in force in that behalf, and was prosecuted as directed by the act in force in that behalf: that such proceedings were had in the matter of the said petition, that the defendant was before the times aforesaid by the said court duly and according to the statutes in force in that behalf adjudged bankrupt, and an assignee of the defendant's estate and effects was before the times aforesaid duly and according to the said statutes in force in that behalf chosen at the first meeting of the defendant's creditors by a majority in value of the creditors of the defendant who had proved debts, and that the said election of the said assignee was duly and according to the act in force in that behalf accepted by the person so elected, and was confirmed by the said court of bankruptcy; and the said court did, before the times aforesaid, duly and according to the said act in that behalf, by a certificate under the hand of the commissioners and the seal of the court declare the said creditors' assignee to have been duly elected, and appoint him to the said office accordingly: Averment, that all things having been done, and all events having happened, and all times having elapsed, necessary to entitle the defendant to receive his order of discharge according to the act in force in that behalf, the said court duly and according to the said act, and before this suit, made and granted to the defendant an order of discharge according to the statute in force in that behalf; that, after the said appointment of the said creditors' assignee of the estate and effects of the defendant as thereinbefore mentioned, and before this suit, the said assignee of the estate and effects of the defendant declined to take the said lease in the declaration mentioned, or the benefit thereof; and that [377] within fourteen days after the defendant had notice that the said assignee had so declined, and before this suit, he the defendant duly made and executed and delivered a certain deed under his seal, whereby he the defendant surrendered to the plaintiffs the said demised premises, and all the residue of the said term then to come and unexpired therein, and all his the defendant's estate and interest therein, and was then and before this suit ready and willing to, and tendered and offered to deliver the said deed to the plaintiffs, and at the same time offered to deliver up possession of the said premises to the plaintiffs accordingly.

The plaintiffs demurred to this plea, the ground of demurrer alleged in the

margin being, "that the plea does not shew that the defendant delivered up or offered to deliver up the indenture of lease, or otherwise brought himself within the provisions of s. 145 of the Bankrupt Law Consolidation Act, 1849." Joinder.

Horace Lloyd, in support of the demurrer (*a*). The [378] defendant does not by his fourth plea bring himself within the 145th section of the Bankrupt Law Consolidation Act, 1849, 12 & 13 Vict. c. 106. That section enacts, "that, if the assignees of the estate and effects of any bankrupt having or being entitled to any land either under a conveyance to him in fee or under an agreement for such conveyance, subject to any perpetual yearly rent reserved by such conveyance or agreement, or having or being entitled to any lease or agreement for a lease, shall elect to take such land or the benefit of such conveyance or agreement, or such lease or agreement for a lease, as the case may be, the bankrupt shall not be liable to pay any rent accruing after the issuing of the fiat or filing of the petition for adjudication of bankruptcy against him, or to be sued in respect of any subsequent non-observance or non-performance of the conditions, covenants, or agreements in any such conveyance or agreement, or lease or agreement for a lease: and, if the assignees shall decline to take such land, or the benefit of such conveyance or agreement, or lease or agreement for lease, the bankrupt shall not be liable, if, within fourteen days after he shall have had notice that the assignees have declined, *he shall deliver up such conveyance or agreement, or lease or agreement for lease, to the person then entitled to the rent, or having so agreed to convey or lease, as the case may be,*" &c. To entitle the bankrupt to the benefit of that section, he must strictly comply with the condition. In *Slack v. Sharpe*, 8 Ad. & E. 366, 3 N. & P. 390, it was held that an offer to deliver up possession of the premises, in the case of a parol demise, was a sufficient compliance with the cor-[379]-responding section (75) of the 6 G. 4, c. 16. Two subsequent cases, however, have thrown considerable doubt upon the accuracy of that decision. But there is a marked distinction between the case of an unwritten and a written demise. In the former case, unless the bankrupt can release himself by abandoning possession of the premises, he cannot discharge himself at all: but, at all events, *Slack v. Sharpe* does not warrant the notion that, where there is a deed in existence, as here, anything short of an absolute compliance with the statute will do. In *Briggs v. Soury*, 8 M. & W. 729, 739, Parke, B., intimates that, but for the case of *Slack v. Sharpe*, he would have been of opinion that the case of an occupation under a parol demise did not fall within the statute, but that, after the decision of the court of Queen's Bench in that case, he should be unwilling so to decide, without taking more time to consider the point: and Alderson, B., said that he felt himself bound by the authority of that case, although he did not entirely concur in the reasons assigned by the court for their judgment. In *Maples, App., Popper, Resp.*, 18 C. B. 177, the tenant of premises (under a demise from year to year, was permitted by the landlord to make a communication through the party-wall to an adjoining house, and to make other alterations, upon condition that he should at the termination of his tenancy restore the premises to their original state. Some years afterwards, the tenant became bankrupt, and, shortly after his bankruptcy, the assignees declining to take the premises, gave notice to the landlord that he would deliver up possession of the premises to him under s. 145 of the Bankrupt Law Consolidation Act, 1849: and it was held by this court

(*a*) The points marked for argument on the part of the plaintiffs were as follows:—

"1. That the fourth plea is bad in substance, for not shewing that the defendant was in any manner relieved from his obligations under the lease:

"2. That, in order to his being so relieved, it was necessary that the defendant should shew by his plea that he had complied with and brought himself within the provisions of the 145th section of the Bankrupt Law Consolidation Act, 1849: and that, on the contrary, the plea shews that he has not done this:

"3. That, in order to comply with and bring himself within the provisions of the before-mentioned section, it was necessary (among other things) that the defendant should actually deliver up the lease or agreement for a lease to the person then entitled to the rent; and that it was not sufficient to make and execute and deliver the deed of surrender mentioned in the said plea, and to offer to deliver such deed of surrender to the plaintiffs, and to offer to deliver up possession of the premises to the plaintiffs."

that the condition or agreement above specified, to restore the premises to their previous state, was not a condition [380] or agreement within that section. Crowder, J., in giving judgment, said: "But for the case of *Slack v. Sharpe*, and those cases which have followed it, I must own I should have thought the condition, to satisfy that section, must be in some written document: but, at all events, it must be in the lease or agreement." In *Manning v. Flight*, 3 B. & Ad. 211, in covenant for rent, the defendants pleaded that, before the rent became due, the defendants by deed assigned all their interest in the demised premises to one Barnard, subject to the payment of the rent and performance of the covenants contained in the lease; and that Barnard by the assignment covenanted to pay the rent and perform the covenants contained in the lease; that the defendants delivered the lease to Barnard, and he accepted the same, and entered on the premises by virtue of the assignment: the plea then went on to state that Barnard became bankrupt, and that the arrears of rent accrued after the date of the commission; that the assignees declined the lease; and that the bankrupt, within fourteen days after notice of that fact, delivered up such lease to the plaintiffs, the devisees of the reversion. It was held that this was a bad plea, inasmuch as the statute did not put an end to the lease, but merely discharged the bankrupt from any subsequent payment of the rent or observance of the covenants. There can be no reason why the section should be extended beyond its language.

Coleridge, Q. C., *contra* (a). The question is whether, [381] in order to satisfy the requirements of the 145th section of the Bankrupt Law Consolidation Act, 1849, the actual paper or parchment must be delivered up. *Slack v. Sharpe* shews that an offer to deliver up possession of the premises is enough where the premises are held by parol: and that case is an authority binding upon this court. A surrender by act and operation of law puts an end to the demise, and extinguishes all rights under the lease, if the premises are held under a lease: see *Grimman v. Legge*, 8 B. & C. 324, 2 M. & R. 438, and many other cases. [Byles, J. There is no doubt about that.] The delivery up of the lease, and possession of the premises with it, clearly operates as a surrender by act and operation of law: see *Lyon v. Reed*, 13 M. & W. 285, and the cases referred to in the notes to *Doe v. Oliver*, and *The Duchess of Kingston's case*, in 2 Smith's Leading Cases, 5th edit. 714 et seq. Suppose the lease assigned to a person who had gone to Australia with it. It would be impossible in that case to deliver up the parchment. But, would not a surrender by act and operation of law, and a delivery up or an offer to deliver up possession of the premises, be enough to satisfy the words of the 145th section? [Byles, J. The plea alleges the execution of a deed of surrender, a tender of the deed, and an offer to deliver up the possession of the premises.] Yes. The whole legal right is extinguished by what has been done. What more can be necessary? Suppose the defendant had delivered up the lease, but not the actual possession of the premises,—would that be a sufficient compliance with the act? It is submitted that it would not, and yet the words of the section would be satisfied. The words, therefore, are not to be looked at, but the [382] general scope and object of the enactment. The plea shews that the defendant has, as far as he could do so, complied with all the substantial requisites of the statute. The surrender operates an extinguishment of the defendant's legal estate. [Byles, J. Only if it is accepted. Willes, J. *Slack v. Sharpe* shews that there may be a compliance with the statute cy pres. This plea, however, does not allege facts which amount to a compliance cy pres. It is consistent with all that is alleged, that the defendant is keeping the lease in his own possession. He cannot give up a lease which he has assigned. And the plea cannot be helped by an amendment.] It is submitted that enough is shewn to constitute a defence.

WILLES, J. This is an action by the lessors against the lessee for breaches of covenants in a lease under seal, to which there is a plea professedly founded upon

(a) The points marked for argument on the part of the defendant were as follows:—

"1. That it appears on the face of the plea that the plaintiffs could have had both a surrender and actual possession of the premises, and all the defendant's interest therein:

"2. That delivering a deed of surrender of the whole of the defendant's interest, coupled with a delivery of possession, was equivalent to a delivery up of the lease, within the meaning of the statute."

the 145th section of the Bankrupt Law Consolidation Act, 12 & 13 Vict. c. 106, stating that the lessee (the defendant) had become bankrupt, that the assignees declined to take the lease, and that, within fourteen days after he had notice that the assignees so declined to take the lease, he executed a deed of surrender of the demised premises to the lessors, and tendered the deed to them, and offered to deliver up to them the possession of the premises. There is no statement that the deed was lost or destroyed, or that any circumstances existed which prevented the bankrupt from giving up the lease to the lessors; and on that ground the plea appears to me to be bad, because the clause of the statute in question, dealing apparently with the case of a lease or agreement for a lease, which seems to imply the creation of the relation of landlord and tenant by a document in writing, gives a discharge to the bankrupt on his giving up the lease or agreement [383] in writing. If that section requires a literal compliance, and only extends to a lease in writing, it is clear that the bankrupt is not discharged from his covenants unless he hands over to the lessor the document itself. As we are dealing with an exception in the statute, it is not possible for us to say that the bankrupt is discharged by a compliance with the requirements of the section *cy pres*, by shewing the impossibility of delivering the lease, and surrendering the actual interest in the term. But the case of *Slack v. Sharpe*, 8 Ad. & E. 366, 3 N. & P. 390, certainly puts a different construction upon the statute; and I am far from saying that that case was not rightly decided. The court of Queen's Bench there dealt with the 145th section of the Bankrupt Act of 1849 in this way: they held that the object of the statute being to relieve the bankrupt from his debts and engagements, they would give effect to such paramount intention where the interest was created by parol, by saying that the statute was complied with by the bankrupt's giving up the estate created, and the lease or agreement, *if any*, and that, where there was no lease or agreement in writing, the bankrupt might discharge himself by giving up the possession of the subject-matter of the demise. It has been urged on the part of the defendant here that we ought to act upon the authority of that case, and give judgment in favour of the plea, because he has complied with the statute as far as he could, by executing a deed of surrender of the demised premises, and offering to deliver up the possession to the lessors. But, in order to complete that defence founded upon the statute, as explained by the case of *Slack v. Sharpe*, the defendant should have gone on and shewn that there was no lease or agreement in writing so that the statute could be literally complied with, as well as a surrender and offer of the surrender. Here the plea [384] shews the latter, but not the former. The plea, therefore, fails, for not shewing the impossibility of a strict and literal compliance with the statute, by delivering up the lease.

The rest of the court concurring,

Judgment for the defendant.

WILLIAM PEARSON, *Appellant*; JESSE TAZEWELL, *Respondent*. June 24th, 1865.

[S. C. 13 L. T. 158; 14 W. R. 39.]

By a local turnpike act (3 G. 4, c. lxx.), the following tolls (amongst others) were imposed,—“1. For every horse, &c. drawing any coach, barouche, sociable, berlin, chariot, landau, chaise, calash, chair, phaeton, caravan, taxed-cart, hearse, litter, or other such light carriage (*except stage-coaches*), a sum not exceeding 4½d.—2. For every horse, &c. drawing any stage-coach licensed to carry in the whole, inside and outside, not more than nine passengers, a sum not exceeding 4½d.—3. For every horse, &c. drawing any *stage-coach* licensed to carry in the whole, inside and outside, more than nine, and not exceeding sixteen passengers, a sum not exceeding 6d.—4. For every horse, &c. drawing any *stage-coach* licensed to carry in the whole, inside and outside, more than sixteen passengers, a sum not exceeding 8d.—5. —For every horse, &c. drawing any caravan, tilted-waggon, tilted-cart, or other carriage employed in carrying passengers for a fare, a sum not exceeding 4½d.—11. For every *stage-coach* or other public carriage having more passengers than the same is licensed to carry, or having a greater weight of luggage upon the top of the same than is authorized by law, or having passengers riding upon the top of such luggage,” double the usual toll.—A subsequent clause provided that no person should pay toll more than once in any one day for passing and re-passing with the

same horse or horses : and s. 40 provided that the tolls should be payable for or in respect of all *stage-coaches* and other such public carriages *licensed or not licensed*, for every time of passing and re-passing through the same turnpike on the same day.” —A., a carrier, travelled to and from Ashcott and Bridgewater three times a week with a light covered spring van on four wheels, drawn by one horse (for which he paid duty under the 16 & 17 Vict. c. 90, sched. D.), which did not travel more than four miles an hour, and which was principally and *bonâ fide* used for the carrying of goods and merchandize, but occasionally also for conveying passengers for a fare, never more than six :—Held, that he was not liable, under s. 40 of the local act, to return-toll.

At a petty session holden for the borough of Bridgewater, in the county of Somerset, on Monday the 24th of April, 1865, before, &c., an information preferred by [385] Jesse Tazewell (hereinafter called the respondent) against William Pearson (hereinafter called the appellant, under s. 55 of the 3 G. 4, c. 126, the General Turnpike Act, charging for that he the appellant, then being collector of the tolls at the Bridgewater Eastern turnpike-gate in the said borough of Bridgewater, did on the 18th of April then instant demand and take from the said respondent a greater toll, viz. 4½d., than he was authorized to do under the powers of any act of parliament,—was heard and determined by the justices, the appellant being represented by his attorney ; and upon such hearing the said appellant was duly convicted of the said offence ; and the justices adjudged him to pay the sum of 4½d., being the toll excessively taken, the sum of 2s. 6d., to be paid and applied according to law, and also to pay to the respondent his costs in that behalf.

The appellant being dissatisfied with the decision, the following case was stated, pursuant to the 20 & 21 Vict. c. 43 :—

At the hearing of the aforesaid information, it was proved on the part of the informant, the respondent in this appeal, that he was a common carrier, living at Ashcott, about nine miles from Bridgewater, and travelling to Bridgewater and back three days in each week, with a light covered one-horse spring tilted-van on four wheels, having two movable seats, which could be put up or down as occasion required, with a small entrance in front, and which was principally and *bonâ fide* used for and in the carrying of goods, wares, or merchandize, whereby he sought his livelihood, but occasionally also used in conveying passengers for hire : and, on cross-examination, he stated that the said tilted-van was capable of conveying as many as six passengers, but the average taken was not more than two : that he charged a fare of 9d. to each pas-[386]-senger from Ashcott to Bridgewater and vice versâ, and smaller fares varying with the distance for passengers over shorter portions of his route ; that he did not travel more than four miles an hour ; that, on the 18th of April then instant, he passed through Bridgewater Eastern gate, kept by the appellant, on his way to Bridgewater with the said tilted-van and one horse, and produced a ticket denoting payment of the toll of 4½d. at another gate which clears the appellant's gate : that, on his return the same day with the same tilted-van and the same horse, and having no passenger, the appellant demanded from him a back toll of 4½d., on the ground that the said tilted van was a “stage-coach or other such public carriage,” within the meaning of the proviso in the local act hereinafter mentioned, and that he paid it under protest ; that the respondent's van is not licensed as a stage-coach, but he pays a duty of 2l. 6s. 8d. under Schedule D. of the 16 & 17 Vict. c. 90, which enacts that duty shall be paid “For every carriage used by any common carrier principally and *bonâ fide* for and in the carrying of goods, wares, or merchandize whereby he shall seek a livelihood, where such carriage shall be occasionally only used in conveying passengers for hire, and in such manner that the stage-carriage duty, or any composition for the same, shall not be payable under any licence by the commissioners of inland revenue,—where such last-mentioned carriage shall have four wheels, 2l. 6s. 8d.”

The tolls imposed by the local turnpike-act, 3 G. 4, c. lxx. s. 34, are as follows :—

“1. For every horse or other beast drawing any coach, barouche, sociable, berlin, chariot, landau, chaise, calash, chair, phaeton, caravan, taxed-cart, hearse, litter, or other such light carriage (*except stage-coaches*), a sum not exceeding the sum of 4½d. :

[387] “2. For every horse or other beast drawing any *stage-coach* licensed to carry in the whole, inside and outside, not more than nine passengers, a sum not exceeding the sum of 4½d. :

"3. For every horse or other beast drawing any stage-coach licensed to carry in the whole, inside and outside, more than nine, and not exceeding sixteen passengers, a sum not exceeding the sum of 6d. :

"4. For every horse or other beast drawing any stage-coach licensed to carry in the whole, inside and outside, more than sixteen passengers, a sum not exceeding the sum of 8d. :

"5. For every horse or other beast drawing any caravan, tilted-waggon, tilted-cart, or other carriage employed in carrying passengers for a fare, a sum not exceeding the sum of 4½d. :

"11. For every *stage-coach* or other public carriage, having more passengers than the same is licensed to carry, or having a greater weight of luggage upon the top of the same than is authorized by law, or having passengers riding upon the top of such luggage, double the toll otherwise chargeable upon the horses drawing such coach or other carriage."

By the 39th section it is provided "that no person shall be subject to the payment of toll more than once in any one day for passing and re-passing with the same horse or horses through the same turnpike, except as hereinafter mentioned, such person or persons producing a note or ticket denoting the payment of such toll, and which note or ticket the collectors of the tolls are hereby required to deliver gratis on payment of the tolls as hereinafter mentioned."

By the 40th section it is enacted as follows :—"Provided, nevertheless, and be it further enacted, that the tolls shall be payable for or in respect of all *stage-coaches* and other *such* public carriages, *licensed or not* [388] *licensed*, for every time of passing and re-passing through the same turnpike on the same day : and that the said tolls shall be payable for or in respect of all post-chaises and other carriages travelling for hire, for passing and re-passing through the same turnpike on the same day, upon every time of a new hiring of such post-chaises or carriages last mentioned, on a ticket being produced denoting a new hiring."

It was contended on the part of the defendant, the appellant in the present appeal, that the back toll was legally chargeable, on the ground that the 40th section of the local act must be held to refer to the tolls imposed by the 2nd, 3rd, 4th, and 5th paragraphs of the 34th section, and not to the 2nd, 3rd, and 4th only, inasmuch as those three paragraphs contemplated only the case of carriages *licensed* to carry passengers : and that, to confine the liability to back toll to such carriages only, would render the words "licensed or not licensed" meaningless.

The appellant further contended that the respondent's carriage came clearly within the 5th paragraph of the 34th section, as a carriage employed in carrying passengers for a fare : and relied on the case of *Entwistle, App., Richmond, Resp.*, 18 C. B. (N. S.) 364, as an authority that the tolls were chargeable upon that which is the habit of the carriage : and that, as this was a carriage running regularly at stated times, not only for goods, but also for the conveyance of passengers for a fare, it was immaterial whether on any particular occasion there chanced to be a passenger in the carriage at the time of its passing through the gate, provided it was in fact performing one of its regular journeys.

It was also contended, that the part of the 40th section referring to post chaises, which were only to be liable to toll upon a fresh hiring, supported the same [389] view : and that the 40th section did not (as had been suggested) apply exclusively to the tolls imposed by the 11th paragraph, which was in the nature of a penal clause.

The justices being of opinion that the respondent's tilted-van was not a "stage-coach or other such public carriage, licensed or unlicensed," within the meaning of the said 40th section of the said local act, but that it was *bonâ fide* a carrier's cart used principally for and in the carrying of goods, whereby the said respondent sought his livelihood, and only occasionally used in conveying passengers for hire, and travelling less than four miles an hour, and being assessed as such under the 16 & 17 Vict. c. 90, and having no passenger on the occasion in question, was not liable to pay back toll, but was entitled to return free on the same day with the same horse, under the 39th section of the local act ; and that the assessment of the respondent's tilted-van under the 16 & 17 Vict. c. 90, and the restriction of travel to four miles an hour by the Stage-Coach Act, prevented it from being classed as a stage-coach or other such public carriage, either licensed or unlicensed : that the term "licensed" applies to coaches properly licensed under the Excise Acts, and the term "unlicensed" to *coaches* defrauding

the revenue by not obtaining such license; whilst in this case the respondent had only a modified license to carry passengers occasionally with his goods; and, the Excise authorities being satisfied, the toll-collector ought to be satisfied also: and that the double toll imposed by the 40th section, being on the vehicle, must have reference to the 11th paragraph of the 34th section; and that the evidence given before them brought the case within the operation of the statute 3 G. 4, c. 126, s. 55: and they gave their determination against the appellant in the manner before stated.

[390] The question of law arising on the above statement therefore is,—was the respondent liable or not to pay a second or back toll in respect of his tilted-van with the same horse returning the same day without any passenger, under the terms of the said 40th section of the said local act. The opinion of the court was thereupon asked on the said question of law, whether or not the justices were correct in their determination as aforesaid, and as to what further should be done or ordered by the said court in the premises.

Campbell Forster, for the appellant, submitted that the respondent was liable to the return-toll under the 40th section of the local act, even though he was not actually carrying any passenger at the time of returning, the vehicle being a “stage-coach,” and its habit being to carry passengers for a fare. He referred to *Eatwell, App., Richmond, Resp.*, 18 C. B. (N. S.) 364, and *Comley, App., Carpenter, Resp.*, 18 C. B. (N. S.) 397; and further submitted that the words “not licensed,” in s. 40, meant, not required to be licensed under the Stage Carriage Act, 2 & 3 W. 4, c. 120.

No one appeared on behalf of the respondent.

Cur. adv. vult.

WILLES, J. No counsel appearing for the respondent in this case, the court took time to consider, in order to compare the case of *Eatwell, App., Richmond, Resp.*, with a subsequent case of *Comley, App., Carpenter, Resp.*, which had not at the time of the argument of this case been published. In the former, the court held, upon the construction of a clause in the local act (10 G. 4, c. ex.) which imposed the return toll in respect of the horses drawing “any stage-coach, stage-[391]-waggon, van, or other stage-carriage for the conveyance of passengers for payment, hire, or reward,” that the carrier’s van, usually employed in carrying goods, though occasionally carrying passengers also for hire, was not liable for such return-toll. In the second case, the carrier in like manner travelled with a van in which he principally carried goods for hire, but sometimes passengers also, and it was held that he was liable, upon the words of a clause in the local act (6 G. 4, c. exlii.), which imposed the return-toll in respect of horses drawing “any stage coach, diligence, van, caravan, or stage-waggon, or other stage-carriage conveying passengers or goods for pay or reward.” In neither of these cases was the carrier’s vehicle licensed under the Stage-Carriage Act, 2 & 3 W. 4, c. 120, but in both the carrier paid duty, as here, under the 16 & 17 Vict. c. 90, Sched. D.: and in each case the decision turned on the construction of the particular words in the local act. The present case arises upon an act of parliament the terms of which are neither like those of the act in *Eatwell, App., Richmond, Resp.*, nor like those in *Comley, App., Carpenter, Resp.* The words of the clause imposing the return-toll here are,—“The tolls shall be payable for or in respect of all stage-coaches, and other such like carriages, licensed or not licensed, for every time of passing and re-passing through the same turnpike on the same day.” It was contended on the part of the appellant that the words “not licensed,” in s. 40, meant not required to be licensed by the 2 & 3 W. 4, c. 120, and therefore that this vehicle, which is one which does require a licence, was chargeable with return toll. On the other hand, it was urged before the magistrates that “such” must mean of the same sort as stage-carriage, that is, a vehicle the primary object or use of which was to carry passengers for a fare. The magistrates yielded to the [392] latter argument; and it must be taken that they found the van in question was not liable to toll because its habit was not to carry passengers for a fare, but that that was only the occasional use of the vehicle. On this ground they held that it was not such a public carriage as a stage-coach, and therefore not chargeable with return-toll. Upon consideration, we think that the most convenient construction of the statute, and that their decision must be affirmed.

BYLES, J. I am of the same opinion. The 39th section enacts that no person shall be subject to the payment of toll more than once in any one day for passing and re-passing with the same horse or horses through the same turnpike, except as thereinafter mentioned. One thing is plain, that everybody is exempt from toll, except he

be by the act of parliament clearly declared liable. Section 40 provides that the toll shall be payable in respect of all stage-coaches or other *such* public carriages, *licensed or not licensed*, for every time of passing and re-passing through the same turnpike on the same day. The carriage in question is not a "stage coach." But it is a public carriage. Is it *such* a public carriage as a stage-coach? It is a vehicle paying duty as a carrier's van, and principally and bona fide used for and in the carrying of goods, wares, and merchandize, but occasionally also used in conveying passengers for hire. The licences required for the two descriptions of vehicle are different. In no view of the case,—whether looking at the ordinary employment of the vehicle, or at its authorization,—is this, in my judgment, such a public carriage as the return-toll was intended to be imposed upon.

Decision affirmed.

[393] HUGHES v. PALMER AND OTHERS. June 19th, 1865.

[S. C. 34 L. J. C. P. 279; 12 L. T. 635; 11 Jur. N. S. 876; 13 W. R. 974.]

1. By a composition deed under the 192nd section of the Bankruptcy Act, 1860, the debtor and the defendants as his sureties jointly and severally covenanted with the plaintiff as trustee for the creditors, to pay to him so much as would suffice to pay a composition of 7s. 6d. in the pound to all the creditors, by three instalments of 2s. 6d. each, at four, eight, and twelve months: and the deed contained a proviso that, "in case default should be made in payment of any or either of the said instalments, or in case before the said composition should be fully paid to the trustee, the debtor should be adjudicated bankrupt, or make or attempt to make any assignment of his estate for the benefit of his creditors, or any arrangement with his creditors different to that arrangement, then and in every such cases those presents, and the release, and every other clause and provision therein contained, should be thenceforth at an end and void."—In an action against the sureties to recover the second instalment,—the principal debtor having been adjudicated bankrupt on his own petition:—Held, that the bankruptcy did not render the deed *void* as against the sureties, but that the proviso made it *voidable*, at the election of the creditors.—
2. By whom the election in such a case was to be exercised,—*quære?*

This was an action for breach of covenant; and by the consent of the parties, and by a judge's order, according to the Common Law Procedure Act, 1852, the following case was stated for the opinion of the court, without any pleadings:—

Thomas Hatchard Palmer, being indebted to divers persons in divers sums of money, an indenture made between him the said Thomas Hatchard Palmer of the first part, the defendants of the second part, the plaintiff of the third part, and the creditors of the said Thomas Hatchard Palmer of the fourth part, was executed as their deed by the said Thomas Hatchard Palmer and by the defendants, and by the requisite number of creditors within the Bankruptcy Act. The following is a copy of the indenture:—

"This indenture made the 8th of June, 1864, Between Thomas Hatchard Palmer, of, &c., of the first part, George Josiah Palmer, of, &c., George Josiah Palmer the younger, of, &c., Charles Henry James, of, &c., and the Rev. S. W. Maugen, of, &c., of the second part, and William Hughes, of, &c., of the third part, and the several persons, companies, and partnership firms who are creditors of the said Thomas Hatchard Palmer (hereinafter called "the said creditors"), of the fourth part: Whereas, the said T. H. Palmer, being indebted to divers persons in divers sums of money [394] which he is unable to pay in full, has proposed to the said creditors to pay to them respectively a composition of 7s. 6d. in the pound upon the amount and in full discharge of their respective debts, such composition to be paid to the said William Hughes as a trustee on behalf of the said creditors, in three equal instalments of 2s. 6d. each, in manner following, that is to say, the first instalment to be paid at or before the expiration of four calendar months after the registration of the deed to be prepared to carry out the said proposal under the 192nd section of the Bankruptcy Act, 1861; the second instalment to be paid at or before the expiration of eight calendar months after the registration of the said deed; and the third instalment to be paid at or before the expiration of twelve calendar months from the regis-

tration of the said deed,—the payment of such instalments to be secured by the said parties hereto of the second part as sureties for the said T. H. Palmer: And whereas, in order to carry out the said proposal, the several parties hereto have agreed to execute these presents with such covenants and clauses as are hereinafter contained: Now, this indenture witnesseth that, in pursuance of the said agreement, and in consideration of the premises, they the said parties hereto of the first and second parts, do and each and every of them doth hereby, for himself, his heirs, executors, and administrators, jointly and severally covenant and agree to and with the said William Hughes, his executors and administrators, that they, or some of them, their or some or one of their executors or administrators, shall and will pay unto the said William Hughes, his executors or administrators, the sums hereinafter mentioned, at the times hereinafter stated, that is to say, such a sum of money as will be sufficient to pay all the creditors of the said T. H. Palmer the sum of 2s. 6d. in the pound [395] on the respective amounts of their said debts at or before the expiration of four calendar months after the date of the said registration of these presents, and the like sum at or before the expiration of eight calendar months after the said registration of these presents, and the like sum at or before the expiration of twelve calendar months after the said registration of these presents: And this indenture further witnesseth, and it is hereby agreed and declared between and by the several parties hereto, that the said William Hughes shall stand possessed of the said sums of money so to be paid into his hands as aforesaid, upon trust from time to time, and as and when the same shall be received by him, to apply and distribute the same in payment to himself and the rest of the said creditors respectively of the said instalments of the said composition: And this indenture further witnesseth that, in further pursuance of the said agreement, and in consideration of the premises, the said creditors do hereby severally, for themselves and their respective heirs, executors, administrators, and successors, release and discharge the said T. H. Palmer, his executors and administrators, and his estate and effects, from the debts, claims, and demands of the said creditors respectively, and from all actions, suits, or other proceedings for or in respect of such debts, claims, and demands, or any of them: Provided always, and it is hereby agreed and declared that, although, as between the said T. H. Palmer and the said parties hereto of the second part, they the said parties hereto of the second part are sureties only for the payment of the said composition, nevertheless, as between them the said parties hereto of the second part and the said creditors, they the said parties hereto of the second part shall be deemed and taken to be principal debtors, so that they the said parties hereto of the second part [396] shall not be discharged from their, either or any of their liability by reason of time being given to, or any arrangement being made with, the said T. H. Palmer, without the consent of them the said parties hereto of the second part, or by reason of any other circumstance which would or might have the effect of discharging them, any or either of them, if they were sureties only: Provided always and it is hereby agreed and declared that these presents shall not in any way prejudice or affect the rights or remedies of any of the said creditors against any surety or sureties, or any person or persons other than the said T. H. Palmer, his heirs, executors, and administrators, nor shall these presents in anywise prejudice or affect any security which any of the said creditors may have or claim for his debt: but, nevertheless, if such security shall be enforceable against the said T. H. Palmer or his estate or effects, then and in that case such creditor (unless he shall consent to abandon his said security) shall be entitled to receive the said compensation upon so much only of his said secured debt as may remain after such security shall have been realized, or after credit shall have been given for the full value thereof, such value to be fairly agreed upon between such secured creditor and the said T. H. Palmer, or in case of dispute to be ascertained by two impartial valuers, one to be chosen by such secured creditor and the other by the said T. H. Palmer, or an umpire to be named by such valuers before proceeding to the valuation: Provided always, and it is hereby agreed and declared that, in case default shall be made in payment of any or either of the said instalments of the said composition, or any part thereof, or in case, before the said composition shall be fully paid to the said William Hughes as aforesaid, the said T. H. Palmer shall be adjudicated bankrupt, or make or attempt to make any assignment [397] of his estate for the benefit of his creditors, or any arrangement with his creditors different to this present arrangement, then and in any such cases these presents, and the release, and every other clause and provision herein contained,

shall be henceforth at an end and void (but without prejudice to any act which may have been done by the said trustee under these presents); and the said creditors shall thenceforth be at liberty to sue for or prove for the full amount of their respective debts, less the amount which may have been received by them on account thereof under these presents or otherwise: And it is hereby lastly agreed and declared that these presents are intended to and shall so far as they lawfully may operate as a composition deed for the benefit of all the creditors of the said T. H. Palmer within the meaning of the provisions of the 192nd section of the Bankruptcy Act, 1861, in that behalf. In witness," &c. [Here followed a schedule containing the names of the several creditors, with the amount of their respective debts.]

The said indenture was within twenty-eight days from the time of its execution by the said T. H. Palmer, that is to say, on the 6th of July, 1864, registered in the court of bankruptcy, under the 192nd section of the Bankruptcy Act, 1861.

The first instalment under the said indenture was paid.

Afterwards, and before the second instalment became due, and before it was paid, viz. on the 27th of February, 1865, the said T. H. Palmer, *on his own petition*, was adjudicated bankrupt.

This action is brought for non-payment of the second instalment according to the covenant contained in the said indenture, the day for the payment of which elapsed before the commencement of this action.

The said creditors have never, nor has any one of [398] them, elected to treat the said indenture as void; nor have they, nor has any one of them, sued for or proved for the full amount of the unpaid portions of their or his debts or debt.

After the said adjudication, and before this action, most of the creditors, including the plaintiff, one of them, met and resolved that they did not treat the said indenture as void, and that they held the defendants jointly and severally liable to pay the balance of the said composition, pursuant to the said covenant.

The following is a copy of the resolution, that is to say,—"That the creditors who executed the said deed, or who may be bound thereby, in pursuance of the Bankruptcy Act, 1861, do not treat such deed of composition as void against the sureties parties thereto of the second part; but that they hold them jointly and severally liable to pay the balance of the composition, pursuant to the covenant on their part contained in such deed."

The court were to draw any conclusion of fact which they might think a jury ought to draw from the premises.

The question for the court was, whether the defendants were by the facts discharged from liability on the covenant to pay the second of the said instalments.

If the court should answer the question in the affirmative, judgment was to be entered for the defendants by *nolle prosequi*, with costs of defence. If the court should answer the question in the negative, judgment was to be entered for the plaintiff, for 130*l.*, or such a sum, to be ascertained by one of the Masters of this court, or in such other manner as the court might direct, should be paid by the defendant to the plaintiffs, together with costs of this action and special case; and that no writ of error or other proceedings should issue or be taken by either party.

[399] *Anstie*, for the plaintiff (*a*). The proviso in question is inserted for the benefit of the creditors. The defendants are seeking to set up the very contingency on which they were to become liable as sureties, viz. the non-payment of the instalments, to defeat the claims of the creditors under the deed. The proviso, it is submitted, renders the deed voidable only at the election of the creditors. In *Hyle v. Watts*, 12 M. & W. 254, a similar question arose upon an indenture by which the defendant covenanted to pay to S. and H., as trustees for the creditors, 500*l.* for each of the three successive years next after the 1st of January then next, and that he would forthwith insure his own life in some assurance office in London or Westminster in 1500*l.*, and would continue the same so insured during the said three years; with

(*a*) The points marked for argument on the part of the plaintiff were as follows:—

"That, upon the true construction of the proviso in the deed set forth in the special case, the deed was voidable merely at the election of the creditors, and not void upon the happening of any of the events therein mentioned and contemplated:

"2. That such proviso was inserted in the said deed for the benefit of the creditors."

a proviso that, in case of the defendant's neglect or refusal to effect or keep on foot such policy of assurance on his own life, then, in either of those cases, *the indenture was to be utterly void to all intents and purposes whatsoever*: and it was held that, by the defendant's neglect to keep alive the policy, the indenture was not absolutely void as to all the parties to it, but merely void as to the plaintiff and others, *if they should elect to make it so*. Parke, B., in delivering the judgment of the court, says: "The material question in the cause was, whether the deed, in case of a neglect to effect or keep alive a policy on his own life for 1500l., was absolutely void as to all the [400] parties, and incapable of being confirmed, or only void as against the plaintiff, if he should so elect. Our opinion is that the latter is the true construction, by reason of the absurd consequences which would follow, if the defendant, against the consent of the parties, who had all an interest in the continuance of the indenture, and to whom it gave benefit as well as to the defendant, could avail himself of his own wrong, and absolve himself and the trustees from liability on their respective covenants." There, as here, the proviso was introduced for the benefit of the persons with whom the covenant was entered into, and they only could take advantage of a breach. In *Doe d. Bryan v. Bancks*, 4 B. & Ald. 401, a lease of coal-mines reserved a royalty rent for every ton of coals raised, and contained a proviso that the lease should be void to all intents and purposes if the tenant should cease working at any time two years. After the working had ceased more than two years, the lessor received rent: and it was held that a tenancy from year to year was not thereby created; for the lease was not absolutely void by the cesser to work, but voidable only at the option of the lessor, and that he might avoid the lease upon any cesser to work commencing two years before the day of the demise in the ejectment. "The true construction," says Bayley, J., "of the proviso in this lease, 'that it shall be null and void to all intents and purposes upon a cesser of two years,' is that it shall be voidable only at the option of the lessor, and that it does not lie in the mouth of the lessee, who has been guilty of a wrongful act, in omitting to work in pursuance of his covenant, to avail himself of that wrongful act, and to insist that thereby the lease has become void to all intents and purposes." *Roberts v. Davey*, 4 B. & Ad. 664, is to the same effect, the judgment being founded upon *Doe d. Bryan v. Bancks*. In *Arnshay v. [401] Woodward*, 6 B. & C. 519, 9 D. & R. 536, a lease contained a proviso that, if the rent should be in arrear for twenty-one days after demand made, or if any of the covenants should be broken, then the term thereby granted, or so much thereof as should be then unexpired, should cease, determine, and be wholly void, and it should be lawful to and for the landlord upon the demised premises wholly to re-enter, and the same to hold to his own use, and to expel the lessee: and it was held that this, in the event of a breach of covenant, made the lease voidable, and not void, that the landlord was bound to re-enter in order to take advantage of the forfeiture, and that he waived it by a subsequent receipt of rent. *Pennington v. Cardale*, 3 Hurlst. & N. 656, is an authority to the same effect. It was there held that leases granted by deans and chapters for long terms of years, not in conformity with the disabling and restraining statutes, are not void, but voidable only.

J. Brown, Q. C., contra (a). This is an action against the sureties in a composition deed, at the suit of the trustee: and the answer set up is that the deed contains a stipulation that, in case default should be made in payment of any or either of the instalments of the composition, or any part thereof, or in case before the composition should be fully paid to the trustee, the debtor should be adjudicated bankrupt, or make or attempt to make any assignment of his estate for the [402] benefit of his creditors, or any arrangement with his creditors different to that present arrangement, then and in any such cases those presents, and the release, and every other clause and provision therein contained, should be thenceforth at an end and void. In the cases cited, the party was setting up his own wrongful act. The effect of a bankruptcy would be to take away from the sureties the bankrupt's means of indemnifying

(a) The points marked for argument on the part of the defendants were as follows:—

"1. That the bankruptcy of the said Thomas H. Palmer, as stated in the case, discharged the defendants from their covenant, and avoided the deed:

"2. That the election of the creditors was immaterial, and that it was not a case of election; and that, if it was, the whole of the creditors should have joined in it."

them, and destroy the equality of contribution which it is the object of these composition deeds to secure. The filing a petition by the debtor is not a wrongful act. It is a legal proceeding, and in many cases the most honest thing a man can do, as it prevents his whole estate from being swept away by one creditor. [Keating, J. What operation could this deed have against the sureties, if your argument be well founded?] It would operate against them if the debtor made default in payment of an instalment at the day. The reason why leases granted by deans and chapters for long terms, and not in conformity with the disabling and restraining statutes, are held to be voidable only is that the statutes were made for the benefit of the chapter, and not for that of the lessee: see *The Lincoln College case*, 3 Co. Rep. 60 a. This, however, is a totally different case.

Anstie, in reply. There is no foundation for the distinction suggested between this case and those of the mining leases. The proviso which the defendants are seeking to avail themselves of was evidently put in for the purpose of protecting the creditors against the consequences of the non-performance of the debtor's covenants. He could not be made a bankrupt by any of the creditors parties to the deed: they have released their debts. If he were adjudged a bankrupt at all, it could only be at the instance of a new creditor or upon [403] his own petition. The argument on the part of the defendants is groundless, unless the covenant could be split: and for that there is no authority.

WILLES, J. I am of opinion that our judgment in this case should be for the plaintiff. This is an action brought to recover the second instalment of a composition under a deed made between one T. H. Palmer of the first part, the defendants of the second part, the plaintiff of the third part, and the several creditors of T. H. Palmer of the fourth part, by which T. H. Palmer and the defendants jointly and severally covenanted with the plaintiff to pay to him such a sum as would suffice to pay a composition of 7s. 6d. in the pound on the amount of the respective debts of all his creditors, by three instalments of 2s. 6d. each, at four, eight, and twelve months, and by which the defendants agreed that, though they were sureties only for the payment of the composition, they should as between them and the creditors be deemed and taken to be principal debtors: and by which deed, in consideration of that arrangement, the creditors agreed to release T. H. Palmer from their several debts, claims, and demands, subject to a condition upon which the question we have to determine turns, viz. that, in case default should be made in payment of any or either of the said instalments of the said composition, or any part thereof, or in case, before the said composition should be fully paid to (the plaintiff) the trustee, the said T. H. Palmer should be adjudicated bankrupt, or make or attempt to make any assignment of his estate for the benefit of his creditors, or any arrangement with his creditors different to that arrangement, then and in any such cases those presents, and the release, and every other clause and provision therein contained, should be thenceforth at an end and void (but without prejudice to any act [404] which might have been done by the said trustee under those presents), and the said creditors should thenceforth be at liberty to sue for or prove for the full amount of their respective debts, less the amount which might have been received by them on account thereof, under those presents or otherwise. It appears that the first instalment was duly paid, and afterwards, and before the second instalment became due, T. H. Palmer was adjudicated a bankrupt upon his own petition. The defendants being afterwards called upon to pay the second instalment, the answer they set up is that the condition has become operative, and the deed void as against them, and they are discharged from their covenant to pay any instalment subsequently due. The question is whether that is the true effect of the condition. For the purpose of determining that question, we must take the whole of the proviso into our consideration, and ascertain its true character, —whether the parties have expressed an intention that the deed shall be absolutely void as to all parties thereto on the happening of either of the events referred to, or whether it is a condition on which the deed is to become voidable only as against such of the parties as may be guilty of a default, and that the remedies in favour of those who have committed no default should be preserved: according to the familiar doctrine of the power of re-entry by a landlord on the tenant, in which case the condition, however strong the words, in modern times at least has always been construed to mean that the lease shall be void only on the lessor electing to take advantage of the forfeiture. These cases come within a class of cases which are

founded on the principle of giving effect to the language according to the whole scope of the instrument, without regard to particular words which would seem to point to a contrary intention. Now, looking at the whole of this instru-^[405]ment, it is manifest that the parties intended that one of them should have a particular benefit, subject to its becoming forfeited on his making default, and that "void" here means voidable, as against the party who is in no default. Many familiar instances might be given to illustrate this branch of the law. The condition may be that the instrument shall become void on the doing of some indifferent act by either party, as that the term shall be ended upon either the lessor or lessee giving six months' notice to the other of his intention to put an end to it at the expiration of the first seven or fourteen years. There, no wrong is done; and it is obviously the intention of the parties that the term should come to an end, if done by either of them. Then, put the case of a default in payment of rent: the words of the proviso in that case are mere *verba sonantia*. So, of the covenants to repair, and to insure, and so forth. To say that the lease should become absolutely void upon default made by the tenant, would involve two absurd consequences,—one, that the lease should be put an end to by the default of one of the parties, without the consent of the other, secondly, that it would involve the absurdity not only that the lessee should be relieved from the future performance of the covenants, but also that the lessor should lose the benefit of his remedy for breaches occurring before the lease was so put an end to. These considerations have induced the courts to decide that "void" in all these cases means voidable only at the election of the party not in default. I may notice that, amongst the terms on which such a condition is to operate, one is not infrequently introduced, viz. that, if the lessee shall become insolvent or be adjudicated bankrupt, the lease shall be void. The question has arisen where the tenant had been adjudicated bankrupt upon insufficient materials. As to this, the law is ^[406]not without abundant light. The present case gives rise to a question upon another branch of the law, upon which it is not my intention to express any opinion, viz. that which deals with the case of several persons jointly interested having an election to put an end to the deed. The present case differs from the case I put during the argument, of several persons jointly interested in a reversion; for here the defendants have several interests; and all have agreed to be represented by the trustee named in the deed: I therefore pronounce no opinion as to what would amount to a determination of the election in such a case. I will content myself with referring to *Co. Litt.* 145 a., where it is laid down that, when election is given to several persons, there the first election made by any of the persons shall stand. I see no difficulty in applying that doctrine here. Whether, as the deed is intended to operate under the Bankruptcy Act, the statutory majority ought to elect, or whether one creditor may elect on behalf of all, I do not say. If there be a difficulty, the parties have created it for themselves. That point, however, has no material bearing on the language now before us. Having compared the case of a lease with a similar condition with this, I should have thought that enough to dispose of the question. There is, however, a further argument applicable to the present case. It is provided that the deed is to come to an end on failure of the debtor in payment of any one of the instalments. Having regard to the principles laid down in the cases cited by Mr. Anstie, I think it is impossible to contend that the deed was void simply by reason of such default on the part of the debtor in payment of the second instalment. Applying the ordinary rules of construction and good sense to this proviso, you have here a covenant for making void the deed in case of the bankruptcy of one of the contracting parties, which ^[407]in the case of a lease has been decided to make the demise void only at the election of the lessor, coupled with a covenant which can only be applicable where the creditors elect to declare the deed void. I would make this further remark. Mr. Brown has argued that this condition is severable, and that there is a case within the condition in which the deed must be void, without further election by the creditors; that is, where one creditor causes the condition to be broken, viz. the case of *Palmer*, the debtor, being adjudicated bankrupt at the suit of a creditor. That is open to two answers. In the first place, no such event can arise, so long as *Palmer* fulfils the covenants on his part contained in the deed: and, in the next place, if it could, it would only be on a creditor's taking proceedings which are inconsistent with the deed. That argument, therefore, appears to me to fail on both grounds. I must own that the arguments urged on the part of the plaintiff have satisfied me that the true con-

struction of this condition or proviso is, that the deed is voidable only at the election of the creditors, and consequently that our judgment must be for the plaintiff.

BYLES, J. I am of the same opinion. There are cases innumerable to shew that "void" may mean "voidable" or "void," at the election of the party contracted with, where otherwise the wrongful act of the other party would put an end to the covenant. No doubt, the words here are strong enough to render the deed void in certain events. But they are not so strong as were the words in *Roberts v. Durney*, 4 B. & Ad. 664: there they were "null and void to all intents and purposes whatsoever;" and the court, in regarding the real intention of the parties, did violence to the language they had used. It is past controversy here, in [408]-deed it was admitted that "void" must mean voidable so far as the non payment of the instalments is concerned. The bankrupt and his sureties covenant to pay the instalments, with a proviso that, in case of default, the deed, that is, the release, shall be void. That beyond all doubt must mean voidable at the election of the creditors. Some of the acts contemplated are acts to which the debtor may or may not be a party: but the covenant must be read in the same sense in either event. The plain intention of the parties was that the creditors should not be bound by their release unless the instalments were paid. I think it is impossible to read the word "void" any otherwise than as voidable at the election of the creditors.

KEATING, J. I am entirely of the same opinion. My two learned Brothers have gone so fully into the matter that there is little left for me to say. To accede to the argument of Mr. Brown, would be to defeat that which was the evident intention of the parties.

Judgment for the plaintiff.

[409] BUTTERWORTH v. BROWNLOW AND ANOTHER. June 19th, 1865.

[S. C. 34 L. J. C. P. 266.]

A., a carrier between Hull and the continent, employed B. as his agent to carry goods between Hull and Manchester, the course of business being to deliver the goods to the consignee immediately on their arrival. C., a customer, requested B. not to deliver goods consigned to him, but to send him notice of their arrival, and await his orders. To this B. assented, *A. being ignorant of the arrangement*. A quantity of cotton-waste consigned to C. from Lille arrived at Hull and was forwarded thence to Manchester by B.: but B. omitted to give C. notice of its arrival, and C. in consequence sustained loss:—Held, that A. was not responsible.

This was an action brought to recover the sum of 22l. 8s. 6d., the value of three bags of cotton-waste which were on the 7th of September last delivered by the plaintiff's agent at Lille to the defendants' agents there, for carriage to and delivery to the plaintiff at Manchester.

The plaintiff is a cotton-waste dealer at Manchester: and the defendants, whose place of business is at Hull, undertake to carry from Lille and other places on the continent of Europe to Manchester, Liverpool, and other places in the United Kingdom, at certain through rates of carriage, of which they publish a tariff. They carry principally by means of other carriers, with whom they make their own arrangements: they themselves, however, making the contract of carriage with the customer on their own account as principals.

The plaintiff, who imports considerable quantities of waste from Lille and that part of the continent, has dealt with the defendants from time to time for some years.

On the 20th of October, 1862, some time after he commenced dealing with them, he wrote them the following letter:—

"Gentlemen,—In future, all goods coming into your hands for me you will please consign them through Messrs. Carver & Co., Lancashire and Yorkshire railway, not by Sheffield and Lincolnshire rail. Your attention will oblige."

The defendants usually employ a firm of carriers called Thompson, M'Kay, & Co. (who make use of the Manchester, Sheffield, and Lincolnshire railway), [410] to carry their goods from Hull to Manchester: but, at the plaintiff's request contained in the above letter (the terms of Carver & Co. and Thompson, M'Kay, & Co. being, as far as the defendants were concerned, the same), the defendants afterwards forwarded

the plaintiff's goods to Manchester by Carver & Co., the firm of carriers mentioned in the said letter, and who used the Lancashire and Yorkshire railway.

It was proved that, in the ordinary course of business, and in the absence of any special instructions to the contrary, Carver & Co., or any other carriers at Manchester, would immediately on the arrival of the goods at Manchester, and without any previous advice of such arrival, deliver them at the warehouse of the person to whom they were directed.

Some time ago, the plaintiff gave instructions to Messrs. Carver & Co., that, when goods arrived in Manchester directed to him, they were not to deliver them at once at his warehouse, as they otherwise would have done in ordinary course, but were to advise him of their arrival, and deliver them only on receiving a written or printed order from him to that effect. These instructions have been accepted and regularly acted on by Messrs. Carver & Co.

It was not proved, and indeed it was wholly denied by the defendants, that they ever had notice of these instructions by the plaintiff to Messrs. Carver & Co., or of this his course of dealing with them.

In ordinary course, the three bags of waste consigned from Lille on the 7th of September would be shipped to Hull, forwarded from there, and arrive at Manchester about the 14th or 15th of September.

On the 13th of September, the defendants wrote to the plaintiff the following letter, which he received on the 14th of September :—

[411] “Hull, 13th September, 1864.

“Sir,—We beg to advise of having forwarded to your address the under-mentioned goods, per Carver & Co.

“Viâ Manchester.”

Q 59 Q 3 bales waste.

Ex Transit from Dunkirk.

“Charges forward.

“Freight from Lille to Manchester	112 kills.}	£0 6 5
Trinity House primage	55/10}	
Disbursement as per bill of lading		
Duty		
Carriage		
Dock charges for landing, wharfage, weighing, and delivering		
Cooperage, examining, making up, and cartage		
Postage		
Commission for entering and forwarding		”

The goods left Hull on the 14th, and arrived in Manchester the same evening or the next morning.

There was no complaint at the trial, on the part of the plaintiff, that the goods did not arrive in Manchester in proper time.

On the arrival of the goods in Manchester, they were not sent up to the plaintiff's warehouse, in consequence of his above-mentioned instructions to Messrs. Carver & Co. Messrs. Carver & Co., through some oversight, neglected to advise the plaintiff as usual of their arrival; and the plaintiff never inquired for the goods at Messrs. Carvers', although his servants were there about other matters almost every day. This was to some extent accounted for by the extensive nature of the plaintiff's business; different departments being conducted by different clerks.

The market for waste was falling during the whole period from the 7th of September, and by the 5th of October had fallen 50 per cent.

[412] On the 5th of October, the plaintiff, having in the meantime given no notice whatever to the defendants of the non-arrival of the goods, invoiced them to the defendants at 22l. 8s. 6d., being what the goods were worth in the Manchester market when they were delivered to the defendants at Lille.

Upon the above facts, the advocate for the plaintiff contended that the defendants were bound to deliver the goods to the plaintiff at his warehouse in Manchester, or, at all events, to give him notice of their arrival in Manchester.

The judge decided that the plaintiff, by his instructions to Carver & Co. not to deliver the goods until they had received a written or printed order from him, had himself been the cause of the defendants' contract to deliver not having been carried out: and that the defendants, not having had notice of the plaintiff's instructions to Messrs. Carver & Co., and never having assented thereto, were not bound to advise the plaintiff of the arrival of the goods in Manchester in any other way than by their delivery: and therefore that the defendants were not liable in the present action.

If, upon the above facts, the court should be of opinion that the plaintiff was not entitled to recover, then the judgment for the defendants was to stand. If, however, the court should be of opinion that the plaintiff was entitled to recover, then the case was to be remitted back for a new trial, or otherwise disposed of as the court should direct.

Holker, for the plaintiff (*a*). The defendants, who were carriers professing to carry from Lille, in Flanders, [413] to Lancashire, employed Thompson, McKay, & Co. as their agents to forward their goods from Hull to Manchester and other places. In October, 1862, the plaintiff, who had been in the habit of employing the defendants for some time to carry goods for them, wrote to them requesting them to send their consignments in future through Messrs. Carver & Co. by the Lancashire and Yorkshire railway, instead of, as theretofore, by the Sheffield and Lincolnshire railway. In pursuance of this request, the defendants sent all goods subsequently received by them for the plaintiff through Carver & Co.: and Carver & Co.'s course of business was, to deliver all goods so received by them for the plaintiff at his place of business at Manchester. Some time since, the plaintiff gave instructions to Carver & Co. not to deliver his goods at once at his warehouse, but to advise him of their arrival, and deliver them only on receiving a written order from him to that effect. To this Carver & Co. assented. On the 13th of September, 1864, the plaintiff received from the defendants an intimation of their having forwarded to his address, through Carver & Co., three bales of cotton-waste, which duly arrived at Carver & Co.'s [414] warehouse on the following day. They remained at Carver & Co.'s for a considerable time, no notice of their arrival having been given to the plaintiff. In the mean time, the market for cotton-waste became much depressed: and the question now is, whether the defendants are not responsible for the loss. The county court judge ruled that they were not. Now, if Carver & Co. were the agents of the defendants, they clearly were responsible for their negligence: *Butcher v. The South Eastern Railway Company*, 16 C. B. 13; *Sadler v. Henlock*, 4 Ellis & B. 570; *Powell on Carriers*, 167. In *Golden v. Manning*, 2 W. Bl. 916, it was held that a carrier is bound to deliver goods, if it be the general course of his trade so to do. [Willes, J. The contrary has been held as to a carrier by sea, on a charterparty.] In *Bourne v. Gatliffe*, 11 Clark & Fin. 45, it was held that a carrier by sea is not entitled immediately on the arrival of a vessel, and without notice to the owner, to land the goods; and, if he do so, and they are destroyed at the wharf, he will be answerable to the owner for the loss. [Willes, J. That arose on a bill of lading.] It did. [Willes, J. The arrangement between the plaintiff and Messrs. Carver & Co. turned the latter into warehousemen.] Not so: the arrangement simply was that, instead of delivering the goods on arrival, Carver & Co. should give the plaintiff notice of their arrival.

Pope, for the respondent, was not called upon.

(*a*) The points marked for argument on the part of the plaintiff were as follows:—

"1. That the defendants were, under their contract with the plaintiff, bound either to deliver the goods on their arrival in Manchester, or else advise the plaintiff of their arrival:

"2. That Messrs. Carver & Co. were the agents of the defendants, and any notice given to them was notice to the defendants:

"3. That Messrs. Carver & Co., as agents for the defendants, were authorized to consent or agree on their behalf to give notice to the plaintiff of the arrival of his goods, instead of immediately sending them to his place of business: and that the consent or agreement they gave or entered into was in fact the consent or agreement of the defendants:

"4. That the defendants are liable to answer to the plaintiff for the negligence of Carver & Co.:

"5. That, upon the facts stated in the case, the plaintiff was entitled to judgment."

WILLES, J. I am of opinion that the decision of the county-court judge in this case was right, and ought to be affirmed. This is in effect an action by the plaintiff against Messrs. Brownlow & Co., carriers at Hull, for not giving the plaintiff notice of the arrival of certain cotton-waste carried by them for him from [415] Lille to Manchester. It appeared that Brownlow & Co. had formerly employed Thompson & Co. to forward goods for them from Hull to Manchester, viâ the Manchester, Sheffield, and Lincolnshire railway; but, at the plaintiff's request, they employed Carver & Co., who used the Lancashire and Yorkshire railway: and the course of business had been, to deliver all goods consigned to the plaintiff through them at the plaintiff's place of business. Before the goods in question were forwarded, the plaintiff had requested Carver & Co. not to deliver goods for the future at his warehouse,—that is to say, not to fulfil the contract for carriage in the ordinary way,—but to keep the goods until they received the plaintiff's orders for their disposal, sending him notice of their arrival. The result at which the county-court judge arrived upon this state of facts was, that Brownlow & Co. were employed as carriers for the purpose of carrying and delivering the goods to Butterworth; that Brownlow & Co. employed Carver & Co. to carry that contract into effect; and that, unknown to Brownlow & Co., Butterworth made a contract with Carver & Co., not for carrying, but for warehousing the goods with them. I think it is impossible to say that the county-court judge was wrong in that conclusion of fact, or in the conclusion of law resulting from it.

BYLES, J. I am of the same opinion. The plaintiff in effect says to the defendants' agents, "Do not in future pursue the ordinary course of business, by delivering the goods on arrival, but keep them until I send you instructions." The defendants, knowing nothing of this arrangement between the plaintiff and Carver & Co., send their goods on in the expectation that Carver & Co. will do their duty. The latter have, it may be, been guilty of negligence in omitting to do [416] something which they were directed by the plaintiff to do, without the knowledge of the defendants. The defendants clearly are not liable for that.

KEATING, J., had gone to Chambers.

Judgment affirmed, with costs.

RAY v. JONES. June 20th, 1865.

[S. C. 34 L. J. C. P. 306; 12 L. T. 737; 11 Jur. N. S. 812; 13 W. R. 1018.]

By a deed of arrangement under s. 192 of the Bankruptcy Act, 1861, purporting to be made between the debtor of the first part, and the several executing creditors, on behalf of themselves and all and every other the creditors who might assent to or become bound by the deed, of the second part, the debtor covenanted to pay all his creditors the amount of their respective debts by nine monthly instalments, and the parties of the second part agreed to accept such instalments, and covenanted that, "while the said instalments were duly and regularly paid by the debtor, they would not sue him or enforce any judgment or other proceedings against him or his estate:"—Held, that this amounted only to a covenant not to sue for a limited time, and was not pleadable in bar as a release.

This was an action for goods bargained and sold, goods sold and delivered, and money found due upon accounts stated. The declaration was as follows:—

William Ray, the trustee on behalf of the creditors of F. R. Gilder, a debtor, under a deed or instrument made and entered into between the said F. R. Gilder and his said creditors, and the plaintiff, as trustee as aforesaid, relating to the debts and liabilities of the said F. R. Gilder, and his release therefrom, according to the clauses of the Bankruptcy Act, 1861, relating to trust deeds for benefit of creditors, and which said deed or instrument has been duly registered under the said act of parliament, and under which said deed or instrument, all things necessary in that behalf having happened and been done, all the property comprised in the said deed or instrument, including the causes of action hereinafter mentioned, was and is under the said act of parliament vested in the plaintiff as such trustee as aforesaid, by, &c., sues the defendant for money payable by the defendant to the plaintiff as [417] such trustee as aforesaid for goods before the making or entering into or execution of the said deed or instrument bargained and sold by Gilder to the defendant at his request, and for

goods before the making or entering into or execution of the said deed or instrument sold and delivered by Gilder to the defendant at his request, and for money before the making or entering into or execution of the said deed found to be due from the defendant to Gilder on accounts before the making or entering into or execution of the said deed stated between them the defendant and Gilder: and the plaintiff as such trustee as aforesaid claimed 50l.

The defendant pleaded that, after the accruing of the causes of action in the declaration mentioned, and after action, to wit, on the 10th of April, 1865, the defendant, then being indebted to divers persons, made and executed a deed, which, without the schedule or signatures and attestations thereto, is in the words and figures and to the effect following, that is to say:—"This indenture made the 10th day of April, 1865, between Stephen Thomas Jones, of, &c. (hereinafter called the said debtor), of the first part, and the several persons, companies, and firms, whose names are subscribed and seals affixed in the schedule hereunder written, being creditors of the said debtor, on behalf of themselves and all and every other the creditors of the said debtor who may assent to or become bound by these presents, of the second part: Whereas, the said debtor is indebted to the parties hereto of the second part and other persons in sums which he is unable to pay at the present time, and it has been agreed by and between the parties hereto to give the said debtor the time hereinafter mentioned for payment of his debts in full: Now, this indenture witnesseth that he the said debtor hereby, for himself, his executors and administrators, covenants and agrees to and with [418] the said parties hereto of the second part, that he will duly pay all and every the debts and claims of the parties hereto of the second part, and all other his creditors, whether executing these presents or not, the full amount of their respective debts and claims that are now due and owing by the said debtor, by nine equal monthly instalments, the first payment of an equal ninth part thereof to commence and be made on the 20th of May next, and a similar payment to be made on the 20th of each following month until the whole of his said debts are satisfied and discharged: And this indenture further witnesseth that, in pursuance of the said agreement, and in consideration of the debtor's covenant as hereinbefore contained, they the parties hereto of the second part hereby covenant and agree to accept payment of their respective debts by the nine instalments hereinbefore mentioned, and, *while the said instalments are duly and regularly paid by the said debtor, not to sue the said debtor or enforce any judgment or other proceedings against him or his estate*: And it is lastly agreed that this indenture shall operate (so far as it lawfully may) as a deed of arrangement between the said debtor and his creditors under the Bankruptcy Act, 1861." Averment that a majority in number representing three fourths in value of the creditors of the defendant whose debts respectively amounted to 10l. and upwards, did in writing assent to and approve of the said deed; and the execution of the said deed was attested by an attorney and solicitor: and within twenty-eight days from the day of the execution of the said deed by the defendant the same was produced and left (having been first duly stamped) at the office of the chief registrar of the court of bankruptcy for the purpose of being registered, and together with such deed there was delivered to the said chief registrar such affidavit [419] by the defendant as by the Bankruptcy Act, 1861, in that behalf is provided: and the said deed did before the registration thereof bear such ordinary and ad valorem stamp-duties as were provided by the Bankruptcy Act, 1861; in that behalf and at the time of the execution of the said deed the plaintiff was a creditor of the defendant in respect of the amount claimed herein pleaded to within the meaning of the Bankruptcy Act, 1861; and that, all conditions prescribed by the said act having been observed and performed, and all things having happened necessary in that behalf, the plaintiff became and was and is bound by the said deed as if he had been a party thereto and had executed the same.

The plaintiff demurred to this plea, the ground of demurrer stated in the margin being, "that the deed set out in the plea is no defence to the action, as it contains no release, and contains unreasonable provisions." Joinder.

Prentice, in support of the demurrer (a). The deed set out in the plea does not

(a) The points marked for argument on the part of the plaintiff were as follows:—

"1. That the plea is no defence to the action, as it contains no release:

amount to a release, and could not have been pleaded as such even if the plaintiff had been an executing party. [Willes, J. A covenant not to sue may, according to the case of *Keyes v. Elkins*, 34 Law J., Q. B. 25, be set up as an equitable defence.] There was a release there: the deed provided that the creditors who executed it thereby agreed to accept [420] "these presents in full discharge and satisfaction of their respective debts, claims, and demands" against the defendant; and they thereby released the defendant from all their debts and claims against him, and agreed that the deed might "operate as a defeazance pleadable in bar to or be otherwise set up as a defence to any action," &c. Here, the covenant is merely an engagement on the part of the creditors parties thereto that they will not sue the debtor so long as the instalments are regularly paid. A covenant not to sue for a limited time cannot be pleaded as a release: *Thimbleby v. Barron*, 3 M. & W. 210; *Gibbons v. Fouillon*, 8 C. B. 483. In *Walker v. Nevill*, 34 Law J., Exch. 78, a covenant on the part of the creditors, contained in a deed of composition and inspection, not to sue within a time limited, viz. before the 20th of May, 1865, was held to be pleadable as a release, because it was accompanied by an express stipulation to the following effect,—“that these presents shall and may be pleaded and allowed in any court of law or equity as a bar or in discharge of all and every action or actions, suit or suits, or other proceedings, judgments, and executions which shall or may be brought, commenced, sued, prosecuted, or taken against the debtors, or either of them, or their or either of their goods or estates, by the said several creditors or any of them, contrary to the true intent and meaning of these presents.” In delivering the judgment of the court, Channell, B., there says: “There is no doubt that a simple covenant not to sue for a limited time, is of itself only the subject for a cross-action if broken, and not pleadable in bar. But here there is an express provision that, during this limited time, the deed may be pleaded in bar: and we think that, if the plaintiff had in fact executed such a covenant, it might be pleaded in bar to an action by him. This being the case, he is in the same position [421] by virtue of the statute, unless this or some other covenant in the deed is so unreasonable that the assent of the requisite majority cannot bind the minority.” There is no such provision in this deed: and the court will not allow an amendment so as to raise an equitable defence, to meet the suggestion thrown out by Crompton, J., in the course of the argument in *Keyes v. Elkins*, and which raises a nice question that was not fully brought to the attention of the court there. It is not so clear that a court of equity would not impose terms. [Willes, J. The covenant is, not to sue for the original debt while the nine monthly instalments of the composition are duly and regularly paid. It is not a release, with a condition subsequent.] The plea is clearly a bad one.

Piffard, contra (a). The only covenant in this deed by the parties of the second part is this covenant not to sue. The effect of it is a positive covenant not to sue, with a defeazance in case the instalments are not duly paid. The court will not extend the strictly technical rule laid down in *Thimbleby v. Barron*, 3 M. [422] & W. 210, *Gibbons v. Fouillon*, 8 C. B. 483, *Ford v. Beech*, 11 Q. B. 852, and other cases. This covenant can only be pleaded as a release. It is like the covenant in *Hilson v.*

“2. That the deed could not have been pleaded as a defence, if the plaintiff had executed it:

“3. That the deed is not binding on non-assenting creditors, as creditors executing are in a different position from those not executing:

“4. That non-assenting creditors are not bound by the covenant not to sue.”

(a) The points marked for argument on the part of the defendant were as follows:—

“That the plea is a good defence to the action, notwithstanding it contains no formal release, inasmuch as,—first, it could have been pleaded as a defence, if the plaintiff had executed it,—secondly, the deed is binding on non-assenting creditors, as creditors executing are not in a different position from those not executing,—thirdly, non-assenting creditors are bound by the covenant not to sue, inasmuch as the covenant not to sue is not a covenant by the subscribing parties only, but a covenant by the parties hereto of the second part, that is, ‘the several persons, companies, and firms whose names are subscribed and seals affixed in the schedule hereunder written, being creditors of the said debtor, on behalf of themselves and all and every other the creditors of the said debtor who may assent to or become bound by these presents.’”

Barclay, 3 Hurlst. & Colt. 9. In all these cases, a covenant not to sue is considered the more appropriate one, inasmuch as a release might affect the rights of others.

Prentice, in reply. The deed in *Hudson v. Barclay* had a covenant in terms similar to that in *Walker v. Nevill*, 34 Law J., Exch. 73.

WILLES, J. Mr. Piffard has said all that could be said in favour of this plea, and has referred to the authorities on which alone it could be sustained, if at all, and especially to the case of *Hudson v. Barclay*, 3 Hurlst. & Colt. 9. I am, however, of opinion that those authorities are not sufficient to bear him through. The plea sets up a deed by which the statutory number of the defendant's creditors have agreed to receive payment of their respective debts by nine equal monthly instalments. The deed was intended to bind all the creditors, and for the present purpose I assume that it does so. It contains a covenant by the creditors to accept the instalments, and, "while the said instalments are duly and regularly paid by the debtor, not to sue the said debtor or enforce any judgment or other proceedings against him or his estate." In terms, that is obviously a covenant not to sue, not a release nor a defeazance: for, if it had been intended to enure as a release, it would have been expressed in language such as is found in the deed in *Gibbons v. Youillon*, 8 C. B. 483, or in *Hudson v. Barclay*. No authority has been cited to shew that a release or defeazance is to be implied, unless there be something in the language of the instrument itself to war-[423] rant such an implication. If it can be construed as a covenant not to sue, it ought to be so construed. A covenant not to sue, if absolute, may be pleaded as a release: and, by a benignant construction, this covenant might, if all the instalments were paid, be said to be an absolute covenant not to sue, and so to operate as a release. But it would be obviously contrary to the intention of the parties, as well as contrary to the doctrine laid down in *Thimbleby v. Barron*, 3 M. & W. 210, to hold it to amount to a release in the first instance. The deed, therefore, amounting only to a qualified covenant not to sue, and there being no release or defeazance, or satisfaction independently of the statute, amounts to no defence, though in all other respects it might be a strict compliance with the statute. For these reasons, I feel bound to give judgment for the plaintiff.

BYTES, J. I am of the same opinion. No doubt, the general rule is that a covenant not to sue, when it does not affect other parties, and is so intended, may be pleaded as a release. Since *Thimbleby v. Barron*, 3 M. & W. 210, a mere covenant not to sue operates nothing, not even a suspension of the action. If this deed had contained a provision similar to that in *Walker v. Nevill*, 34 Law J., Exch. 73, the result might have been different.

KEATING, J. I am of the same opinion. I think it is impossible to extend this covenant beyond a covenant not to sue within a limited time,—a conditional covenant.

Judgment for the plaintiff.

[424] THE VESTRY OF THE PARISH OF ST. MARYLEBONE, *Appellants*;
JOHN STEPHEN VIRET, *Respondent*. June 23rd, 1865.

[S. C. 34 L. J. M. C. 214: 12 L. T. 673: 11 Jur. N. S. 907: 13 W. R. 1064.
Followed, *St. Martin's Vestry v. Ward*, [1897] 1 Q. B. 43.]

Where the vestry or district-board of a parish or district, under the powers conferred on them by the Metropolis Local Management Act, 18 & 19 Vict. c. 120, substitute a new sewer in a course different from that of an old one, and think proper to divert house-drainage (not in itself defective or insufficient) from the latter to the former, they are bound (under s. 69) to provide new drains for the old ones so diverted, and cannot call upon the owners of the premises, under s. 73, to pay the expense of such new drains.

On the 26th of February, 1864, John Stephen Viret, the respondent, appeared before one of the magistrates at the Marylebone police-court, in answer to the following summons:—

“Marylebone Police Court.

“Metropolitan police district and county of Middlesex.

“To John Stephen Viret, of No. 17 Edgeware Road, in the parish of St. Marylebone in the county of Middlesex.

“Whereas complaint hath this day been made before me the undersigned, one of the magistrates of the police courts of the metropolis sitting at the police-court High Street, Marylebone, in the county of Middlesex, and within the metropolitan police-district, by the vestry of the parish of St. Marylebone, For that, on the 1st of January, 1864, the vestry of the parish of St. Marylebone, in the county of Middlesex, a parish included in Schedule A. to the Metropolis Local Management Act, 1855 (18 & 19 Vict. c. 120), under and in execution of the said act, and in consequence of the neglect and refusal of the owner of the premises hereinafter mentioned to comply with their lawful requisition in respect of the works hereinafter mentioned, incurred certain expenses amounting to 17l. 7s. 4d., in and about constructing and making from the house or building situate and being No. 17 Edgeware Road, in the said parish, and within the metropolitan police-district, of which house you are the occupier, into a certain sewer in the Edgeware Road aforesaid, being a sewer of sufficient size, and within 100 feet of such house, and on a lower level than such house, a certain [425] covered drain and other fit and proper works requisite to secure the safe and proper working of the same; and that payment of the said sum of 17l. 7s. 4d. for such expenses hath been required of you, and that the same hath not been paid:

“These are therefore to command you, in Her Majesty’s name, to be and appear on Saturday next, at 2 o’clock in the afternoon, at the police-court aforesaid, before me, or such other magistrate of the said police-court as may then be there, to shew cause why an order should not be made under the provisions of the Metropolis Management Acts, 1855 (18 & 19 Vict. c. 120), and 1862 (25 & 26 Vict. c. 102) for the payment by you to the vestry of the said sum of 17l. 7s. 4d.

“Given under my hand and seal,” &c.

On the hearing of the summons, the following facts were proved:—

1. Viret was the occupier of the above-mentioned house and premises. Complaint having been made to the vestry as to the drainage of the house and premises No. 17 Edgeware Road, the surveyor of the vestry, by their direction, examined the drains of the said house and premises, and made a report to the vestry; and the vestry, on the 30th of July, 1863, after duly considering the matter, came to the following resolution, which was duly entered on their minutes:—

“Resolved, that the premises Nos. 13, 14, 16, and 17 Edgeware Road, and Nos. 33 and 34 Upper Seymour Street, not being drained by sufficient drains communicating with a sewer and emptying themselves into the same to the satisfaction of the vestry, notices be given to the owners of the respective premises, 13, 14, 16, and 17 Edgeware Road, requiring them, pursuant to the 73rd section of the Local Management Act, to drain their premises by separate drains into the front [426] sewer in the Edgeware Road; and that like notices be given to the owners of the respective premises Nos. 33 and 34 Upper Seymour Street, to drain by separate drains into the sewer in Upper Seymour Street; and that the old drain or sewer at the rear of the above premises in the Edgeware Road and under the houses 33 and 34 Upper Seymour Street be discontinued.”

2. On the 21st of August, 1863, the following notice was duly served upon Viret:—

“Parish of St. Marylebone.

“To the owner of the house and premises No. 17 Edgeware Road, in the parish of St. Marylebone, in the county of Middlesex.

“By virtue of the provisions of an act of parliament made and passed, &c., intituled ‘An act for the better local management of the metropolis,’ notice is hereby given to you that the vestry of the parish of St. Marylebone find that your house and premises, situate number 17 Edgeware Road, in the said parish of St. Marylebone, is not drained by a sufficient drain communicating with a sewer and emptying itself into the same to the satisfaction of the said vestry, and that there is a sewer within 100 feet of

some part of your house and premises on a lower level than the same: and further take notice that you are hereby required, within twenty-eight days from the service hereof, to construct and make from such house and premises into the sewer in the Edgware Road, in front of your said house, a covered drain, and such branches thereto, of such materials, of such size, at such level, and with such fall, as shall be adequate for the drainage of such house and premises and its several floors or storeys, and also of its areas, waterclosets, and offices, and for conveying the soil, drainage, and wash therefrom into the said sewer, and to provide fit and proper traps, inlets, and apparatus for hindering the entry of improper substances therein, and all other arrangements requisite to secure the safe and proper working of the said drain, and to prevent the same from obstructing or otherwise injuring or impeding the action of the sewer to which it leads: And further take notice that such works and arrangements are required to be done to the satisfaction of the said vestry, who reserve to themselves the right to order reasonable alterations therein, additions thereto, and abandonment of part or parts thereof, as may to the vestry or their officers appear, on the fuller knowledge afforded by the opening of the ground, requisite to secure the complete and perfect working of such works. Dated, &c.

"N.B.—Notice in writing of your intention to commence the works above referred to must be given at the court house, Marylebone Lane."

3. This notice not having been complied with, the builder with other persons employed by the vestry went to the premises on the 2nd of December, 1863, for the purpose of doing the work: and Viret refused to allow them to enter such premises. The following correspondence then took place between Viret and Mr. Greenwell, the vestry-clerk:—

"17 Edgware Road, Dec. 4th, 1863.

"To the vestry of St. Marylebone.

"I decline giving you permission to enter my premises to make any alterations to my present mode of drainage through my house, unless the vestry will hold me harmless from all expenses attending the execution of such works.

"JOHN STEPHEN VIRET."

"Court House, St. Marylebone,
"December 4th, 1863.

"Sir,—To prevent misunderstanding, it may be desirable to say, with reference to your notice of this date directed to the vestry of St. Marylebone, declining to [428] give permission to enter your premises to make any alteration to your present mode of drainage unless the vestry will hold you harmless from all expenses, that the work is intended to be done by the vestry in consequence of the notice to the owner by the vestry dated the 21st of August ultimo to make such drainage not having been complied with; and the payment of the expenses the vestry are put to in consequence will be required from you as the occupier, pursuant to the provisions of the Metropolis Management Amendment Act, 1862.

"W. E. GREENWELL."

4. Shortly after Viret withdrew his opposition, and allowed the agents of the vestry to enter, who in the said month of December did the work mentioned in the said resolution and notice.

5. On the 1st of January, 1864, and also on the 19th of January, 1864, the following demand was duly served on Viret:—

"Court House, St. Marylebone,
"1st January, 1864.

"Sir,—The drainage work at your premises has been completed by the vestry, in default of the notice of the 21st August last having been attended to. The expense incurred by the vestry amounts to 17l. 7s. 4d.; and, pursuant to the Metropolis Management Amendment Act, 1862, s. 96, the vestry require the immediate payment of such amount from you. The act of parliament referred to provides that notice shall be given to an occupier not to pay any rent to his landlord without first deducting the amount of the costs and expenses to which he is liable under the act: and you will be good enough to receive this as notice accordingly; but I feel bound also to inform you that the act also provides that nothing therein contained shall be taken

to affect any contract made between the [429] owner and occupier, whereby it is agreed that the occupier shall pay all rates, dues, and sums of money, or to affect any contract whatsoever between landlord and tenant. I shall feel obliged by an early reply to this communication.

“W. E. GREENWELL, vestry-clerk.”

“Mr. Viret, 17 Edgeware Road.”

6. Viret refused to comply with the said demand, although there was sufficient rent due to the owner of the premises No. 17 Edgeware Road, out of which he might have deducted the same: he also refused, on application being made to him under the 25 & 26 Vict. c. 102, s. 96, for the same, the name and address of his landlord, and the amount of rent due.

7. The sum of 17l. 7s. 4d. was a reasonable charge for the work done.

8. The house and premises in question, No. 17 Edgeware Road, together with eighteen other houses, form a block of buildings seventeen of which drain into a sewer being a main sewer for the purposes of this case, called the Edgeware Road sewer, running in front of the said block of houses along the Edgeware Road, and constructed by the commissioners of sewers in the year 1839. At the time of the said resolution and notice, and thenceforward until the completion of the work by the vestry as aforesaid, two of such houses, the said house No. 17 being one, did not drain into the Edgeware Road sewer, but into an old drain or sewer for the purposes of this case called the “Old drain,” which ran at the back thereof, and under two of the houses forming such block, and then discharged itself into one of the main sewers.

9. This old drain was sixty or seventy years old, and decidedly objectionable. It was formerly used for carrying off the drainage of the whole block of houses before mentioned: and, in 1859, one Butcher drained [430] into it, from a tenement in Adams Mews, at the back of the said block of houses, with the permission of the vestry. It had also been cleansed and flushed by the commissioners of sewers in the years 1849 and 1850, upon the representation made by their surveyor.

10. The effect of the said works of the vestry was, to drain the said house and premises No. 17 by a sufficient covered drain, having the branches, the size, the level, the fall, and the other properties and incidents required by the 73rd section of the 18 & 19 Vict. c. 120, communicating with and emptying itself into the said Edgeware Road sewer, which is of sufficient size within the meaning of the said section, and within twenty-six feet of the front wall of the said house, and is on a lower level than such house and premises.

11. The vestry also removed and filled up all the drains leading from the interior of the said house and premises No. 17 Edgeware Road to the old drain, and then cut off all communication therewith from the said premises, by bricking up the same.

12. The annexed plan correctly describes the relative situation of the Edgeware Road sewer, and of the old drain, and of the drains in No. 17 communicating with the same, respectively; the red line describes the new drains communicating with the Edgeware Road sewer; the blue lines the drains communicating with the old drain.

13. It was contended before the magistrate, on behalf of the respondent,—first, that the alteration in his drains was an alteration in the system of drainage, and did not come within the 18 & 19 Vict. c. 120, s. 73, but under section 69 of that act; and that such alterations ought to have been executed at the expense of the parish, and not at that of the respondent,—secondly, that, under the 73rd section, the vestry was only authorised to require the respondent to make [431] sufficient drains communicating with the old drain or sewer at the back of the said house and premises, that being, as he contended, a “sewer,” and being nearer to his house and premises than the sewer in the Edgeware Road.

14. The appellants contended that the old drain was not a “sewer” within the meaning of the statutes; and that, if it was, the vestry had nevertheless the right to make the alterations.

15. Thirdly, it was contended on behalf of the respondent that the magistrate had jurisdiction to review the decision of the vestry, and to determine whether or not, before the alterations, the respondent's house was drained by a sufficient drain communicating with some sewer.

16. The magistrate was of opinion that he had no power to review the decision of the vestry. He held also that the “old drain” running behind the block of buildings in which the respondent's house is comprised was a “sewer” within the meaning of



Note The Blue lines on Plan of No 17 represent the original mode of Drainage

The Red lines the new Drainage as laid down by Order of Vestry

Sever 5' 6" high 3' 0" wide



the interpretation clause of the 18 & 19 Vict. c. 120, s. 250: that the commissioners of sewers had exercised control over it: that the rights of the said commissioners passed to the vestry by the operation of s. 68 of the same act, and that, in one instance, the vestry had used such rights: that the appellants were bound by s. 69 of the same act to supply private drains necessary to enable the respondent's house to drain into the sewer in Edgeware Road: and that, the appellants having so done, the respondent was not liable to them for the expenses thereby incurred.

17. All formal matters were duly proved: and it was solely on the last mentioned ground that the magistrate refused to make the order for payment of the 17l. 7s. 4d.

The appellants being dissatisfied with the decision, [432] as being erroneous in point of law, demanded a case for the opinion of this court. They therefore prayed the judgment of the court upon the above facts.

Keane, Q. C. (with whom was Poland), for the appellants. The question in this case turns mainly upon the construction of the 69th and 73rd sections of the Metropolitan Local Management Act, 18 & 19 Vict. c. 120. By the former it is provided that the vestry (or board of works) of every parish or district shall from time to time repair and maintain the sewers vested in them, &c.: and that it shall be lawful for any such vestry or district-board from time to time to enlarge, contract, raise, lower, arch over, or otherwise improve or alter all or any of the sewers, watercourses, and works which shall be from time to time vested in them or subject to their order or control, and to discontinue, close up, or destroy such of them as they may deem to have become unnecessary: provided always that no new sewer shall be made without the previous approval of the metropolitan board of works: provided also, that the discontinuance, closing-up, destruction, or alteration of any sewer as aforesaid shall be so done as not to create a nuisance: and that if, by reason thereof any person shall be deprived of the lawful use of any covered sewer, it shall be the duty of the vestry or district board to provide some other sewer or a drain as effectual for his use as the sewer of which he is so deprived: provided also that, "where the vestry or district board alter any sewer, or provide a new sewer in substitution for a sewer discontinued, closed up, or destroyed, they may contract or otherwise alter the private drains communicating with the sewer so altered, or with the sewer so discontinued, closed up, or destroyed, or may close up or destroy such private [433] drains, and provide new drains in lieu thereof, as the circumstances of the sewerage may appear to them to require, but so that in every case the altered or substituted drain shall be as effectual for the use of the person entitled thereto as the drain previously used." And the 73rd section enacts that, "if any house or building, whether built before or after the commencement of this act, situate within any such parish or district, be found not to be drained by a sufficient drain communicating with some sewer, and emptying itself into the same, to the satisfaction of the vestry or board of such parish or district, and if a sewer of sufficient size be within one hundred feet of any part of such house or building on a lower level than such house or building, it shall be lawful for the vestry or board, at their discretion, by notice in writing, to require the owner of such house or building forthwith, or within such reasonable time as may be appointed by the vestry or board, to construct and make from such house or building into any such sewer a covered drain, and such branches thereto, of such materials, of such size, at such level, and with such fall as shall be adequate for the drainage of such house or building, and its several floors or storeys, and also its areas, waterclosets, privies, and offices (if any), and for conveying the soil, drainage, and wash therefrom into the said sewer, and to provide fit and proper paved or impermeable sloped surfaces for conveying surface water thereto, and fit and proper sinks, and fit and proper syphoned or otherwise trapped inlets and outlets for hindering stench therefrom, and fit and proper water supply and water-supplying pipes, cisterns, and apparatus for securing the same, and for causing the same to convey away the soil, and fit and proper sand-traps, expanding inlets, and other apparatus for hindering the entry of improper substances therein, and all other such fit [434] and proper works and arrangements as may appear to the vestry or board, or to their officers, requisite to secure the safe and proper working of the said drain, and to prevent the same from obstructing or otherwise injuring or impeding the action of the sewer to which it leads: and it shall be lawful for the vestry or board to cause the said works to be inspected while in progress, and from time to time during their execution to order such reasonable alterations therein, additions thereto, and abandonment of part or parts thereof, as may to the

vestry or board, or their officers, appear, on the fuller knowledge afforded by the opening of the ground, requisite to secure the complete and perfect working of such works; and, if the owner of such house or building neglect or refuse, during twenty-eight days after the said notice has been delivered to such owner, or left at such house or building, to begin to construct such drain and other works aforesaid, or any of them, or thereafter fail to carry them on and complete them with all reasonable despatch, it shall be lawful for the vestry or board to cause the same to be constructed and made, and to recover the expenses to be incurred thereby from such owner, in the manner hereinafter (s. 227) provided." By the interpretation-clause, s. 250, the word "drain" is to mean and include "any drain of and used for the drainage of one building only or premises within the same curtilage, and made merely for the purpose of communicating with a cess-pool or other like receptacle for drainage, or with a sewer into which the drainage of two or more buildings or premises occupied by different persons is conveyed, and shall also include any drain for draining any group or block of houses by a combined operation under the order of any vestry or district-board;" and the word "sewer" is to mean and include "sewers and drains of every description except drains to which the word [435] 'drain,' interpreted as aforesaid, applies." Upon the facts found by the magistrate, it must be assumed that the old drain at the back was a "sewer," within the above definition. The vestry, having found that the old drain was not sufficient, proceeded, under s. 73, as they had a right to do, to call upon the owner of the premises to make a proper drain communicating with the sewer. This was a matter for their determination, and not, as will be insisted on the part of the respondent, for the magistrate. The proper course for the respondent to have pursued, if he felt aggrieved by the decision of the vestry, was to appeal to the metropolitan board of works, under s. 211 (a), who might have varied or quashed the order of the vestry. The case finds that the old drain was "decidedly objectionable," and that there was a sewer within 100 feet of [436] the respondent's premises. The facts therefore existed which entitled the vestry to put in force the provisions contained in s. 73. It will be contended on the part of the respondent, that this was a discontinuance of an old sewer, under s. 69, and therefore a charge properly falling upon the parish, and not upon the individual owner,—an alteration of the system of sewerage, and not an amending of imperfect drainage. No doubt, where the vestry or district-board, for the general benefit of the parish or district, proceed to alter the system of drainage, and in so doing deprive a man of the lawful use of a sewer, they must provide him a new sewer or proper drains to communicate with the old one. But the 73rd section proceeds upon the assumption that the owner or occupier has, within 100 feet of a sewer, a drain which is defective and objectionable. When the vestry find that a particular drainage is insufficient, it ceases to be a lawful drain, and the owner or occupier must alter it under s. 73. This is not a case within s. 69 at all. [Montague Smith, J. Does the case find that the old drain was insufficient?] The vestry found that it was objectionable, and the magistrate thought that he could not interfere with their decision. [Willes, J. Are we to assume that the abolition of the old drain took place after the resolution of the vestry?] Certainly. [Willes, J.

(a) Which enacts that "any person who deems himself aggrieved by any order of any vestry or district-board in relation to the level of any building, or any order or act of any vestry or district-board in relation to the construction, repair, alteration, stopping or filling up, or demolition of any building, sewer, drain, watercloset, privy, ashpit, or cess-pool, may, within seven days after notice of any such order to the occupier of the premises affected thereby, or after such act, appeal to the metropolitan board of works against the same; and all such appeals shall stand referred to the committee appointed by such board for hearing appeals as herein (s. 12) provided; and such committee shall hear and determine all such appeals, and may order any costs of such appeals to be paid to or by the vestry or district-board by or to the party appealing, and may, where they see fit, award any compensation in respect of any act done by such vestry or district-board in relation to the matters aforesaid: provided that no such compensation shall be awarded in respect of any such act which may have been done under any of the provisions of this act on any default to comply with any such order as aforesaid, unless the appeal be lodged within seven days after notice of such order has been given to the occupier of the premises to which the same relates."

The case does not say so.] It having been properly found that there was no sufficient and effectual drainage to the respondent's premises, the vestry had a right to proceed as they did under s. 73.

Macnamara, for the respondent. That which was done here was an alteration of the system of sewerage, and should (under s. 69) have been done at the expense of the vestry, and not at that of the individual owner. The primary object of the vestry was to sub-[437]-stitute a sewer in front of the respondent's premises for the old sewer at the back: and the alteration of the private drains was rendered necessary in order to divert them into the new sewer, —the red line on the plan being substituted for the blue. The owner of No. 17 Edgeware Road was not required to repair or alter an insufficient drain, but to substitute a new course of drainage for the old one,—the vestry conceiving that it would better harmonize with the general system that the premises should be drained into the new sewer in front. There is no finding that the former drainage of the respondent's premises was faulty or insufficient: the expression "decidedly objectionable" applies only to the system of drainage into which it passed. The case, therefore, falls precisely within the proviso in s. 69, that, "where the vestry or district board alter any sewer, or provide a new sewer in substitution for a sewer discontinued, closed up, or destroyed, they may contract or otherwise alter the private drains communicating with the sewer so altered, or with the sewer so discontinued, closed up, or destroyed, or may close up or destroy such private drains, and provide new drains in lieu thereof, as the circumstances of the sewerage may appear to them to require, but so that in every case the altered or substituted drain shall be as effectual for the use of the person entitled thereto as the drain previously used." What more has the vestry done than that? The 68th section vesting all the sewers in them, it is but reasonable that the vestry should at their own expense remedy defects which they find in the system. The magistrate in terms finds that the whole proceedings took place under s. 69: and the vestry cannot by a finding contrary to the fact give themselves jurisdiction so as to exclude the jurisdiction of the magistrate. [Bytes, J. There is nothing upon the face of the case [438] to shew that the old blue drain did not sufficiently answer its purpose.] Nothing.

Keane, Q. C., in reply. It is found by the vestry that the old drainage of these premises was insufficient and objectionable; and the magistrate declines to enter into that question. If the decision of the vestry was wrong, the proper course for the respondent to pursue was to appeal to the metropolitan board, under s. 211. [Willes, J., referred to *The Vestry of St. George, Hanover Square, App., Sparrow, Resp.*, 16 C. B. (N. S.) 209.] If the vestry had a discretion, they have exercised it, and, it is submitted, properly exercised it under s. 73; the 69th section not being applicable to the state of things existing here, but only to the general purposes of the parish or district.

WILLES, J. I am of opinion that the decision of the magistrate in this case was right and ought to be affirmed. The question turns upon the construction of the Metropolis Local Management Act, 18 & 19 Vict. c. 120. The principal question is whether the respondent is bound to pay the expenses incurred by the vestry in constructing certain drains from the respondent's premises into the new sewer coloured red on the plan annexed to the case. It appears that the house in respect of the ownership of which the respondent is alleged by the vestry to be liable, was formerly drained into the old sewer coloured blue, and that the vestry considered the drainage of the house into that sewer unsatisfactory, and made a resolution in the terms of s. 73 of the statute, by which they found that the premises of the respondent, amongst others, were not drained by sufficient drains communicating with a sewer and emptying themselves into the same to their satisfaction; and they resolved that [439] notice should be given to the owners of the respective premises, requiring them to drain their premises by separate drains into the front sewer in the Edgeware Road. And it further appears that, under the direction of the vestry, in whom the statute vests very large powers for the alteration and improvement of the drainage of the parish, the drains by which the respondent's house was formerly drained into the old sewer at the back were destroyed, and the outlet into the same filled up, and new drains were made communicating with the new sewer in the front, coloured red on the plan. It is in respect of the expense of constructing these new drains that the question before us arises: and that question turns upon the construction of s. 73, which pro-

vides that, if any house or building be found not to be drained by a sufficient drain communicating with some sewer, and emptying itself into the same, to the satisfaction of the vestry or board of the parish or district, and if a sewer of sufficient size be within 100 feet of any part of such house or building, on a lower level than such house or building, it shall be lawful for the vestry by notice in writing to require the owner to construct a proper covered drain into such sewer. I will assume that to mean into any sewer which the vestry may think proper to point out. It appears that the vestry, acting upon the above resolution, did give notice to the respondent, requiring him to make the drain which, on his default, they have constructed for him. The case, therefore, falls literally within the 73rd section, as contended for by Mr. Keane. It further appears that the resolution of the vestry finding the old drains insufficient, was accompanied by a resolution "that the old drain or sewer at the rear of the premises should be discontinued: and in truth that which was the object of the vestry was not that the drainage of the respondent's house should be [440] improved, but that the drainage of that and of the other houses pointed out should be withdrawn from the old sewer and carried into the new one. The question, therefore, arises upon the section which is applicable to that state of things, which is s. 69. Before I proceed to state the provisions of that section and my opinion upon its construction, I think it right to draw attention to the scope and object of the act generally. The intention was that one body should have the control and direction of the drainage and the sewerage of the parish or district. But a marked distinction is made between that which is for the general benefit of the public, and that which applies only to the convenience of individuals. Drains were considered to be private property, to be provided by the owner of the particular house or building to be benefited by them, and the expense of which, whether in constructing new drains where none existed before, or in providing sufficient drains where insufficient before, should fall upon the owner of the premises. But, with respect to sewers, properly so called, which are not constructed with reference to any private house in particular, it was intended the expense of making and maintaining, or if necessary altering, such sewers should fall upon the public in the shape of a tax. When that is considered, it follows that the 73rd section was intended to apply to cases where the drainage of a particular house was either altogether wanting or insufficient. If we look back at s. 72, which provides that "every vestry and district board shall cause the sewers vested in them to be constructed, covered, and kept so as not to be a nuisance or injurious to health, and to be properly cleared, cleansed, and emptied," &c., we shall at once see the propriety of vesting in the body having the superintendence, not only the power of providing efficient drainage, but also the power of altering and [441] keeping in repair, &c., the great sewers. One of the main sections introduced for that purpose is the 69th. By that section, the vestry or the district-board are required from time to time to repair and maintain the sewers vested in them, or such of them as shall not be discontinued, closed up, or destroyed under the powers therein contained, and to cause to be made, repaired and maintained such sewers and works, or such diversions or alterations of sewers and works, as may be necessary for effectually draining their parish or district, &c. Then comes a provision that no new sewer shall be made without the previous approval of the metropolitan board of works, and that the discontinuance, closing up, destruction, or alteration of any sewer shall be so done as not to create a nuisance, and that if by reason thereof any person shall be deprived of the lawful use of any covered sewer, it shall be the duty of the vestry or district-board to provide some other sewer or a drain as effectual for his use as the sewer of which he is so deprived. The object of the inquiry I made in the course of the argument with respect to whether the old drain had been closed up, was to ascertain whether or not this was a case within that proviso; because, if the respondent had been deprived of the use of the old drain, the vestry would be bound to provide him with another. It should seem, however, that that is not so. By the resolution the vestry determine that the old drain or sewer shall be discontinued; but that means that it shall be discontinued so far as the houses referred to had the use of it for the purpose of carrying off their drainage. Then we come to the further proviso, on which the question does arise, "that, where the vestry or district-board alter any sewer, or provide a new sewer in substitution for a sewer discontinued, closed up, or destroyed, they may contract or otherwise alter the private drains communicating with the sewer

[442] so altered, or with the sewer so discontinued, closed up, or destroyed, or may close up or destroy such private drains, and *provide new drains in lieu thereof*, as the circumstances of the sewerage may appear to them to require, but so that in every case the altered or substituted drain shall be as effectual for the use of the person entitled thereto as the drain previously used." In the case of an alteration or substitution of a sewer, therefore, such alteration or substitution imposes upon the vestry or district-board the obligation to provide any private individual with an altered or substituted drain as effectual for the drainage of his premises as he had previously used. I come now to the question to which the magistrate applied his mind. Was the system of drainage marked red on the plan an improvement of the drainage rendered necessary by the insufficiency of the existing drainage of the respondent's premises? or was it a drain which by reason of the alteration or substitution of the new for the old sewer the vestry were bound to provide under s. 69? That is partly a question of fact and partly a question of law. I will consider that point first with reference to that as to which there was no evidence, and then I will consider it with reference to that as to which there was positive evidence. First, there was no evidence that the drain by which the respondent's house was drained into the old sewer was an insufficient drain. The finding is that it was old and unsatisfactory. I will assume that to be a *bonâ fide* finding. I will assume that the new sewer was a great improvement. But the reason of that was because it was a better sewer, and that the old one was a bad sewer to drain into, not because the respondent's drains were insufficient. Before the vestry could have a right to call upon a private individual to pay for the improvement, they must shew that his drains were insufficient and [443] bad. So much as to what is not found. Then, as to what is found. The magistrate has found that the vestry did do away with the old sewer, and close up the old drain: and the question is whether that was an alteration of the sewer within the 69th section of the act. Physically it was: and it was the alteration of the sewer which rendered it necessary to do that which the vestry were bound to do, viz. to provide the respondent's premises with new drainage as effectual as that which he had previously enjoyed. Bearing in mind the objects of the statute, and the distribution of the burthen of the cost of the contemplated works, I entertain no doubt, upon the merits of the case, that the expense in question should be borne by the public, and not by the respondent individually. I do not think it necessary to go into the question whether or not, if the case were clear of the 69th section, it was competent to the magistrate to entertain it. He thought he had no power to review the decision of the vestry: and I am far from saying that he was wrong. For the reasons I have imperfectly given, I am of opinion that the decision of the magistrate should be affirmed.

BYTES, J. I am of the same opinion. I think the magistrate was right, and the vestry wrong. The vestry, it seems, had thought fit to make a new sewer in front of the respondent's house, which was under their jurisdiction, and that they closed the old sewer at the back, into which his premises were formerly drained, and it became necessary in consequence to construct a long drain from the respondent's premises to the new sewer: and the question is whether the expense of that work is to fall upon the individual or upon the public. That depends upon whether the [444] proceeding should be under the 69th or the 73rd section of the Metropolis Management Act, 1855. I think the case falls clearly within the 69th section. The work was done for the improvement of the general system of sewerage, and the expense must be borne by the public. To bring the case within the 73rd section, it must be shewn that the premises sought to be charged were not drained by a sufficient drain. The case finds that the sewer at the back of the respondent's premises was between sixty and seventy years old, and decidedly objectionable. It depreciates the sewer, but says not a word about the drainage. No single fact is stated or found to give the vestry jurisdiction under s. 73. The facts stated shew that they could not have had jurisdiction to proceed under that section. I entirely agree with my Brother Willes that this was a public improvement, which ought to be paid for by the public.

MONTAGUE SMITH, J. I am entirely of the same opinion. The expenses in question were incurred by the vestry under s. 69. It appears that the old sewer at the back of the respondent's premises was found to be objectionable, and the vestry had substituted for it a new one running along the Edgware Road, in the front: and by a

resolution they called upon the respondent to divert his drainage from the old to the new sewer. It is said that the resolution of the vestry is conclusive. I think not. It is not found as a fact that the drainage of the respondent's premises was insufficient or imperfect, so as to bring the case under the 73rd section. On the contrary, it appears that the alteration of the respondent's drains had become necessary in consequence of the substitution of the new for the old sewer. That brings the case within the plain words of the 69th section. The resolution of the [445] vestry never can be held to be conclusive when the question is whether the facts bring a case within the 69th or the 73rd section. The construction contended for by Mr. Keane cannot prevail. The decision of the magistrate was right, and must be affirmed.

Decision affirmed, with costs.

THE METROPOLITAN BOARD OF WORKS, *Appellants*; ROBERT COX, *Respondent*.
June 23rd, 1856.

[Applied, *Metropolitan Board of Works v. Clever*, 1868, L. R. 3 C. P. 537.]

The 98th section of the Metropolis Management Amendment Act, 1862, provides that "no existing road, passage, or way being of a less width than 40 feet shall be hereafter formed or laid out for building as a street for the purposes of carriage-traffic, unless such road, passage, or way be widened to the full width of 40 feet,"—the measurement to be taken half on either side from the centre or crown of the roadway to the external wall or *front* of the house, or to the fence or boundary of the *forecourt*, if any:—Held, that this provision did not apply where the buildings abutted in the *rear* upon an old lane of less width than 40 feet.

This was an appeal against an order made on the 9th of February, 1865, by one of the magistrates of the police-courts of the metropolis, sitting at the police-court, Westminster, in the county of Middlesex, dismissing a complaint of the appellants against the respondent founded on a bye-law of the appellants as to the formation of new streets in the metropolis, duly made and published under the provisions of the Metropolis Local Management Act, 1855, 18 & 19 Viet. c. 120, and also on the 98th section of the Metropolis Management Amendment Act, 1862, 25 & 26 Viet. c. 102:—

The appellants being dissatisfied with the said determination as being erroneous in point of law, the following case was stated for the opinion of the court under the 20 & 21 Viet. c. 43:—

1. The complaint came before the magistrate on the 2nd of February, 1865, on a summons in the following terms:—

Metropolitan Police-District, to wit.—Westminster Police Court.

[446] "To Mr. Robert Cox, of Oakley Street, Chelsea.

"Whereas, information and complaint have been this day made before the undersigned, one of the magistrates of the police-courts of the metropolis, sitting at the police-court, Westminster, in the county of Middlesex, and within the metropolitan police-district, by the metropolitan board of works, by John Pollard, clerk of the said board: For that, after the passing of the Metropolis Local Management Act, 1855, and before the committing by Robert Cox, of Oakley Street, Chelsea, builder, of the offence hereinafter mentioned, the said metropolitan board of works did make a bye-law as to the formation of new streets in the metropolis as defined by the said act, which said bye-law was made, confirmed, approved, and published as required by the said act:

"That, by the 98th section of the Metropolis Management Amendment Act, 1862, it is provided, amongst other things, that no existing road, passage, or way, being of a less width than 40 feet shall be hereafter formed or laid out for building as a street for the purposes of carriage-traffic or of foot-traffic only, respectively, unless such road, passage, or way be widened to the full width of 40 feet or of 20 feet respectively, the measurement of such width being taken half on either side from the centre or crown of the roadway to the external wall or front of the houses or buildings erected or intended to be erected on each side thereof: but, where forecourts or other spaces are

intended to be left in front of the houses or buildings, then the width shall be measured up to the fence or boundary dividing or intended to divide such forecourts or spaces from the public way : And such streets respectively shall be open at both ends from the ground upwards : and any road, passage, or way hereafter to be formed or laid out for either of the purposes aforesaid, [447] shall be deemed to be a new street, and become subject to all the provisions of the statutes for metropolis management, and to the provisions and penalties of and under any bye-laws made or to be made in pursuance thereof in relation to sewerage, drainage, or paving, and to width, construction, surface, inclination, and other requirements and particulars :

"That the said bye-law relative to the formation of streets in the metropolis, amongst other things, provided that, in case of any breach of the regulations contained therein, the offender shall be liable for such offence to a penalty of 40s., and, in case of a continuing offence, to a further penalty of 20s. for each day after notice thereof from the metropolitan board of works :

"That, after the making, approving, and publishing of the said bye-law, and the enactment of the said statute of 1862, that is to say, on or about the 2nd of December, 1864, the said metropolitan board of works gave notice under the said bye-law to the said Robert Cox, of Oakley Street, Chelsea, builder, and whomsoever else it might concern, that he had erected or caused to be erected certain buildings at the southern end and on the eastern side of Hob Lane, Chelsea, in the county of Middlesex, within the limits of the said metropolis as defined by the said Metropolis Local Management Act, 1855, and within the said metropolitan police-district, whereby the said road or lane has been formed and laid out for building as a street for the purposes of carriage-traffic as aforesaid by the said Robert Cox, and was and is of less width than 40 feet as defined and described by the said bye-law and statute, that is to say, of the width of 21 feet only, contrary to the said bye law and to the said statute in that behalf :

"These are therefore to command you Robert Cox, in Her Majesty's name, to be and appear on Thursday, [448] the 5th of January, 1865, at 2 o'clock in the afternoon, at the police-court aforesaid, before me or any other magistrate of the said police-court who may then be there, to answer to the said information and complaint of the said metropolitan board of works, and to be further dealt with according to law. Given," &c.

3. The bye-law referred to in the said summons was made and published on or about the 1st of May, 1857, and was, so far as is material to the present case, as follows,—"In case of any breach of the regulations contained in this bye-law, the offender shall be liable for each offence to a penalty of 40s., and, in case of a continuing offence, to a further penalty of 20s. for each day after notice thereof from the metropolitan board of works."

4. The facts of the case, as admitted on both sides, were as follows : -The respondent, Robert Cox, is a builder, holding on a lease for 500 years or thereabouts a large piece of ground in Chelsea, which partially abuts on a certain ancient carriage-way varying in width from 21 feet to 18 feet 2 inches or thereabouts, called Hob Lane ; and the said piece of ground was at the date of the said lease, and still is, separated from Hob Lane by a wooden fence.

5. The other side of Hob Lane, opposite to the said piece of ground of the respondent, is bounded by the wooden fence of Cremorne Gardens. The respondent has no estate or property in the soil of Hob Lane : neither has he any interests in the property on the other side of it.

6. In laying out his land for building purposes, the respondent obtained under the provisions of the Metropolis Local Management Act, 1855, and the said bye-law, the consent of the appellants to and did form and lay out some new streets.

7. The respondent has erected six houses, part of an [449] intended row of houses fronting upon Seaton Street. The backs of this row of houses are towards Hob Lane, which is there from 21 to 20 feet wide, and are at a distance varying from 17 feet 5 inches to 10 feet 9 inches from the fence separating the said piece of land of the respondent from Hob Lane as aforesaid, and at a distance varying from 38 feet 2 inches to 31 feet 9 inches from the fence of Cremorne Gardens upon the opposite side of the lane : and there is at present no communication between the backs of the said houses and Hob Lane.

8. The respondent has not widened Hob Lane in any way.

9. The appellants contended that, by reason of the premises, the respondent had formed or laid out for building as a street for the purposes of carriage-traffic the existing road of Hob Lane; and that, under the bye-law and the section of the act herein before mentioned, the respondent was bound to leave and had not left the full width of 40 feet between those houses and the boundary wall of the other side of Hob Lane.

10. The respondent contended that, by reason of the premises, he had not formed or laid out for building as a street for the purpose of carriage-traffic the existing road of Hob Lane, within the meaning of the said act and bye-law; and that he was not bound to widen the same to the said full width of 40 feet.

11. The magistrate adjourned the case until the 9th of February, 1865, and then determined and adjudged that the said complaint and summons ought to be dismissed. The ground of his said determination was, that the existing road called Hob Lane had not been formed or laid out for building as a street for the purposes of carriage traffic by the defendant.

The question for the opinion of the court was, whether the magistrate was right in dismissing the said complaint.

[450] Mellish, Q. C., (with whom was Raymond), for the appellants (*a*).¹ The question turns upon the construction of the 98th section of the Metropolis Management Amendment Act, 1862, 25 & 26 Vict. c. 102, which enacts that "no existing road, passage, or way being of a less width than 40 feet shall be hereafter formed or laid out for building as a street for the purposes of carriage-traffic, unless such road, passage, or way be widened to the full width of 40 feet, the measurement of the width of such street to be taken half on either side from the centre or crown of the roadway to the external wall or front of the houses or buildings erected or intended to be erected on each side thereof; but, where *forecourts* or other spaces are intended to be left in front of the houses or buildings, then the width shall be measured up to the fence or boundary dividing or intended to divide such forecourts or spaces from the public way; or, for the purposes of foot-traffic only, [451] unless such road, passage, or way be widened to the full width of 20 feet, measured as aforesaid; or unless such streets respectively shall be open at both ends, from the ground upwards: and any road, passage, or way hereafter to be formed or laid out for either of the purposes aforesaid shall be deemed to be a new street, and become subject to all the provisions of the recited acts (*a*)² and this act, and to the provisions and penalties of and under any bye-laws made or to be made in pursuance thereof in relation to sewerage, drainage, or paving, and to width, construction, surface, inclination, and other requirements and particulars." The question is, what constitutes the forming or laying out for building an existing road or way as a street? It is submitted that, if there be an existing highway or road, not being a street in the sense of having houses on either side, and any person is desirous of building on either side, there must be a clear width of 40 feet left between the fences or boundaries. Here, the respondent, having a piece of land abutting on Hob Lane, has laid it out in streets, and has built his outer fence at

(*a*)¹ The points marked for argument on the part of the appellants were as follows:—

"1. That Hob Lane was at the time of the respondent building the houses abutting on it an existing road, passage, or way of less width than 40 feet, within the meaning of the 98th section of the 25 & 26 Vict. c. 102, and of the said bye-law:

"2. That the respondent, by building the said houses as mentioned in the case, formed and laid out Hob Lane for building as a street for the purpose of carriage-traffic, within the meaning of the said 98th section and of the said bye-law:

"3. That the respondent did not widen Hob Lane to the full width of 40 feet, as required by the said section and bye-law:

"4. That Hob Lane, when so formed and laid out by the respondent, was a new street, within the said section and bye-law:

"5. That the respondent ought therefore to have been convicted of an infringement of the said act and bye-law, and that the decision of the magistrate in dismissing the complaint of the appellants was erroneous in point of law."

(*a*)² 18 & 19 Vict. c. 120; 19 & 20 Vict. c. 112; and 21 & 22 Vict. c. 104.

the rear so as to leave less than the space required by the act for a carriage-way. In the interpretation clause, s. 250, of the 18 & 19 Vict. c. 120, "street" is defined in a way which cannot be applicable to this act, viz. "any highway (except the carriage-way of any turnpike-road), and any road, bridge (not being a county-bridge), lane, footway, square, court, alley, passage, whether a thoroughfare or not:" and but little aid is derived from the 112th section of the 25 & 26 Vict. c. 102, which declares that "street" shall be deemed to apply to and include the subject matters specified in the 250th section of the firstly recited act; and that the expression "new street" [452] shall apply to and include "all streets hereafter to be formed or laid out, and a part of any such street, and also all streets the maintenance of the paving and roadway whereof had not previously to the passing of this act been taken into charge and assumed by the commissioners, trustees, surveyors, or other authorities having control of the pavements or highways in the parish or place in which such streets are situate, and a part of any such street, and also all streets partly formed or laid out." [Willes, J. The 98th section seems to assume that the houses are to *face* the street.] The mischief intended to be remedied is the same, whether the front or the rear of the houses abuts upon the road.

Keane, Q. C., for the respondent, was not called upon (a).

WILLES, J. I am of opinion that the decision of the magistrate was right, and should be affirmed. The meaning of the 98th section of the 25 & 26 Vict. c. 102, evidently is, that the street on which the houses *front* [453] is to be of the prescribed width. I must own I should have thought it a question of fact.

BYLES, J. I am of the same opinion. The respondent has not laid out Hob Lane as a street for carriage-traffic. He has done nothing to Hob Lane.

Decision affirmed.

Keane, for the respondent, asked for the costs below.

Per Curiam. We have nothing to do with the costs below.

TAMVACO v. SIMPSON. June 24th, 1865.

[Affirmed, L. R. 1 C. P. 363; 35 L. J. C. P. 196. See *Coulthurst v. Sweet*, 1866, L. R. 1 C. P. 655; *Allison v. Bristol Marine Insurance Company*, 1876, 1 App. Cas. 225.]

Coals were shipped at Sunderland under a charterparty between one De M. and the defendant (the owner of the vessel), whereby and by the bill of lading they were made deliverable at Alexandria to order or assigns. The charterparty contained the following stipulation,—“The freight to be paid on unloading and right delivery of the cargo less advances in cash at current rate of exchange: One half of the freight to be advanced by freighter's acceptance at three months, on signing bills of lading: Owner to insure the amount, and deposit with charterer the club-policy, and to guarantee same.—On receiving the acceptance (which became due on the 3rd of February, 1864), the agent for the ship indorsed on the bill of lading a receipt

(a) The points intended to be urged on behalf of the respondent were as follows:—

“1. That Hob Lane has not been formed or laid out for building as a street for the purposes of carriage traffic or of foot-traffic:

“2. That the *houses* of the respondent are at the proper distance from the centre or crown of Hob Lane:

“3. That the respondent is not bound to widen Hob Lane at all:

“4. That the respondent is not bound to widen Hob Lane to the full width of 40 feet:

“5. That the respondent has no right or power and is not bound to widen Hob Lane to the full width of 40 feet, the measurement being taken half on either side from the centre or crown of the roadway:

“6. That the respondent has done all things which he is bound by the said act of parliament to do, and that the respondent is not in respect of buildings erected by him liable to widen Hob Lane.”

for "301l. 17s. 6d., as per charterparty."—De M. indorsed the bill of lading in blank, and forwarded it to the plaintiff (for whom the coals had been purchased) at Alexandria. The plaintiff, on the ship's arrival at Alexandria on the 5th of January, 1864, demanded the delivery of the cargo; but the master (having heard that De M. had stopped payment, refused to deliver it unless he received the full freight or a guarantie for its payment. The plaintiff thereupon caused his agents B. & Co. to give the required guarantie, and the coals were delivered. At this time the bill of exchange was outstanding in the hands of a third person: but the defendant had taken it up before this action was brought.—B. & Co. declining to pay more than the half freight, the master sued them on their guarantie in the Consular court, and B. & Co. paid the whole freight, under protest. In an action by the plaintiff for the wrongful conversion of the coals,—Held, that the defendant had no lien upon the cargo for the amount represented by the bill of exchange; and that the plaintiff was entitled to recover it as damages in this action; and that his right was not affected by the proceedings which took place in the Consular court.

This was an action brought by the plaintiff to recover 301l. 17s. 6d. under the circumstances hereinafter mentioned. By consent, and under a judge's [454] order, the following case was stated for the opinion of the court:—

1. The plaintiff is a merchant residing at Alexandria, in Egypt; and the defendant is a ship-owner residing at Sunderland, and the owner of a ship called the "Parthian."

2. On the 1st of September, 1863, Messrs. Zizinia & Co., of London, as agents for the plaintiff, entered into a contract with one De Mattos, also of London, for the purchase of 2000 tons of steam coal, of which contract the following is a copy:—

"Memorandum of agreement between Mr. W. N. De Mattos
and Messrs. Zizinia & Co.:

"Mr. W. N. De Mattos agrees to supply Messrs. Zizinia & Co. with (2000) two thousand tons of best Davidson's West Hartley large steam coals, screened and with usual certificates, say ten per cent. more or less; the bills of lading for the entire quantity to be delivered to the purchasers by the end of the present month (September) in two or more shipments. Messrs. Zizinia & Co. agree to pay on receipt of the documents (bill of lading and policy of insurance) at the rate of 34s. sterling per ton of 20 cwt. nett cash, deducting the balance of freight payable to the captains at Alexandria, together with a commission of 3 per cent. upon the full 34s. per ton; said balance of freight to be paid in cash at Alexandria, at the current rate of exchange for 3 months' bills on London. The coals to be taken from alongside the ship at the buyer's risk and expense, at the rate of not less than thirty tons per weather working day, Sundays excepted. In the event of Mr. De Mattos neglecting to supply tonnage in the specified time, Messrs. Zizinia & Co. are at liberty to charter ships for the said quantity, at current rates, for seller's account."

3. In pursuance of the aforesaid contract, De Mattos [455] chartered certain vessels for the conveyance of the said coals; and, amongst others, he entered into the following charterparty of the "Parthian" with the defendant:—

"London, 1st October, 1863.

"It is this day mutually agreed between Mrs. Simpson, owner of the good ship or vessel called the 'Parthian,' A 1, and metalled, ———, master, of the burthen of 284 tons register, or thereabouts, now in Havre, or on passage thereto from Queenstown, and W. N. De Mattos, of London, merchant, that the said ship, being tight, staunch, and every way fitted for the voyage, shall with all possible dispatch, after discharging present cargo at Havre, sail and proceed to South Dock, Sunderland, and there load in the customary manner from the factors of the said freighter a full and complete cargo of steam coals, to be loaded in regular turn, not exceeding what she can reasonably stow and carry over and above her tackle, apparel, provisions, and furniture; and, being so loaded shall therewith proceed to Alexandria, or so near thereunto as she may safely get, and there deliver the same, on being paid freight at and after the rate of 30l. (five guineas gratuity) sterling, per keel of 21 tons 4 cwt. taken on board and delivered, in full of all port-charges and pilotages, harbour-dues on cargo, Dover and

Ramsgate dues, and of all pier and light-dues (the act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of what nature and kind soever during the said voyage, always excepted): the cargo to be delivered afloat alongside a railway or other safe wharf, steamer, or floating-depôt, and to be discharged by the ship over the ship's side, as customary; and no part of the cargo to be used during the voyage, or to be retained for ballast. Coals for ship's use to be provided at the ex-[456]pense of the owners, and the quantity to be stated on bills of lading. The freight to be paid on unloading and right delivery of the cargo, less advances, in cash, at current rate of exchange. One half of the freight to be advanced by freighter's acceptance at three months on signing bills of lading. Owner to insure the amount, and deposit with charterer the club-policy, and to guarantee same. One working day per keel and a half, weather permitting, to be allowed the said merchant (if the ship is not sooner despatched) for unloading the said ship at the port of discharge (Sundays and holidays excepted), and ten days on demurrage, over and above the said lading days, at 6l. per day. The ship to be addressed to freighter's agents at port of discharge, paying usual commission of 2 per cent. The brokerage of 5 per cent. upon this charterparty is due to Smith, Sundius, & Co., ship lost or not lost. The ship and her freight are bound to this venture. All claim for average to be settled in London, in conformity with the rules of Lloyd's. Penalty for non-performance of this agreement, 700l."

4. In accordance with this charterparty, De Mattos shipped on board the "Parthian" 426 tons 13 cwt. of steam coals, being part of the 2000 tons he had contracted to sell Messrs. Zizinia & Co. for the plaintiff, as before stated. The captain of the "Parthian" thereupon duly signed a bill of lading for the said 426 tons 13 cwt. of coals, of which the following is a copy:—

"Shipped in good order and well conditioned, by W. N. De Mattos, in and upon the good ship called the 'Parthian,' whereof is master for this present voyage W. Simpson, and now riding at anchor in the port of Sunderland, and bound for Alexandria, 161 Newcastle chaldrons, or 20½ keels, and weighing 426 tons, 13 cwt., of Davidson's West Hartley large steam coals, [459] which are to be delivered in the like good order and condition alongside any craft, steamer, floating-depôt, wharf, or pier where the ship can lie afloat, at the aforesaid port of Alexandria, as the agent of the charterer may direct (the act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of whatever nature and kind soever, excepted) unto order or to his assigns. The ship to be discharged at the rate of not less than 31½ tons per working day (weather permitting), and, when required by the freighter's agent, such extra quantity as may be practicable; and, if not discharged in the time above specified, demurrage to be paid at the rate of 6l. per diem. Freight for the said goods to be paid as per charterparty, with average accustomed. In witness whereof the master or purser of the said ship hath affirmed to four bills of lading, all of this tenor and date, the one of which bills being accomplished, the others to stand void. Dated in Newcastle, 27th October, 1863."

5. The freight on the coals so shipped on board the "Parthian" amounted, at the rate of 30l. per keel reserved by the charterparty, to 603l. 15s., one half of which sum was 301l. 17s. 6d.

6. Upon the said bill of lading being so signed as aforesaid, De Mattos, the charterer, gave his acceptance at three months for 301l. 17s. 6d. in favour of the defendant, pursuant to the terms of the charterparty.

7. The said acceptance was dated the 31st of October, 1863, and became due on the 3rd of February, 1864. Upon its being so given as aforesaid, the defendant's agents, Messrs. Smith, Sundius, & Co., indorsed a receipt on the bill of lading, of which receipt the following is a copy:—

"Received on account of the within freight three [460] hundred and one pounds seventeen shillings and sixpence, as per charterparty.

"£301 17 6.

"For MRS. MARY SIMPSON,

"SMITH, SUNDIUS, & Co., as agents."

8. De Mattos then made out and delivered to the plaintiff's agent an invoice

showing what was due for the coals shipped by the "Parthian," of which the following is a copy:—

"London, 28th October, 1863.

"Messrs. Zizinia & Co. to W. N. de Mattos.

"Under contract of 1st September, 1863.

"426 $\frac{13}{20}$ tons of Davidson's West Hartley large steam coals,			
shipped at Sunderland per 'Parthian,' Simpson, master,			
for delivery at Alexandria, at 34s. per ton			
			£725 6 1
Freight, at 30l. per keel	.	.	£603 15 0
Gratuity	.	.	5 5 0
			£609 0 0
Less advance on sailing	.	.	301 17 6
			307 2 6
			£418 3 7
Less 3 per cent. on 725l. 6s. 1d.	.	.	21 15 2
			£396 8 5

"Received by cheque

"Per W. N. DE MATTOS,

"C. A. SFANG."

9. On the 28th of October, 1863, De Mattos indorsed the bill of lading in blank, and handed the same so indorsed to Messrs Zizinia & Co., the plaintiff's agents, who on the 31st of October, 1863, paid De Mattos the balance of 396l. 8s. 5d. appearing due on the aforesaid invoice.

10. Messrs. Zizinia & Co. afterwards forwarded the bill of lading so indorsed by De Mattos to the plaintiff, at Alexandria.

11. The defendant was not informed, nor had she any knowledge, at any time before the commencement [461] of this action, of the said contract between the plaintiff's agent and De Mattos of the 1st of September, 1863, or of the said invoice, or of the payment of the balance appearing due thereon, or of any dealings or transactions between the plaintiff or his agents and De Mattos, relating to the premises.

12. The ship sailed with her cargo from Sunderland for Alexandria on the 4th of November, 1863; and, shortly after she so sailed, De Mattos became and declared himself insolvent, and ultimately, on the 4th of January, 1864, a deed of inspectorship was executed by him and divers of his creditors (not including either the plaintiff or the defendant) under and in accordance with the 192nd section of the Bankruptcy Act, 1861, but without the written assent or approval of the plaintiff or the defendant. This deed was registered in accordance with the provisions of the said 192nd section on the 1st of February, 1864; and, for the purposes of this case, it is to be assumed that all the conditions required by that section to make the said deed valid, effectual, and binding on all the creditors of the said charterer as if they were parties to and had executed the same, were duly performed at the time of the said registration. The provisions of the said deed are set out in *Strick v. De Mattos*, 3 Hurlst. & Colt. 22, and are to be taken as part of this case.

13. The "Parthian" afterwards sailed for Alexandria, and arrived there with the cargo on the 5th of January, 1864; on which day the captain reported her arrival to the plaintiff, and stated that he would on the following day (the 6th) be ready to discharge the cargo.

14. The plaintiff, then being the holder of the bill of lading as such indorsee as aforesaid, thereupon took the necessary measures for receiving the cargo, and intimated to the captain that he was prepared to pay [462] the balance of the freight remaining unpaid after deducting the 301l. 17s. 6d. referred to in the receipt on the bill of lading. On the following day, namely, the 6th of January, 1864, the captain of the "Parthian," who by letters received by him on his arrival at Alexandria, had learnt that De Mattos had suspended payment, refused to deliver the cargo to the plaintiff, except upon the terms of being paid the full amount of the freight, without making any such deduction, or having a guarantie for the payment of the same.

15. The master of the ship thereupon claimed to have a lien upon the said cargo for the payment of the full chartered freight; and, in exercise of such alleged lien, detained the said cargo on board the ship until the 20th of January, the plaintiff during all that time refusing to make such payment or to guarantee or procure a guarantee for the payment to the said master of the full chartered freight.

16. De Mattos's acceptance was not due till the 3rd of February, 1864, and was therefore not due at the time when the captain refused to deliver the coals to the plaintiff.

17. The said acceptance at this time was in the hands of third parties, and was not paid at maturity, but was taken up by the defendant before the commencement of this action.

18. Upon the 20th of January, 1864, Messrs. Barker & Co., of Alexandria, at the request of the plaintiff, and to procure delivery of the cargo to the plaintiff, gave the master of the "Parthian" the following guarantee,—the master still continuing his refusal to deliver the cargo without being paid the full amount of the freight or having a guarantee for the payment of the same as aforesaid:—

"Captain Simpson, of the 'Parthian.'

"Alexandria, 20th January, 1864.

"Sir,—In consideration of your agreeing at our [463] request to deliver to Mr. E. Tamvaco the cargo of coals at present on board your ship, we hereby undertake and guarantee that, when and so soon as you shall have delivered the said cargo unto the said Mr. E. Tamvaco or his order, that we will on demand pay or cause to be paid to you in cash the full amount of freight due and payable to you in respect of said cargo, without any deduction whatsoever, except commission due."

(Signed) "BARKER & Co."

19. The master of the "Parthian," upon receiving the said guarantee, forthwith commenced to deliver the cargo to the plaintiff, and completed such delivery on the 13th of February, 1864.

20. Upon the completion of the said delivery, the master of the "Parthian" (Mr. De Mattos's acceptance having been in the meantime dishonoured at maturity,) applied to the plaintiff for payment of the full charter freight; and, upon the plaintiff's refusal to pay the same, applied to Messrs. Barker & Co. for payment of the same in pursuance of the said guarantee. The said Messrs. Barker & Co., however, by the plaintiff's instructions, and on his behalf, also refused to pay the same; whereupon the master of the said ship instituted legal proceedings against the Messrs. Barker & Co. in Her Majesty's Consular court for Egypt, at Alexandria, which had jurisdiction in the said matter, for the recovery of the sum due from Messrs. Barker & Co. to him on their said guarantee; and the said cause was proceeded with and duly prosecuted, and a day fixed for the trial of the same; but, on the day before such last-mentioned day, Messrs. Barker & Co., on behalf of the plaintiff, and by his authority, and in discharge of their liability under the said guarantee, viz. on the 7th March, 1864, paid the master of the "Parthian" the amount agreed to be paid by them under [464] their said guarantee, without making any deduction for the 301l. 17s. 6d.; the plaintiff at the same time protesting against such payment being demanded or made.

21. Upon receiving the amount so paid by Messrs. Barker & Co. as aforesaid, the master of the "Parthian" gave them a receipt for the same.

22. The plaintiff afterwards, and before the commencement of this action, repaid Messrs. Barker & Co. the amount so paid by them to the said master of the "Parthian" as aforesaid.

23. The average length of a voyage of a vessel of the same class as the "Parthian" from Sunderland to Alexandria, is two months.

The questions for the opinion of the court are,—first, whether, under the circumstances before set out, the plaintiff was at the time when the captain of the "Parthian" refused to deliver her cargo entitled to have the said cargo delivered to him on payment of the balance of the freight, after deducting the 301l. 17s. 6d.,—secondly, whether, assuming the plaintiff to be entitled to recover in respect of the said refusal to deliver, he is entitled to recover anything as damages but the damage sustained by him by being deprived of the possession of the cargo from the time of the said refusal to the time of the cargo being delivered to him.

If the court should be of opinion upon both points in the affirmative, then the

plaintiff was to have judgment for the sum of 311l. 17s. 6d., with costs. If the court should be of opinion upon the first point in the affirmative, and upon the second point in the negative, then the plaintiff was to have judgment for 10l., with costs. If the court should be of opinion upon the first point in the negative, a nonsuit was to be entered.

[465] Mellish, Q. C. (with whom was Bidder), for the plaintiff(a). The first question is, whether the defendant had a lien on the cargo for that portion of the freight of the coals which was represented by the bill of exchange which had not arrived at maturity when the ship reached Alexandria. The plaintiff, as indorsee of the bill of lading, on which was indorsed a receipt for one half of the charter freight, claimed the coals on payment of the remaining half. The master, acting for his owner, refused to deliver any part of the cargo unless the whole of the freight was paid or guaranteed. At this time the bill of exchange which De Mattos, [466] the charterer, had given for one half of the freight, was still running, and in the hands of a third person. The question is, whether that refusal of the master to deliver was not a conversion. If the bill had become due and had been dishonoured before the refusal to deliver the goods, the court would have had to determine whether or not they would follow the decision of the Privy Council in *Kirchner v. Venus*, 12 Moore's P. C. 361, where that court, adopting the principle laid down in *How v. Kirchner*, 11 Moore's P. C. 21, but repudiating the authority of *Gilkison v. Middleton*, 2 C. B. (N. S.) 134, held, after much consideration, that where freight is by the contract payable at the port of loading, the owner thereby agrees to abandon his lien on the cargo, notwithstanding the shipper has failed to comply with the condition. [Willes, J. The Privy Council seem to have thought they were acting in opposition to *Gilkison v. Middleton*, but in truth they were not. There were two previous cases, in one of which, *Neish v. Graham*, 8 Ellis & B. 505, such a payment was treated as freight, and in the other, *Blakey v. Dixon*, 2 Bos. & P. 321, as not being freight proper. The question decided in *Gilkison v. Middleton* does not arise here: that case was in truth only an affirmation of *Blakey v. Dixon*. There is no express lien clause here.] *Kirchner v. Venus* does conflict with *Neish v. Graham*. The court there did not attend to the distinction between that case and *Gilkison v. Middleton* now pointed out. It is impossible to contend that the owner could have any lien here. The next question is, what is the proper measure of damages. When delivery of the cargo was demanded, it was refused unless the full freight was paid or guaranteed. If the plaintiff had paid the money under protest, he would undoubtedly have been entitled to recover it back as money had and received to his use. How is his posi-[467]-tion altered by his having procured Barker & Co. to give a guarantee? [Willes, J. The defendant has got the whole freight: if the plaintiff was not liable as to the moiety, surely he may recover it back.]

(a) The points marked for argument on the part of the plaintiff were as follows:—

"1. That, on the ship's arrival at Alexandria, the defendant had no lien on the cargo for the 301l. 17s. 6d., the amount of freight in respect of which she had agreed to take and had taken the bill of exchange accepted by De Mattos:

"2. That, the defendant having pro tanto waived her lien by taking the said bill, and the ship having arrived at Alexandria, and the plaintiff's right to the delivery of the cargo having accrued, the defendant's lien in respect of the amount of freight for which the said bill was given could not and did not revive upon the insolvency of De Mattos and the probable or possible future dishonour of the bill:

"3. That the defendant having held out to the plaintiff that she had received the sum of 301l. 17s. 6d. on account of the freight, and the plaintiff having settled with De Mattos on that footing, she cannot now be heard to say that she did not so receive it:

"4. That, the question being in effect whether the plaintiff or the defendant is to bear the loss occasioned by De Mattos's insolvency, the defendant, who gave the credit, must be the loser:

"5. That the plaintiff is entitled to recover the aforesaid sum of 301l. 17s. 6d., which he was wrongfully compelled to pay in order to obtain possession of the cargo, as well as damages for its wrongful detention: and his right to recover was not under the circumstances altered or affected by the eventual dishonour of De Mattos's acceptance."

Manisty, Q. C. (with whom was Lewers), for the defendant (*a*). All about the bargain between the plain-[468]tiff and De Mattos may be dismissed from the case: the defendant was ignorant of that arrangement. Her right depends upon the charterparty and the bill of lading. By the former, the clear intention of the parties was, that the freight should be paid at the port of [469] delivery, less something.

(*a*) The points marked for argument on the part of the defendant were as follows:—

“1. That the stipulation in the charterparty, that the shipowner should insure the amount of half the freight, clearly indicates the intention of the parties, that the charterer's acceptance should not be a part payment in lieu of freight strictly so called, but a mere loan by the charterer to the ship-owner not affecting in any way the ship-owner's right of lien for the full chartered freight on the arrival of the ship at Alexandria: and that the opposite construction on which the plaintiff must rely, viz. that the said acceptance was to be a part payment in lieu of freight strictly so called, and as such a waiver of lien pro tanto, involves the unwarrantable hypothesis that the charterer and ship owner contracted that the shipowner should do that which it was not legally competent for him to do, viz. that he should insure freight which ex hypothesi would at the time of effecting such insurance have been already paid to him, and which therefore could be under no risk from any of the perils proposed to be insured against:

“2. That the former part of the charter, which prescribes the ship-owner's duty, imposed no obligation upon the defendant, to deliver the cargo except on payment of full freight: and that the consignee's liability under the charter, as consignee, and his consequent right to deduct advances, did not arise until the complete delivery to and acceptance by him of the cargo:

“3. That, on De Mattos's suspension of payment, the defendant was entitled to exercise a lien against the plaintiff for the full amount of the chartered freight:

“4. That the term ‘advances’ in the clause stipulating that the freight was to be paid on ‘unloading and right delivery of the cargo, less advances in cash,’ is inapplicable to an acceptance which was already in effect dishonoured at the time when such deduction had to be made, that is to say, upon the unloading and right delivery of the cargo; and that, either on the supposition of the said acceptance being a loan, or of its being a conditional payment of freight in advance, the plaintiff was not entitled to deduct the amount of the said acceptance from the full chartered freight under the name of an ‘advance,’ but on the contrary, there being then nothing to be deducted under the name of an ‘advance,’ the plaintiff by virtue of the clause above mentioned was bound to pay the full charter freight:

“5. That, even assuming the acceptance to have been a part payment of freight in advance, nevertheless, express reference being made to the terms of the charterparty both in the indorsed receipt and in the bill of lading itself, the plaintiff had due notice before the indorsement of the bill of lading to him that the said receipt was not a receipt for a cash payment in satisfaction and discharge of half the chartered freight, but only a receipt for a conditional payment, liable to be defeated by the dishonour of the bill, or by the release and discharge of the charterer therefrom by bankruptcy or otherwise; and that the said receipt therefore could not operate to curtail the liability which the defendant took upon himself as indorsee of the bill of lading, to pay the charter freight, whatever such freight might prove to be:

“6. That De Mattos would not have been entitled on the arrival of the ship at Alexandria on the 5th of January, 1864, to deduct the amount of the said acceptance from the full charter freight, inasmuch as he had on the previous day, viz. the 4th of January, 1864, executed a deed under the 192nd section of the Bankruptcy Act, 1861, whereby he was effectually released from all liability to be sued upon the said acceptance, the said deed operating by relation to the date of the delivering of the same; that the defendant would have been entitled to exercise a lien against De Mattos under these circumstances for the full amount of the charter freight; and that the defendant's rights against the plaintiff, as indorsee of the bill of lading, were on the arrival of the ship at Alexandria, by virtue of the Bill of Lading Act, 18 & 19 Viet. c. 111, co-extensive with her rights against De Mattos; and that she was at the said time accordingly entitled to exercise a co-extensive lien against the plaintiff on his refusal to pay the full charter freight:

“7. That the guarantee so given as above mentioned operated as an accord and

Has the ship-owner, by taking a bill payable at a distant date, waived or precluded herself from setting up her common-law right of lien? What is the contract? "The freight to be paid on unloading and right delivery of the cargo, *less* [470] *advances in cash*, at current rate of exchange. One half of the freight to be advanced, by freighter's acceptance, at three months, on signing bills of lading. Owner to insure the amount, and deposit with charterer the club-policy, and to guarantee same." The words "in cash" in most charterparties are followed by the words "for ship's use." Here those latter words are struck out. [Willes, J. The object of the ship-owner was, to obtain a negotiable instrument. Is the discount of the bill to have the lien?] This was not the case of a payment out and out (*a*): but an advance, to be repaid by the ship owner in the event of the ship being lost, — apart from the question about the policy. The charterparty contemplates the ship owner having an interest in that portion of the freight. All that *How v. Kirchner* and *Kirchner v. Venus* establish [471] is, that the ship-owner's lien is gone, where he enters into a contract which is inconsistent with it. [Willes, J., referred to *Alsiger v. The St. Katherine's Dock Company*, 14 M. & W. 794. There, a charterparty stipulated that the ship should proceed from London to Bombay, and, being there loaded, should proceed to London, and discharge in any dock the freighters might appoint, and deliver her cargo "on being paid freight at and after the rate of 4l. per ton," &c. By a subsequent clause it was stipulated that the freight was to be paid "on unloading and right delivery of the cargo, in cash, two months after the vessel's inward report at the Custom House." And it was held that, upon the construction of these stipulations, taken together, the freight was not payable until two months after the inward report: and that the ship-owner had not, after the cargo was discharged pursuant to the charterparty, any lien thereon for the freight.] Then, before the goods are delivered, De Mattos has become

satisfaction of all then-existing claims on the part of the plaintiff against the defendant in respect of the said freight and detention, and amounted to an agreement on both sides that the cargo should be delivered to the plaintiff without prejudice to his liability for full freight, and that Barker & Co. should hold the full freight in their hands until the plaintiff's liability to pay the same was decided by a competent tribunal: and that the payment by the plaintiff under pressure of legal proceedings taken to determine such liability, was an admission of the defendant's right to full freight, by which the plaintiff is now concluded:

"8. That the coals carried by the defendant's vessel were on their shipment at Sunderland the plaintiff's coals, and the full freight thereof was therefore primarily the plaintiff's debt, and was on the 6th of January the plaintiff's debt notwithstanding that De Mattos's bill was then running: that any liability of De Mattos under the charter, or upon his acceptance, was only collateral to the plaintiff's primary liability: and that the defendant's remedies thereon were not in substitution of, but only collateral to the defendant's lien and other remedies:

"9. That, assuming the detention of the cargo from the 6th to the 20th of January not to have been justified on any of the grounds above mentioned, the defendant will contend that the sum of 301l. 17s. 6d. paid under the said guarantee in alleged excess of what was due for freight on the arrival of the ship at Alexandria, forms no element of the damages legally recoverable from the defendant in respect of the said detention, — first, because the full amount of the freight had at the time of the payment under the guarantee become payable by the plaintiff, the dishonour of the said acceptance having preceded the date of such payment, and the plaintiff's liability accordingly to the full chartered freight had revived, — secondly, because the said guarantee was given without protest, and, in the absence of any suggestion to the contrary, must be taken to have been made with full knowledge of all the facts, and the payment which was so made under the said guarantee stands in the same position as a payment made without protest and with full knowledge of all the facts, — thirdly, because the said payment was made after and in consequence of the commencement and prosecution of legal proceedings instituted for the enforcement of the same, — fourthly, that the plaintiff's repayment to Barker & Co. of the said amount (which repayment alone gives a colour to his claim for damages in respect of the said sum) was too remotely and indirectly consequent upon the defendant's refusal to deliver the cargo, to form an element of damage in respect of such refusal."

(a) See *Frayes v. Worms*, ante, p. 159.

bankrupt, and has virtually dishonoured his acceptance. Knowing that, the master declines to deliver the cargo without payment of the freight, or a guarantee of payment. The money is not paid under protest. But, to put an end to the dispute, Barker & Co. (acting probably as agents for the plaintiff) give the master an absolute undertaking to pay the freight in consideration of his delivering them the cargo. The cargo having been delivered upon the faith of this undertaking, an action is brought against Barker & Co. upon their guarantee, in which action they might have raised, and were bound to raise, the defence now set up. They decline to do so, but submit to a judgment. According to all the principles laid down in the cases referred to in the notes to *Marriott v. Hampton*, 2 Smith's Leading Cases, 5th edit p. 356, the money so paid cannot be recovered back. [Willes, J. That [472] might be a very good answer to an action to recover back the money: but this is an action for the wrongful conversion of the plaintiff's goods.] Changing the form of action cannot vary the rights of the parties. The plaintiff cannot be in a better condition than if he had paid the money, and was seeking to recover it back. This is, in truth, an indirect mode of seeking to obtain that which could not be obtained directly.

Mellish, in reply, was stopped by the court.

WILLES, J. This case has been very fully and ably argued on both sides: and the court has also had an opportunity, before hearing the conclusion of Mr. Mellish's argument, of considering the matter. The result is that we think the plaintiff is entitled to judgment. The first and general question is, whether the ship-owner, under the circumstances which have arisen here, and having regard especially to the insolvency of De Mattos, the charterer, had a lien on the goods for the freight, not only as to the half which was payable at Alexandria, but also as to the half which had been paid by a bill of exchange at three months, in pursuance of the terms of the charterparty, for which the ship-owner stipulated in these terms,—“The freight to be paid on unloading and right delivery of the cargo, less advances, in cash, at current rate of exchange. One half of the freight to be advanced by freighter's acceptance at three months, on signing bill of lading. Owner to insure the amount, and deposit with charterer the club policy, and to guarantee same.” The vessel was loaded, and proceeded on her voyage. The acceptance was given for 3011. 17s. 6d., the half-freight, and became due on the 3rd of February, 1864. The vessel arrived at Alexandria in the early part of January. In the meantime De Mattos had become insolvent; and it may be assumed that the bill would not be honoured by him, but that the holder would only receive a dividend upon the amount from De Mattos's estate. Before the bill became due, the consignee under a bill of lading which by the authority of the ship-owner intimated that one half of the freight had been paid as per charterparty, demanded delivery of the cargo, and offered to pay the remaining half of the freight. The master, having received intelligence of the stoppage of De Mattos, refused to deliver the cargo except on payment of the full amount of the charter freight,—that is, the half freight which was to be paid on delivery of the cargo at Alexandria, and also a sum equivalent to the amount of the acceptance given by De Mattos. In other words, he claimed on behalf of his owner to be entitled not only to the conditional payment by the charterer's acceptance, but also to have the same amount over again in cash. Under these circumstances, a jury would unquestionably find that there had been a conversion of the goods by the master as agent for the owner in the course of his employment and for the benefit of his owner. Matters so stood for a week or ten days: the master persisting in his refusal to deliver the cargo unless he received payment of the full freight in cash, or a guarantee for the same. The plaintiff, in order to obtain the cargo, yielded to the captain's demand, and caused his agents, Barker & Co., to give the master an undertaking that, on delivery of the cargo to the plaintiff or his order, they would on demand pay or cause to be paid to him the full freight due and payable in respect of the cargo. Looking at the circumstances under which that guarantee was given, it manifestly was intended to be applied not only to the half freight which remained to be paid in Alexandria, but also to the moiety which was secured by De Mattos's acceptance. [474] The guarantee having been given, the master proceeded to deliver the cargo, and the delivery was completed on the 13th of February, ten days after the acceptance became due and was dishonoured. This latter circumstance could not be relied on as giving any new right: there had been a demand and refusal before that day. Subsequently, the master insisted upon being paid the full freight. Barker & Co. were advised to resist the claim: and a suit was brought

against them by the master in the Consular court upon their guarantie. On consideration, they did not think fit to raise the present defence, but submitted to a judgment, and paid the amount in dispute (the amount of the bill, I assume), under protest. The question is, whether the plaintiff is entitled to recover that money from the ship-owner, — I do not say *back*, because that would, as I conceive, be limiting his rights. I think he is entitled to recover that money from the ship-owner. In order to determine that question, it will be necessary in the first place to see what were the rights of the parties under the charterparty, — whether the master was right in detaining the cargo for the full freight. Assuming that the owner's lien did not extend to the moiety of the freight in respect of which the bill was given, there will arise another question, viz. whether the subsequent transactions varied the rights of the assignee of the bill of lading. As to the construction of the charterparty, I cannot entertain any doubt that the correct construction of the clause relating to the payment of freight, — “The freight to be paid on unloading and right delivery of the cargo less advances in cash at current rate of exchange,” — is this, viz. that the words “in cash” are not to be read as qualifying “advances,” but are to be read in connection with the subsequent words, “at current rate of exchange.” It is said that mercantile men would read them other-[475]-wise: but we can derive no assistance from mercantile usage; none is stated in the case. If we were to read the clause, “less advances in cash,” then there is nothing in the charterparty to which it can be applied; for, there is no stipulation for advances. The document which was handed up to us during the argument deals with “advances for ship's use.” To read in “for ships use” would not only be nonsense, because the charterparty makes no provision for such advances, but it would be manifestly contrary to the intention of the parties, for those words, which stood in the printed form, are actually struck out. Not only does this charterparty not deal with advances in cash, but it deals with advances not in cash; for, the very next clause is as follows: — “One half of the freight to be advanced by freighter's acceptance at three months, on signing bill of lading.” In order, therefore, to give effect to the intention of the parties as expressed in this instrument, we must refer “advances” to the only advance that is mentioned in it, and read the clause thus, — “Freight to be paid on unloading and right delivery of the cargo (less advances) in cash at current rate of exchange.” That will make the whole sensible, and will give effect to every word used, and will not be inconsistent with that which is a common mercantile transaction. The ship-owner says to the charterer, — “You shall pay one half of the freight three months after the date of the bill of lading, and you shall give me for that a bill of exchange which I can negotiate in the meantime.” Mr. Manisty's argument on the other branch of the clause has had the effect of preventing me from giving any opinion upon the question whether that advance was properly a loan to be restored in cash if no freight should be earned, or whether in that event the loss should fall upon the charterer, he being satisfied with the security [476] of the club policy. If it were necessary to give any opinion upon that point, I should like to consider whether the true meaning of that was, that the freight to that extent should be at the risk of the ship-owner, or (which is the tendency of my present impression) at the risk of the charterer. But I give no opinion upon that, because I think credit was given to the charterer for half the freight. That credit did not expire until the 3rd of February: and the demand and refusal took place before that day. For these reasons, I am of opinion that, unless his rights are affected by what took place at Alexandria, the plaintiff was entitled to sue as for a conversion of the cargo. A jury would undoubtedly find that the master did what he did as the servant of the ship-owner. *Prima facie*, a person whose goods are converted has a right to recover the value of them: and a person whose goods are detained on an unfounded claim of lien may pay the sum claimed and take his goods. The distinction between a payment or a transaction in the nature of a payment, and a contract entered into to relieve goods from a state of restraint or duress, is maintained by numerous authorities, some of which are referred to in the note in *Byles on Bills* (8th edit.) 101. If the plaintiff here had paid the whole freight in order to obtain the delivery of the goods, no doubt he might have recovered back the sum paid in excess. That course, however, was not pursued. The master gave him the alternative of a guarantie. That was obtained from Barker & Co. Now, Messrs. Barker & Co. were not the persons who were entitled to demand the delivery of the coals. They enter into a fresh contract, in consideration of the master agreeing at their request to deliver the cargo to the plaintiff, to pay him in cash, as soon as he

should have delivered the cargo, the full amount of freight due to him in [477] respect of such cargo, —which means the whole of the freight. Barker & Co. were indemnified by Tamvaco, their principal. I adopt the argument of Mr. Manisty on this point. I assume that this was a document which rendered it obligatory on Barker & Co. to pay the whole freight, and therefore that the settlement of the action against them in the Consular court was well advised. Suppose, instead of undertaking to pay the freight, Barker & Co. had undertaken to deliver to the captain a diamond of great price: the latter having done that which was the consideration for their promise, could Barker & Co. have excused themselves for the non-performance of it? Clearly not. The question between the parties was whether or not Barker & Co. had come under an engagement to pay the whole charter freight. I think the answer to that question must have been in the affirmative, and consequently that Barker & Co. acted properly in declining further to contest the matter. Then it was insisted that, regard being had to the contract between Barker & Co. and the defendant, and the action brought upon it, and the acquiescence of Barker & Co. in that claim, the money so paid cannot be recovered back. The master had refused to deliver the goods unless and until he received payment or a security was given to him, not only in respect of what was really due, but also in respect of a sum which he was not entitled to. What is the real character of the transaction? Was it the settlement of a dispute, and so binding and final? The contract certainly was binding and final to this extent, that the master was to receive the whole freight. But, was it binding and final so as to entitle the defendant to retain a sum of money which had been extorted from the plaintiff, and which the latter had been compelled to pay in order to obtain the goods? It would be an abandonment, and not a settle-[478]-ment. The transaction speaks for itself. It was never intended that the master should be either in a better or a worse position by taking the guarantee than if he had received the money at the time. That is the judgment of good sense. What is the judgment at law? Clearly the same. *Prima facie*, in an action for the conversion of goods, the plaintiff gets their value: but, if the goods have been given up, that may be taken into account in reduction of damages. Here is a middle case. The goods have been given up, but in a course of dealing whereby the plaintiff is 301l. 17s. 6d. out of pocket. A jury would be entitled to take that into their consideration in assessing the damages. I therefore think the plaintiff is entitled to judgment for the larger sum.

BYLES, J. I am of the same opinion. It is unnecessary to draw any subtle distinctions as to the meaning of "freight." Whatever it means, it is quite clear that, if a bill of exchange is taken for freight, which bill becomes due after the commencement of the voyage, but before the goods are deliverable, no lien exists in respect of that: *Horneseth v. Farran*, 3 B. & Ald. 497; *Alsager v. The St. Katherine's Dock Company*, 14 M. & W. 794. That being so, here was an advance in the nature of a prepayment of half the freight by a bill of exchange payable at a distant day. On that bill becoming due, and being dishonoured, the debt would revive. But it is one thing to say that the debt revives, and another to say that the lien for freight revives. This bill was not dishonoured at the arrival of the time for the delivery of the goods. There is no authority for the application of the doctrine of stoppage in transitu to such a case. By duress of his goods the plaintiff is obliged to give a guarantee for payment of the whole freight. It is unnecessary to say whether or not there was a sufficient [479] consideration for that guarantee. It seems to me that the real meaning of the transaction is this,—"If you (the master) will deliver me the cargo, I will pay you the whole freight; and you shall be the depositary of the money, to wait the determination of the rights as between your owner and myself." That seems to me to be the fair result. The plaintiff by his agents performs the agreement, and pays the money under protest. I have attended very carefully to the argument, and I must say I think the case a very plain one.

MONTAGUE SMITH, J., having been at Chambers during a portion of the argument, took no part in the judgment.

Judgment for the plaintiff for 311l. 17s. 6d.

LAY v. MOTTRAM. June 26th, 1865.

[S. C. 12 Jur. N. S. 6. Followed, *Gresty v. Gibson*, 1866, L. R. 1 Ex. 115.
 Referred to, *Brooks v. Jennings*, 1866, L. R. 1 C. P. 481.]

1. A recital in a deed may amount to a covenant, where it appears to be the intention of the parties that it should do so.—2. A composition deed under the 192nd section of the Bankruptcy Act, 1861, professing to be made between the debtor, a surety, and all the creditors (whether assenting or bound under the statute), recited, amongst other things, that the debtor had agreed to pay his creditors 5s. in the pound upon their debts by two instalments of 2s. 6d. in the pound each, the first in cash, the second by the joint and several promissory notes of *the debtor and the surety*, at four months' date; and that the statutory majority of creditors had consented to accept such composition. It then witnessed that, in consideration of the premises, the several creditors released the debtor (in the largest possible terms) from all debts, claims, and demands, "save and except their rights, claims, and demands under and by virtue of this deed, and of the said promissory notes for the second instalment of the said composition;" with a proviso saving their remedies against third persons: and the surety covenanted not to accept any security, preference, or benefit, until the full amount of the composition should have been paid:—Held, that the deed amounted to an absolute release, and might be pleaded in bar as such.

This was an action upon three bills of exchange drawn respectively by one Barron on the 18th, 23rd, and 24th of November, 1863, upon and accepted by the defendant, for 280l. 3s., 148l. 19s. 6d., and 160l. 8s. 7d., respectively, each payable four months after date, and indorsed by Barron to the plaintiff: with a count upon an account stated.

[480] The defendant pleaded, amongst other pleas,—thirteenthly, that the defendant and Alexander Mottram accepted the said bills sued upon jointly and not otherwise, and that the said money payable mentioned in the last count was money alleged by the plaintiff to be due by the defendant and the said Alexander Mottram jointly and not otherwise; and that, after the accruing of the alleged causes of action, and before this action, to wit, on the 29th of September, 1864, the defendant and the said Alexander Mottram, being indebted to divers persons, respectively, made and executed a deed, as follows,—“This deed, made the 29th of September, 1864, between Charles Mottram and Alexander Mottram, both of No. 20 Noble Street, in the city of London, merchants, partners in trade, carrying on business under the style of Mottram & Co. (hereinafter called ‘the debtors’), of the first part, Charles Mottram the younger, of, &c. (hereinafter called ‘the surety’), of the second part, and all the creditors of the debtors whether executing or assenting in writing to this deed (being a deed intended to take effect under the 192nd section of the Bankruptcy Act, 1861), or being bound thereby in consequence of the same being executed or assented to in writing by a majority in number representing three fourths in value of the creditors of the debtors whose debts respectively amount to 10l. and upwards, of the third part: Whereas, the debtors are jointly indebted to the several persons and companies whose names or whose trading firms and companies are set forth in the schedule hereto (and which schedule is intended to include all the creditors of the debtors), in the sums set opposite each name, firm, or company, and upon the several bills of exchange and negotiable securities mentioned in the said schedule, as they the debtors do hereby respectively admit and acknowledge, and as they the creditors do hereby [481] respectively declare: And whereas the debtors, being unable to pay the said debts in full, did in the month of June last suspend their payments, and gave notice of such suspension to their creditors; and on the 29th of that month a meeting of their creditors was held at, &c., and an offer having been made by the debtors of 5s. in the pound, 2s. 6d. within six weeks, and 2s. 6d. within three months,—the last payment to be secured,—a committee of creditors was appointed to investigate the debtors’ affairs, and if they were of opinion that a composition should be accepted, they were authorized to accept a composition not less in amount than that above mentioned, and secured as they should decide: And whereas the said committee proceeded to investigate the affairs of the debtors, and have by their report of the 14th of July, 1864, recommended

the creditors to accept a composition of 5s. in the pound upon their said debts, by two instalments of 2s. 6d. in the pound each, —the first of such instalments to be paid in cash, and the second of such instalments to be payable at four months' date from the 1st of August, 1864, and to be secured by the joint and several promissory notes of the said debtors and the said surety; and the said debtors have agreed to pay such composition: and the said creditors, or a majority in number representing three fourths in value of such of them whose debts respectively amount to 10l and upwards, have consented to accept such composition upon the terms hereinafter appearing: And whereas this deed has been approved by the said committee as a proper deed for carrying out the arrangement: Now this deed witnesseth that, in consideration of the premises, they the several creditors of the debtors do and each of them doth hereby, for themselves respectively, and for their several and respective partners, release the debtors and each of them, their and each of their heirs, [482] executors, and administrators, estate and effects, of and from all debts, sums of money, bills, bonds, notes, accounts, judgments, executions, actions, suits, claims, costs, damages, and demands whatsoever, which they respectively, either alone or jointly with their partner or partners or any other person or persons, now have or hereafter may have against them the debtors, or either of them, their or either of their heirs, executors, or administrators, estates or effects, for or in respect or by reason of the said debts, bills of exchange, and negotiable securities mentioned in the said schedule hereto, or for or by reason of any other debt, bill of exchange, negotiable security, damages, liability, claim or demand whatsoever, save and except their rights, claims, and demands under and by virtue of this deed, and of the said promissory notes for the second instalment of the said composition: Provided always, and it is hereby expressly declared that nothing herein contained shall in any way prejudice or affect the rights or remedies of any creditor or creditors against any person or persons, or the property of, or any security given by, any person or persons other than the debtors, or the rights or remedies of any creditor or creditors in respect or upon any security given to or held by them or any of them upon or against any part of the estates and effects of the debtors, which but for these presents they might have resorted to: And this deed also witnesseth that, in consideration of the premises, he the surety doth hereby, for himself, his heirs, executors, and administrators, covenant with the said creditors, respectively, their respective executors, administrators, and partners, that he the surety will not do or cause or require to be done any act or thing whereby he or they may obtain any security, preference, or advantage whatsoever, nor will he or they accept any security, preference, or benefit whatsoever from the [483] debtors or either of them, or over or upon the estate of the debtors or of either of them, or over or upon any part thereof respectively, in respect of his said suretyship, until the full amount of the said composition shall have been paid. In witness," &c. Averment, that a majority in number representing three fourths in value of the creditors of the defendant and the said Alexander Mottram whose debts respectively amounted to 10l. and upwards, did in writing assent to and approve of the said deed; that the execution of the said deed by the defendant and the said Alexander Mottram (a) was attested by an attorney and solicitor; that, within twenty-eight days from the day of the execution of the said deed as aforesaid, and before the commencement of this action, the said deed was produced and left (having been first duly stamped) at the office of the chief registrar of the court of Bankruptcy for the purpose of being registered, and together with the said deed there was delivered to the said chief registrar such affidavit by the defendant and the said Alexander Mottram as by the Bankruptcy Act, 1861, in that behalf is provided: that the said deed did before the registration thereof have such ordinary and ad valorem stamp duties as by the said act in that behalf are provided: that the plaintiff was a creditor of the defendant and the said Alexander Mottram, in respect of the claim herein pleaded to, at the time of the execution of the said deed by the defendant and the said Alexander Mottram; and that, all conditions prescribed by the said act having been observed and performed, and all things having happened necessary in that behalf, the plaintiff became and was and is bound by the said deed, as if he had been a party thereto and had duly executed the same.

(a) There is no averment that the surety executed the deed. But this Willes, J., suggested might be cured by an amendment.

[484] To this plea the plaintiff demurred, the ground of demurrer stated in the margin being, "that the deed pleaded is no bar to the action, and contains unreasonable covenants, and is inoperative against non-assenting creditors." Joinder.

Philbrick, in support of the demurrer (*a*). There is no averment in the plea that the first instalment of the composition was paid or tendered in cash, or that the promissory notes for the second instalment were given or tendered. Looking at the form of the deed, in which there is no covenant by the debtors to pay the money, and no covenant by the sureties to give the notes, except such as may be implied from the recital, a dissentient creditor cannot be bound by it. [Willes, J. The recitals amount to a covenant: *Farrall v. Hilditch*, 5 C. B. (N. S.) 840.] The release can have no operation until payment or tender; and there is no averment of either: *Fessard v. Mugnier*, 18 C. B. (N. S.) 286. There, an averment of the defendant's readiness and willingness to pay or tender was held not be equivalent to an averment of payment or tender, notwithstanding the plea contained a general averment of performance of all conditions precedent, &c. Here, the plea does not even aver readiness and willingness. [Byles, J. The release there was unqualified, and would have discharged joint contractors and sureties. That is provided against here. Willes, J. The release in *Fessard v. Mugnier* was subject to a defeazance, if the composition was not paid. Here, if the composition is not paid, the creditors must look to their remedies under the deed: but the release is a general and absolute release. Montague Smith, J. The true construction is that the covenant of the debtor and of the surety is accepted in satisfaction.] The deed is clearly unreasonable: it contains no provision to enable a dissentient creditor to enforce payment of the composition, if it be improperly withheld. [Montague Smith, J. If the words of the instrument are sufficient to create a covenant, he has his remedy on the deed.]

Hayes, Serjt, *contrà*, was not called upon.

WILLES, J. I am of opinion that our judgment in this case should be for the defendant. The deed set out in the plea is a deed of composition pursuant to the 192nd section of the Bankruptcy Act, 1861, and is so framed and executed as to be binding upon all the creditors. It professes to be made between the debtors of the first part, Charles Mottram the younger (as surety) of the second part, and "all the creditors of the debtors, whether executing or assenting in writing to this deed (being a deed intended to take effect under the 192nd section of the Bankruptcy Act, 1861), or being bound thereby in consequence of the same [486] being executed or assented to in writing by a majority in number representing three fourths in value of the creditors of the debtors whose debts respectively amount to 10l. and upwards," of the third part. The deed then recites certain matters which resulted in a meeting of the creditors, the appointment of a committee to investigate the affairs of the debtors, that the committee proceeded to investigate, and by their report recommended the creditors to accept a composition of 5s. in the pound upon their debts, payable by two instalments of 2s. 6d. in the pound each, the first in cash, the second by the joint and several promissory notes of the debtors and the surety at four months' date. The plea does not aver that the deed was executed by the surety; but that may be amended. The deed then goes on to recite that the debtors had agreed to pay such composition, and that the creditors, or a majority in number representing three fourths in value of such of them whose debts respectively amounted to 10l. and

(*a*) The points marked for argument on the part of the plaintiff were as follows:—

"1. That the deed pleaded is no bar to the action, and contains unreasonable covenants, and reasonable, proper, and necessary covenants are absent:

"2. That it is inoperative as against dissentient creditors, as it contains an absolute and unconditional release, without any covenant to pay the composition by the debtor or to give the promissory notes by the surety:

"3. That the plea is bad, for containing no averment that the composition mentioned in the deed had been paid or tendered:

"4. That the release is inoperative and null until the composition be paid or tendered; and under the deed a dissentient creditor has no remedy for it:

"5. That the non-assenting creditors are by the deed placed in a worse position than those who assent thereto:

"6. That there is no covenant or agreement at all binding the debtor in the said deed; and that all the surety is bound to do the law would imply."

upwards, had consented to accept such composition. It then proceeds to state that the several creditors released the debtors in the most general terms possible, saving their remedies under the deed or against third persons. Then comes an express covenant by the surety against his receiving any preference or benefit in respect of his suretyship until the full amount of the composition should have been paid. The very statement of the deed is enough to shew the effect of the transaction to be, that the creditors were satisfied to discharge the debtors from their debts, in consideration of the covenant entered into by them and their security. Whether the true construction of the deed be that it amounts to a release or merely to an accord and satisfaction or a covenant not to sue, is immaterial, because, inasmuch as it is absolute and unconditional, the release or the covenant not to sue would be a bar [487] to any action for the original debt. Mr. Philbrick says the deed is unreasonable and not binding on dissentient creditors, because no remedy is given them for the composition. But I think the case of *Farrall v. Hilditch*, 5 C. B. (N. S.) 840, furnishes a complete answer to that argument: it shews that the recital that the debtors had agreed to pay the composition amounts in law to a covenant to pay the composition as agreed. The creditors, therefore, agree to let off the debtors, in consideration of the payment of a composition of 5s. in the pound by two instalments, at the times agreed on. That puts an end to their claim for their original debts. For these reasons, I am of opinion that there must be judgment for the defendant.

BYLES, J. I am of the same opinion. This is, I believe, the second deed under the statute which has been held to be good. In *Strick v. De Mottos*, 33 Law J., Exch. 276, Martin, B., says "There are four things settled with regard to these deeds, — first, they may be pleaded in bar,—secondly, they may be pleaded in bar without a *cessio bonorum*,—thirdly, there must be a substantial equality for the creditors." As to these three, no difficulty arises here. The fourth is, that "unreasonable covenants make the deed void as against non-assenting creditors." In this deed there is a release absolute in terms and most cautiously worded to reserve the rights of the creditors as against third parties. The only difficulty which has been suggested is, that the non-assenting creditor gets nothing in return for the release which is cast upon him. But the covenant to pay the composition is his equivalent: and the case of *Farrall v. Hilditch*, 5 C. B. (N. S.) 840, shews that the recitals amount to a covenant.

MONTAGUE SMITH, J. I am of the same opinion. The argument urged on the part of the plaintiff [488] admits that, if the deed contains a covenant by the debtors and the surety (a) to pay the first instalment, and to give promissory notes for the second, the release is absolute and binding on all the creditors, whether assenting or not. I think that is the true construction of the deed. There is a distinct recital (which amounts to a covenant) that the debtors have agreed to pay the composition, and that the creditors (to the required number and value) have agreed to accept the same. The operative part of the deed is that, in consideration of the premises, the several creditors released the debtors, their estates and representatives, from all debts and demands, &c. It is an absolute and immediate release of the debtors from all debts, claims, and demands whatsoever "save and except their rights, claims, and demands under and by virtue of this deed, and of the said promissory notes for the second instalment of the said composition:" and the exception or proviso which follows supports that construction:—"Provided always, and it is hereby expressly declared, that nothing herein contained shall in any way prejudice or affect the rights or remedies of any creditor or creditors against any person or persons, or the property of, or any security given by, any person or persons other than the debtors, or the rights or remedies of any creditor or creditors in respect or upon any security given to or held by them or any of them upon or against any part of the estates and effects of the debtors, which but for these presents they might have resorted to." And then follows the covenant by the surety which has already been adverted to. I think the deed is a perfectly good deed, and binding upon non-executing creditors.

Judgment for the defendant.

(a) The surety is no party to that covenant, unless it be inferentially.

[489] IN THE MATTER OF THE CLAIM OF ROBERT JOHN PETTIWARD *v.* THE METROPOLITAN BOARD OF WORKS. June 26th, 1865.

[8 C. 34 L. J. C. P. 301 ; 12 L. T. 764 ; 11 Jur. N. S. 932. Explained, *Metropolitan Board of Works v. Metropolitan Railway*, 1869, L. R. 4 C. P. 196.]

In 1854, the commissioners of sewers, under the 11 & 12 Vict. c. 112, gave notice to A., the occupier of land under a lease granted by a tenant for life, that they were about to construct a new sewer across the same ; and in the early part of 1855 the work was done, no notice having been given to the owner of the fee.—The Metropolitan Local Management Act, 1855, 18 & 19 Vict. c. 120, passed after the work was so done, and came into operation on the 1st of January, 1856.—On the expiration of A.'s lease in 1862, B., who had succeeded to the estate on the death of the tenant for life (in November, 1855), for the first time became aware of the existence of the sewer, which it was agreed had depreciated the value of the property for building purposes to the extent of 1500*l.* :—Held, that the liability of the commissioners of sewers to compensate B. for such damage was transferred to the metropolitan board of works by virtue of the provisions of the Metropolitan Local Management Act, and that the claim was not too late.

This was a special case stated by an umpire to whom the claim of Mr. Pettiward for compensation under the Metropolitan Local Management Act, 1855, 18 & 19 Vict. c. 120, for damage done to his premises by the works of the board, was referred :—

Roger Pettiward, deceased, was in the year 1832, and thence until his death, seised in fee of certain land used as orchard and market-garden, situate in the parish of St. Mary Abbots, Kensington, in the county of Middlesex.

By his will, dated the 13th of May, 1833, he devised (inter alia) the land in question to trustees, to settle the same in manner by the said will directed.

The said Roger Pettiward died shortly after making his said will.

In 1835, the trustees of the will of Roger Pettiward executed a settlement in pursuance of the said will ; and Lady Hotham under and by virtue of the said settlement became and was tenant for life of the land in question, with power of leasing the same for not more than twenty-one years.

On the 6th of August, 1841, Lady Hotham, in pursuance of the said power, granted a lease of the land in question to John Poupart, for twenty-one years from June, 1841.

On the 14th of December, 1854, the metropolitan commissioners of sewers served upon Mr. Poupart, then in occupation of the land, the following notice :—

[490] “Metropolitan Commission of Sewers.

“To Mr. John Poupart, occupier of the piece or parcel of ground hereinafter mentioned, and whom else it may concern.

“The metropolitan commissioners of sewers hereby give you notice that it has been duly ordered by the said commissioners that certain works necessary for the drainage of a portion of the area within the limits of the metropolitan commission of sewers should be executed and constructed, that is to say, the building of a certain sewer and works in connection therewith, to commence at a point near the river Thames, and near to Cremorne Gardens, in the county of Middlesex, and within the limits of the said commission, in the course and direction shewn upon the plan produced to the said commissioners ; and that, for the purpose aforesaid, it is necessary to lay down, construct, and carry the said sewer into, through, along, and under a certain piece or parcel of ground used as an orchard and market-garden in your occupation, in the county and within the limits aforesaid ; and that, for the construction of such sewer and works as aforesaid, it is requisite and necessary that Thomas Lovick, one of the engineers of the said commissioners, Robert Tomlinson Carlisle, contractor of and with the said commissioners, and their assistants, servants, and workmen, some or one of them, should enter into and upon, lay open, and otherwise lawfully interfere with the said orchard and market-garden, with or without horses, carts, barrows, planks, and other vehicles, implements, and things, for the purpose

and object aforesaid: And whereas the said T. Lovick and R. T. Carlisle have been duly authorized by the said commissioners to enter with assistants, servants, and workmen in and upon the said orchard and market-garden for the purpose of executing the said works at some reasonable [491] hour in the day-time, notice being first given to the occupier of the said orchard and market-garden of the said intended entry in and upon the said orchard and market-garden, and of the purpose and object thereof, twenty-four hours at the least before such entry,—Notice is therefore hereby given that the said T. Lovick and R. T. Carlisle and their assistants, servants, and workmen, some or one of them, will, on the 16th of December instant, at some reasonable hour in the day-time, enter into and upon the said orchard and market-garden for the purpose of executing the said works as aforesaid. Dated," &c.

In pursuance of this notice, the said commissioners of sewers, acting in execution of the powers vested in them by the 11 & 12 Viet. c. 112, by their servants and agents entered upon the land in question, and constructed under it a sewer, which was completed on, &c.; and, having done so, restored the surface of the land to its former condition.

Lady Hotham never had notice from any one, or knowledge of the intention to construct the sewer, or that it had been constructed.

Lady Hotham died on the 30th of November, 1855; and, upon her death, the claimant Robert John Pettiward became under the settlement hereinbefore mentioned tenant for life of the land in question; and, at the expiration of the lease to Poupart in 1862, he entered into possession of the said land.

Mr. Pettiward thereupon determined to apply the said land to building purposes: and he accordingly caused to be prepared a plan for the erection of several houses on the property.

After this plan was completed, namely, in October, 1862, it became for the first time known to Mr. Pettiward that the sewer had been constructed under the surface of the land. The existence of this sewer rendered it necessary to alter the contemplated scheme for building, and in fact diminished the value of the land to the extent of 1500l.

Mr. Pettiward now claims from the metropolitan board of works the sum of 1500l. as compensation for the damage occasioned to the said land by the construction of the sewer.

By the 11 & 12 Viet. c. 112, s. 38, power was given to the metropolitan commissioners of sewers to construct sewers under any lands whatsoever, making compensation for any damage done thereby, as thereafter provided.

By the 69th section of the same act, it was enacted that full compensation should be made out of such rates to be levied under the said act as the commissioners should by their decree direct, to all persons sustaining any damage by reason of the exercise of any of the powers of the said act: and, in case of dispute as to amount, the same should be settled by arbitration, in the manner provided by the said act.

By the Metropolitan Local Management Act, 18 & 19 Viet. c. 120, s. 145, it is enacted that, from and after the commencement of the said act, all duties, powers, and authorities vested in the metropolitan commissioners of sewers shall cease to be so vested.

By s. 146, it is enacted as follows,—“No action, suit, prosecution, or other proceeding whatsoever commenced or carried on by or against the said commissioners, shall abate or be discontinued or prejudicially affected by the determination of the power of such commissioners, but shall continue and take effect in favour of or against the metropolitan board of works in the same manner in all respects as the same would have continued and taken effect in relation to the said commissioners if this act had not been passed, and the powers of the said commissioners had continued in full [493] force: and all decrees and orders made, and all fines, amerciaments, and penalties imposed and incurred respectively previously to the commencement of this act, shall and may be enforced, levied, recovered, and proceeded for, and all administrative proceedings commenced previously to the commencement of this act shall and may be continued, proceeded with, and completed, the metropolitan board of works being in reference to the matters aforesaid in all respects substituted in the place of the said commissioners.”

By section 148 it is enacted as follows,—“All property, matters, and things what-

soever vested in the metropolitan commissioners of sewers, except such sewers as are hereby vested in any vestry or district-board, and except such sewers as are not within the limits of the parishes and places mentioned in the schedule to this act, shall be vested in the metropolitan board of works; and all persons who then owe any money to the said commissioners of sewers or to any person on behalf of such commissioners, shall pay the same to the metropolitan board of works, or as they may direct; and all moneys then due and owing by or recoverable from the said commissioners shall be paid by or recoverable from the metropolitan board of works; and all contracts, agreements, bonds, covenants, and securities theretofore made or entered into with or in favour of or by the said commissioners, and all contracts, agreements, bonds, covenants, and securities made or entered into with or in favour of or by any former or other commissioners, which under the said act of the 11 & 12 Vict. c. 112, were to take effect in favour of, against, and with reference to the said metropolitan commissioners of sewers, and are now in force, shall take effect and may be proceeded on and enforced, as near as circumstances admit, in favour of, by, against, and with reference to, the metropolitan [494] board of works, as the same would have taken effect and might have been proceeded on and enforced in favour of, by, against, and with reference to the said metropolitan commissioners of sewers if this act had not been passed, and the powers of such commissioners had continued in full force; and any retiring pension or allowance granted under s. 27 of the said act of the 11 & 12 Vict. c. 112, shall continue payable on the like terms by the metropolitan board of works."

By s. 225, it is enacted that "the amount of any compensation to be made under the said act by the said metropolitan board, shall, unless therein otherwise provided, be settled in case of dispute by, and shall be recovered before, two justices, unless the amount of compensation claimed exceed 50l., in which case the amount thereof shall be settled by arbitration according to the provisions of the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), which are applicable where questions of disputed compensation are authorized or required to be settled by arbitration."

By the Metropolis Management Amendment Act, 1862, 25 & 26 Vict. c. 102, s. 106, it is enacted that "no writ or process shall be sued out against or served upon, and no proceeding shall be instituted against, the metropolitan board of works for anything done or intended to be done under the powers of such board under the acts therein mentioned or the said act, until the expiration of one calendar month next after notice in writing shall have been served on such board: *and every such action and proceeding shall be brought or commenced within six months next after the accrual of the cause of action or ground of claim or demand, and not afterwards.*"

Mr. Pettiward, in February, 1863, gave notice to the metropolitan board of works that he desired to have his claim settled by arbitration: and, as the parties [495] did not concur in the appointment of a single arbitrator, he appointed Mr. Lee as an arbitrator to whom the said dispute should be referred, and requested the board also to appoint an arbitrator.

The board, by an instrument under their seal, appointed (under protest) Mr. Oakley to act as arbitrator in the matter of the said claim.

The arbitrators, before they entered upon the matters referred to them, duly nominated and appointed Mr. Hannen as umpire to decide on such matters on which they should differ, or which should be referred to him under the provisions of the Lands Clauses Consolidation Act, 1845: and it was agreed between the parties that he should state his award in the form of a special case, which he accordingly did, as above.

It was also agreed between the parties that, if the court should be of opinion that Mr. Pettiward was entitled to have any sum of money awarded to him as compensation for the damage occasioned to the land in question by the constructing of the sewer, the amount of such compensation should be 1500l., together with the costs of and incident to the arbitration.

If the court should be of opinion that the umpire had power, in the circumstances above stated, to award that Mr. Pettiward was entitled to have such compensation awarded to him in this arbitration, he awarded the sum of 1500l. as such compensation to be paid by the board to Mr. Pettiward, together with the costs of and incident to this arbitration.

If, on the other hand, the court should be of opinion that Mr. Pettiward was not so entitled, he awarded accordingly.

Watkin Williams, for the claimant (*a*). In 1835, [496] Lady Hotham became entitled as tenant for life under the will of one Roger Pettiward to certain land at Kensington. In 1841, she granted a lease for twenty-one years to one Poupart. In 1854, the commissioners of sewers, acting under the 11 & 12 Vict. c. 112, gave notice to Poupart (but not to Lady Hotham) of their intention to construct a sewer under a portion of the land comprised in his lease; and, early in 1855, they entered upon the land and did the work, paying compensation to the tenant, no doubt. Lady Hotham died in November, 1855, and Pettiward, the claimant, came in as next in remainder, subject to the lease granted to Poupart. The Metropolitan Local Management Act, 18 & 19 Vict. c. 120, passed on the 14th of August, 1855, and came into operation on the 1st of January, 1856. Poupart's lease expired in 1862, and Mr. Pettiward proceeded to lay out the ground for building, when he for the first time became aware of the existence of the sewer under it. He thereupon claimed compensation: and the question now to be determined is, whether or not his claim is well founded. The act under the authority of which the sewer was constructed was the 11 & 12 Vict. c. 112. By the 7th section of that act the property in the sewers, and all rights, debts, and liabilities of the commissioners under existing commissions were transferred to the metropolitan commissioners of sewers. By s. 38, the commissioners were empowered to construct new sewers and to repair and alter, &c., the old ones. The 59th to the 62nd section relate to notices to be given before [497] commencing works, and empowering the commissioners to enter upon lands for the purposes of the act. The 69th section enacts that "full compensation shall be made out of such rates to be levied under this act as the commissioners shall by their decree direct, to all persons sustaining any damage by reason of the exercise of any of the powers of this act: and, in case of dispute as to amount, the same shall be settled by arbitration in the manner provided by this act (ss. 70-75): or, if the compensation claimed do not exceed the sum of 20*l.*, the same may be ascertained by and recovered before justices in a summary manner." The 76th section relates to the levying of sewer-rates, which by s. 77 may be prospective for future expenses, or retrospective for expenses already incurred; with a special provision as to expenses of permanent works. There is no rule of law which prohibits retrospective rates: see *The Hull Local case*, 2 Stra 1127; *The King v. The Commissioners of Sewers of the Tower Hamlets*, 1 B. & Ad. 231; *Harrison v. Stickney*, 2 House of Lords Cases, 108. [Willes, J. The old commissioners of sewers were a court of record. I have argued demurrers, and have been present at trials upon records before them.] There can be no doubt that the plaintiff would have been entitled to compensation from the commissioners, if the 18 & 19 Vict. c. 120, had never passed. [Mellish, Q. C. The only question in the case that I am aware of is whether the liability of the commissioners under the 11 & 12 Vict. c. 112, is transferred to the metropolitan board of works.] By the 145th section of the 18 & 19 Vict. c. 120, it is provided that, from and after the commencement of that act (the 1st of January, 1856, all duties, powers, and authorities vested in the metropolitan commissioners of sewers shall cease to be so vested. And s. 146 enacts that "no action, suit, or [498] other proceeding whatsoever commenced or carried on by or against the said commissioners, shall abate or be discontinued or prejudicially affected by the determination of the powers of such commissioners, but shall continue and take effect in favour of or against the metropolitan board of works in the same manner in all respects as the same would have continued and taken effect in relation to the said commissioners if this act had not been passed and the powers of the said commissioners had continued in full force; and all decrees and orders made, and all fines, amerciaments, and penalties imposed and incurred respectively, previously to the commencement of this act, shall and may be enforced, levied, recovered, and proceeded for, and all administrative proceedings commenced previously to the commencement of this act shall and may be continued, proceeded with, and completed, the metropolitan board of works being, in reference to the matters aforesaid, in all respects

(*a*) The points marked for argument on the part of the claimant were as follows:—

"1. That the metropolitan commissioners of sewers were liable to make compensation for the injury done by the construction of the sewer to his estate and interest in the land in question:

"2. That such liability is by the Metropolitan Local Management Act, 18 & 19 Vict. c. 120, transferred to the metropolitan board of works."

substituted in the place of the said commissioners." The obvious intention of the legislature was that the metropolitan board of works should assume all the rights and be subject to all the burthens and liabilities of the old commissioners. This is made still more clear by some subsequent provisions. Section 148 enacts that "all property, matters, and things whatsoever vested in the metropolitan commissioners of sewers, except, &c., shall be vested in the metropolitan board of works: and all persons who then owe any money to the said commissioners of sewers, or to any person on behalf of such commissioners, shall pay the same to the metropolitan board of works, or as they may direct: and all moneys then due and owing by or recoverable from the said commissioners shall be paid by or recoverable from the metropolitan board of works; and all contracts, agreements, bonds, covenants, and securities heretofore [499] made or entered into with or in favour of or by the said commissioners, and all contracts, agreements, bonds, covenants, and securities made or entered [into] with or in favour of or by any former commissioners, which under the 11 & 12 Vict. c. 112, were to take effect in favour of, against, and with reference to the said metropolitan commissioners of sewers, and are now in force, shall take effect and may be proceeded on and enforced, as near as circumstances admit, in favour of, by, against, and with reference to the metropolitan board of works, as the same would have taken effect and might have been proceeded on and enforced in favour of, by, against, and with reference to the said metropolitan commissioners of sewers, if this act had not been passed, and the powers of such commissioners had continued in full force." The 180th and 181st sections contain provisions for discharging existing liabilities of boards or bodies having powers of paying, &c., and of the metropolitan commissioners of sewers. The latter enacts that, "notwithstanding the determination or expiration of the said act of 11 & 12 Vict. c. 112, all mortgages, annuities, securities, and other debts and liabilities which at or immediately before such determination or expiration may be a charge on or payable out of all or any of the rates authorized to be levied thereunder, shall continue in full force, and be a charge on the districts or parts in which such rates would have been authorized to be levied in case such act had continued in force;" and that "the sums from time to time becoming payable under or required for payment of the said mortgages, annuities, securities, debts, and liabilities shall be raised by the metropolitan board of works in such districts or parts in like manner as the expenses of such board in the execution of this act." When this act passed, Mr. Pettiward had a claim upon [500] the commissioners which would be a charge upon the rates; and the language of the clauses above referred to is sufficiently comprehensive to transfer that liability to the newly created board. The point suggested as to the limitation of the time for bringing the action is frivolous.

Mellish, Q. C., (with whom was Raymond), for the board (*a*). In order to pass on the liability to the metropolitan board of works under the 18 & 19 Vict. c. 120, the claim should have been preferred in the time of the commissioners under the former act; it must be a claim for moneys numbered. There is no provision for the transfer of causes of action for unliquidated damages, unless proceedings had been actually

(*a*) The points marked for argument on the part of the board were as follows:—

"1. That the compensation which might have been claimed from the former commissioners of sewers by the owner to whose rights Mr. Pettiward has succeeded, but which was not assessed nor claimed before the coming into operation of the Metropolis Local Management Act, was not nor is 'moneys which were due or recoverable from the commissioners,' and is therefore not recoverable from the board:

"2. That, inasmuch as it was expressly directed by the act of 11 & 12 Vict. c. 112, that the compensation was to be paid out of rates to be levied under that act, and to be imposed by the commissioners, no fund now exists or can be created out of which the compensation awarded can be paid, and that it would be unjust and unreasonable to burden existing rate-payers with the payment of a compensation in respect of acts done eight or nine years before:

"3. That the proceedings by arbitration under the powers and provisions of the Metropolis Management Act were not nor are applicable to a claim for compensation arising out of acts done before the coming into operation of that act:

"4. That more than six months having elapsed since the accrual of the ground of claim before any proceeding was instituted against the board, the right to compensation, if any, was barred."

[501] commenced. [Byles, J. This is a liability to pay compensation. Willes, J. And a charge upon the rates.] The 145th section expressly provides that, "in the meantime and until the commencement of the act, the metropolitan commission of sewers, and the act of 11 & 12 Vict. c. 112, and the acts amending the same, shall continue in force." There was therefore a time within which this claim might have been made. If any such proceedings had been commenced, they would have been kept alive by virtue of the provision in s. 146. [Byles, J. The 148th section vests everything in the new board: it strips the old commissioners naked, and transfers all property, matters, and things, and all contracts and agreements, to the newly created body.] That and the 182nd are undoubtedly the material sections for this purpose. The words "all moneys then due and owing by or recoverable from the said commissioners," in s. 148, mean a liquidated and ascertained sum. The legislature never could have meant to keep alive and transfer a claim which had never been brought forward. [Willes, J. The beginning of s. 180 shews the policy of the act. I have a strong notion that there has been a decision upon the subject (*a*).] The 180th and 181st sections clearly relate to debts which have been made a charge upon the works, and to liabilities ascertained at the time of the passing of the act. It was, of course, highly expedient that the board should know at once what claims existed against them. This liability will be cast upon an entirely different set of rate-payers. [Byles, J. Section 169 recognizes it as a landlord's tax.] The 182nd section enacts that, where the metropolitan commissioners of sewers have incurred any expenses authorized by the 11 & 12 Vict. c. 112, to be paid by an [502] improvement rate, or as charges for default, it shall be lawful for the metropolitan board of works to levy improvement rates or charges for default for the recovery of the whole of such expenses, or such portion thereof as shall still remain due and unpaid, in the manner directed by the said act: and the said board shall have all the rights and remedies for the recovery thereof which are now vested in the metropolitan commissioners of sewers in this behalf." There is no clause in the act expressly transferring to the metropolitan board of works a liability of this sort. If it had been intended, it was very easy to say so.

WILLES, J. I am of opinion that the judgment of the court in this case ought to be in favour of the claimant. The only difficulty which is suggested to lie in his way arises out of the powers of the commissioners under the 11 & 12 Vict. c. 112, having been transferred to the metropolitan board of works under the 18 & 19 Vict. c. 120. But that transfer cannot, in my opinion, affect the rights which the claimant would have had if the former act had remained in force. From the earliest time it has been an object of interest and anxiety to the legislature that the country should be protected from floods and inundations, and for that purpose commissions were issued from time to time, beginning so early as the reign of Edward the Third, and probably earlier (*a*)². Since that time various statutes have been passed for the maintenance and regulation of sea-wall and sewers at the expense of the parties to be benefited thereby. This was the object of the legislature in passing the 11 & 12 Vict. c. 112, and the 18 & 19 Vict. c. 120, and it was not their intention that it should be done at the expense of private individuals. The 88th section of the former [503] act impowers the commissioners to repair the sewers vested in them, and from time to time to construct new ones, with this qualification,—"making compensation for any damage done thereby, as hereinafter mentioned." It has been established that the meaning of that is, not that the making compensation shall be a condition precedent to the taking or entering upon the land: but that the act may be done, and that the making of compensation is an obligation cast upon the commissioners. That compensation is dealt with by s. 69, which enacts that "full compensation shall be made out of such rates to be levied under this act as the commissioners shall by their decree direct, to all persons sustaining any damage by reason of the exercise of any of the powers of this act:" and then follow provisions for the manner of ascertaining the amount. If the amount of damage could be ascertained without the intervention of surveyors and arbitrators, the obligation on the commissioners would be as much an obligation to pay a sum in moneys numbered as if it were a bill or a note. The obligation is, by reason

(*a*)¹ The point was glanced at in *Sinott v. The Board of Works for the Whitechapel District*, 3 C. B. (N. S.) 674.

(*a*)² See Woolrych on Sewers, 2, 3, 3rd edit.

of their exercising the powers vested in them by the statute, to make compensation for damage done to an individual. But the commissioners are not to be personally liable: the compensation is to be paid "out of such rates to be levied under this act as the commissioners shall by their decree direct." The circumstance of a considerable period having elapsed since the acts complained of were done, affords merely an argument *ab inconvenienti*. Delay is inconvenient to the debtor, because he may be supposed to have forgotten his liability. It is also inconvenient to the creditor, as rendering it more difficult for him to establish his claim. But, in the absence of any statutory limitation, it has no more importance than that. The only real value of the argument is that [504] attributed to it by Mr. Mellish when he said that it was probable that the legislature should have intended that debts and demands the existence of which might be known should be kept alive, but not these unliquidated liabilities. That argument, however, is not *ad rem*. The liability might have been incurred the very day before the metropolitan board of works assumed the functions of the commissioners under the 11 & 12 Vict. c. 112: the objection, therefore, would apply only to the unliquidated character of the claim, not to its staleness. We are here dealing with a question which ought to have the same result in the year 1865 as it would have had if raised the day after the Metropolis Local Management Act, 1855, came into operation. We have now to put a construction upon the statute, and to see whether the liability lapsed when the powers of the commissioners under the 11 & 12 Vict. c. 112, came to an end, or was kept alive and transferred to the new board called into existence in the place of them by the act of 1855. I have already observed that the act of 1855 was a mere transfer for administrative convenience of the powers of the commissioners of sewers to the metropolitan board of works. There can be no reason, therefore, why the metropolitan board of works, or the public whom they represent, should be absolved from any liability to which they were exposed at the time of the existence of the former body under the 11 & 12 Vict. c. 112. Is there anything in the language of the act, read by the light afforded by these probabilities, to shew that the obligation should not continue? The first section which appears to me to be material is the 145th, by which the powers of the commissioners of sewers were put an end to. It enacts that, "from and after the commencement of this act, all duties, powers, and authorities vested in the metropolitan commissioners of sewers shall cease to [505] be so vested; and in the meantime and until such commencement the metropolitan commission of sewers and the 11 & 12 Vict. c. 112, and the acts amending the same, shall continue in force." By s. 146 the metropolitan board of works is substituted for the commissioners, in the largest possible words: "No action, suit, or other proceeding whatsoever, commenced or carried on by or against the said commissioners, shall abate or be discontinued or prejudicially affected by the determination of the powers of such commissioners, but shall continue and take effect in favour of or against the metropolitan board of works in the same manner in all respects as the same would have continued and taken effect in relation to the said commissioners if this act had not been passed, and the powers of the said commissioners had continued in full force: and all decrees and orders made, and all fines, amerciaments, and penalties imposed and incurred respectively previously to the commencement of this act, shall and may be enforced, levied, recovered, and proceeded for, and all administrative proceedings commenced previously to the commencement of this act, shall and may be continued, proceeded with, and completed, the metropolitan board of works being, in reference to the matters aforesaid, in all respects substituted in the place of the said commissioners." By s. 147, all rates made by the commissioners under the former act are to be recoverable by the board under this act, and applied as they would have been by the commissioners. Then comes s. 148, which enacts that "all property, matters, and things whatsoever vested in the metropolitan commissioners of sewers, except such sewers as are thereby vested in any vestry or district-board (under s. 68), &c., shall be vested in the metropolitan board of works; and all persons who then owe any [506] money to the said commissioners of sewers, or to any person on behalf of such commissioners, shall pay the same to the metropolitan board of works, or as they may direct: and all moneys then due and owing by or recoverable from the said commissioners shall be paid by or recoverable from the metropolitan board of works: and all contracts, agreements, bonds, covenants, and securities theretofore made or entered into with or in favour of or by the said commissioners, and all contracts, agreements, bonds, covenants, and

securities made or entered into with or in favour of or by any former or other commissioners, which under the 11 & 12 Vict. c. 112, were to take effect in favour of, against, and with reference to the said metropolitan commissioners of sewers, and are now in force, shall take effect and be proceeded on and enforced, as near as circumstances admit, in favour of, by, against, and with reference to the metropolitan board of works, as the same would have taken effect and might have been proceeded on and enforced in favour of, by, against, and with reference to the said metropolitan commissioners of sewers if this act had not been passed, and the powers of such commissioners had continued in full force." Now, stopping at section 148, and reading it with its kindred sections, it should seem to be clear that the legislature intended that the new board should, except as to the minor sewers already vested in the local bodies, stand in all respects in the same position as the commissioners of sewers before stood in. We then come to a section which still more clearly shews that such was the intention, -s. 181. That section enacts that, notwithstanding the determination or expiration of the 11 & 12 Vict. c. 112, all mortgages, annuities, securities, and other debts and *liabilities* which at or immediately before such determination or expiration may be a charge on or payable [507] out of all or any of the rates authorized to be levied thereunder, shall continue in full force and be a charge on the districts or parts in which such rates would have been authorized to be levied in case such act had continued in force: "and the sums from time to time becoming payable under or required for payment of the said mortgages, annuities, securities, debts, and *liabilities*, shall be raised by the metropolitan board of works in such districts or parts in like manner as the expenses of such board in the execution of this act," &c. Here we have words apt to express the conclusion at which justice and good sense would incline one to arrive. We have the large word "liabilities," and we find it coupled with that which is, as we have already seen, strictly applicable to the obligation cast upon the board to make compensation to the owners of property which they have taken or which has been injuriously affected by their works. Two arguments have been urged on behalf of the board, to shew that that should not be the construction put upon the act. One of these I have already dealt with. The other is founded on the maxim *noscitur a sociis*. The word "liabilities," it is said, is found accompanied by words which are applicable only to debts or engagements for fixed sums, and therefore is to be taken to mean liabilities *ejusdem generis*. I feel rather inclined to accept that argument, but at the same time to deny that the claim in question is a liability of a different character from any other debt which might arise from a contract entered into with the board. Suppose the metropolitan board of works had entered into a contract for an extensive work, of which the exact price, for extras, for instance, was not determined: could it be contended that that, being a claim for unliquidated damages, was therefore not transferred to the metropolitan board? It may well be that the board might be in doubt what [508] sum they should lay by as a sinking-fund to meet such a demand, under the latter part of s. 181: but I think it would be impossible to say that for that reason it was not a debt or liability transferred to them within the act. We must, therefore, reject the argument derived from the sinking-fund. I cannot help thinking that that which struck my Brother Byles's mind might be set against that argument, viz. that, when the clause is dealing with claims against the former commissioners of sewers in respect of mortgages, securities, and debts, it omits the word "liabilities," and resumes it when it comes to give power to the board to raise moneys to provide for the liquidation of claims against them. There seems, therefore, to be no reason why this obligation should be excluded, and there seems to me to be abundant reason why it should be kept alive: and there is language in the act which is aptly descriptive of it, or at least large enough to include it. For these reasons, I am of opinion that Mr. Petteward's right is not lost, and that he is entitled to claim compensation at the hands of the metropolitan board of works.

BYLES, J. I am of the same opinion. I say nothing as to Mr. Petteward's right to claim compensation from the old commissioners of sewers. I start with the admission that there was an unliquidated demand against them. The only question before us is, whether that liability is transferred to the metropolitan board of works, under the 18 and 19 Vict. c. 120. I cannot approach the consideration of that question without being impressed with a strong sense of the justice of Mr. Petteward's claim. A portion of his estate has been taken from him for the purpose of constructing a sewer,

--or, which is the same thing, its value has been diminished. The district has got the benefit of it, and [509] ought to pay for it. The commissioners of sewers were clearly liable to the owner's claim for compensation. The 148th section of the 18 & 19 Vict. c. 120, strips the commissioners of all property in possession or in action, and of all claims of any sort, and transfers them to their successors, the present board. Are not their liabilities transferred also? I entirely agree with my Brother Willes in the construction which he has put upon the 148th section. And I also think with him that the general words of the 181st section apply to this case. As to the argument, of Mr. Mellish that the power conferred upon the board to raise money to pay off mortgages, annuities, and debts, does not enable them to apply the moneys raised in discharge of liabilities of an unliquidated character, it seems to me that it has no foundation. This is a claim which in the ordinary course of things would be turned into an ascertained claim for moneys numbered; and then will come the time for the board to apply the machinery of the act to pay off the principal sum. For these reasons, I think our judgment should be for the claimant.

MONTAGUE SMITH, J., had gone to Chambers.

Judgment for the claimant.

[510] RICHARD HERRING, *Appellant*; THE METROPOLITAN BOARD OF WORKS, *Respondents*. June 27th, 1865.

[S. C. 34 L. J. M. C. 224. Distinguished and commented on, *Lingke v. Mayor of Christchurch*, [1912] 37 L. B. 595.]

The mere temporary obstruction of access to premises, though it may cause some inconvenience and loss of business to the occupier, is not a "damage" in respect of which he is entitled to claim compensation under the 135th and 225th sections of the Metropolis Local Management Act, 18 & 19 Vict. c. 120.

The following case was stated by one of the magistrates of the metropolitan police district, for the opinion of the court:—

1. On the 6th of March, 1865, a summons was issued on an information laid by the appellant before James Vaughan, Esq., one of the magistrates of the police-courts of the metropolis, sitting at the police-court, Bow Street, in the county of Middlesex, and within the metropolitan police-district, for that, being the occupier of certain land and premises being No. 1 Northumberland Street, in the parish of St. Martin-in-the-Fields, in the county of Middlesex, and within the said district, as tenant from year to year, the respondents, the metropolitan board of works, in the exercise of the powers conferred upon them by the 18 & 19 Vict. c. 120, injuriously affected the said land and premises, and occasioned loss and damage to the appellant in his said business; whereupon the said appellant claimed the sum of 50l. as compensation in respect thereof.

2. The said information was heard by the magistrate on the 10th of March, 1865; and, having taken time to consider, he on the 24th of March, 1865, gave judgment for the respondents, the said metropolitan board of works.

3. The appellant, being dissatisfied with his determination, as being erroneous in point of law, demanded a case, under the 20 & 21 Vict. c. 43.

4. The appellant is tenant from year to year of certain premises in Northumberland Street, Strand, consisting of a small house, yard, and stabling, where he [511] carries on the business of a livery-stable keeper. The entrance to the appellant's yard consists of a gateway (without a gate) about twelve feet wide, under that portion of the premises the frontage of which is in Northumberland Street.

5. In July, 1864, the respondents, in the exercise of the powers conferred upon them by the Metropolis Local Management Act, erected a hoarding in Northumberland Street, for the purpose of enabling them to reconstruct a sewer running under that street. The hoarding occupied the whole width of the street between the kerbstones on either side; and the upper end of it stood five or six inches higher up the street than the lower side of the appellant's gateway, that is, it overlapped the entrance

to his premises five or six inches. It stood three feet six inches from the nearest part of his premises.

6. Against the upper end of the hoarding, and also on the side next the appellant's premises, bricks were stacked; and occasionally rubbish from the sewer, and sand, were deposited there. The distance the bricks and rubbish projected from the hoarding was stated by the witnesses for the respondents to be about eighteen inches, whilst those for the appellant estimated it to extend to five or six feet. Nothing whatever was placed by the respondents upon any part of the appellant's premises.

7. The access to the appellant's premises was thereby rendered less convenient than it had been before. Two or three men were sometimes required to assist in getting a carriage into the yard, in consequence of the obstruction; and the earnings of the business between August, 1864, and January, 1865, during which time the obstruction existed, were 10s. a week less than in the corresponding period of 1863. Several of the appellant's customers were called to speak to the inconvenience occasioned by the obstruction; one of whom had ceased to use the appellant's stables in consequence.

8. No part of the appellant's premises was taken or required to be taken; nor have they sustained any actual damage from the defendant's works.

9. On behalf of the appellant, it was contended that, under these circumstances, he was entitled to compensation under the 126th section of the Lands Clauses Consolidation Act, incorporated in the Metropolis Local Management Act, 18 & 19 Vict. c. 120, or under the 135th and 225th sections of the last-mentioned act.

10. Upon the authority of *Hickets v. The Metropolitan Railway Company*, 13 Weekly Reporter, 455, *The Queen v. The Sheriff of Middlesex, Re Somers v. The Metropolitan Railway Company*, 31 Law J., Q. B. 261, the magistrate was of opinion that the appellant was not entitled to compensation under the Lands Clauses Consolidation Act. And he was further of opinion that the word "damage" in the 135th section of the Metropolis Local Management Act, 18 & 19 Vict. c. 120, only applied to such damage as would produce structural injury, or impair the freehold; and he consequently dismissed the summons.

The question upon the above statement was, whether the appellant was entitled to compensation under the above statutes or either of them.

Butt, for the appellant (*a*). The magistrate on the hearing treated the appellant's claim as arising partly [513] under some sections of the Lands Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 18, which are by s. 151 incorporated with the Metropolis Local Management Act, 18 & 19 Vict. c. 120. He, however, is content to rest his claim to compensation upon the 135th and 225th sections of the last-mentioned act. The 135th section vests all the main sewers of the metropolis which were formerly vested in the commissioners under the 11 & 12 Vict. c. 112, in the metropolitan board of works, and empowers them to make such sewers and works as they may think necessary for preventing all or any part of the sewage within the metropolis from flowing or passing into the river Thames in or near the metropolis, and also to make all such other sewers and works, and such diversions or alterations of any existing sewers or works vested in them under the act, as they may from time to time think necessary for the effectual sewerage and drainage of the metropolis, and to discontinue, close up, or destroy such sewers for the time being vested in them under the act, as they may deem unnecessary, and from time to time to repair and maintain the sewers so vested

(*a*) The points marked for argument on the part of the appellant were as follows:—

"1. That the magistrate was wrong in holding that structural injury to the appellant's premises was necessary in order to entitle him to compensation under the 135th section of the 18 & 19 Vict. c. 120.

"2. That the authorities cited by the magistrate, and on which he bases his decision, have no bearing on the case as stated:

"3. That the facts found entitle the appellant to compensation for damage done, within the 135th section of the 18 & 19 Vict. c. 120:

"4. That the damage sustained by the appellant is such as would have entitled him to maintain an action at law against the respondents, were they not protected by their acts and by the acts incorporated therewith; and that he is therefore entitled to compensation."

in them, or such of them as may not be discontinued, closed up, or destroyed as aforesaid, "and, for the purposes aforesaid," such board shall have full power and authority to carry any such sewers or works through, across, or under any turnpike-road, or any street or place laid out as or intended [514] for a street, as well beyond as within the limits of the metropolis, or through or under any cellar or vault under the carriage-way or pavement of any street, and into, through, or under any lands whatsoever or beyond the said limits, making compensation for any damage done thereby as herein-after provided." That refers to the 225th section, upon which the summons in this case was founded. The 225th section enacts that, "in every case where the amount of any damage, costs, or expenses is by this act directed to be ascertained and recovered in a summary manner, or the amount of any damage, costs, or expenses is by this act directed to be paid, and the method of ascertaining the amount or enforcing the payment thereof is not provided for, such amount shall, in case of dispute, be ascertained and determined by and shall be recovered before two justices; and the amount of any compensation to be made under this act by the said metropolitan board, or any vestry or district board, shall, unless herein otherwise provided, be settled, in case of dispute, by and shall be recovered before two justices, unless the amount of compensation exceed 50l., in which case the amount thereof shall be settled by arbitration, according to the provisions contained in the Lands Clauses Consolidation Act, 1845, which are applicable where questions of disputed compensation are authorized or required to be settled by arbitration." The claim here does not exceed 50l. The contention on the part of the board will be, that the damage spoken of in s. 135 is the same sort of damage as that contemplated in the 68th section of the Lands Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 18, viz. "structural damage," as it is called, that is, where the lands or premises are actually interfered with or taken by the board: and that was the view taken by the magistrate. But the words of the 135th section of the [515] Metropolitan Local Management Act are very large and comprehensive, and evidently intended that compensation should be awarded wherever damage is sustained. [Willes, J. What do you understand to have been decided by the Exchequer Chamber in *Ricketts v. The Metropolitan Railway Company*? I cannot discover whether the court decided that no action could be brought by Ricketts, or that, assuming an action would lie, the case was not within the 68th section of the Lands Clauses Consolidation Act.] I presume they meant to decide that no action would lie at the suit of Ricketts at all. The facts of that case, as stated in the judgment delivered by Erle, C. J., were these:—The plaintiff was lessee of a public-house, situate in Crawford Passage, Clerkenwell. Along Crawford Passage, across Coppice Row, was a public footway. The defendants, for the purpose of their works, placed a hoarding in the Coppice Row, and placed steps to enable the foot-passengers to pass up on one side and down the other side of a bridge over the hoarding, and did all this in accordance with their duty under their statutes, and after twenty months restored the premises to their original state. After this bridge had been so erected, the number of passengers passing to and fro along Crawford Passage diminished. The refreshment sold by the plaintiff was diminished in proportion; and the jury must be taken to have found that the bridge and steps formed the motive which turned the passengers to another direction, and prevented the sale of refreshments which would otherwise have been bought by them, and so caused the loss of profit. "These," says his Lordship, "being the facts, the question is raised, whether the plaintiff is shewn to be entitled to compensation in respect of land or any interest therein which has been injuriously affected by the execution of the defendants' [516] works." After stating the contention on the one side and on the other, his Lordship proceeds,—“As to the first point, viz. that, upon these facts, if there had been no statute for the defendants, the plaintiff would have had no cause of action against them for special damage caused by the obstruction of a highway, we assume it to be clear that there is no title to compensation under the statutes for an obstruction of a highway, unless without the statutes an action would have lain for the obstruction and the special damage, according to *Re Penny and the South Eastern Railway Company*, 7 Ellis. & B. 660. We assume further that, although the action would lie, it does not follow that there would be title to compensation, because the action would lie for a special damage to a personal interest, but no compensation is given under the statute unless land has been injuriously affected:

see Lord Cranworth's judgment in *Ogilvie v. The Caledonian Railway Company*, 2 Macq. 229. Then, first, do these facts shew that an action would have lain? The action lies where the exercise of the right of way by or on behalf of the plaintiff has been obstructed, and a greater damage has been caused to him thereby than is caused to the Queen's subjects in general by obstructing them in the exercise of their right. This position is not disputed: but the following cases exemplify its application. In *Iverson v. Moore*, 1 Ld. Raym. 486, the plaintiff was prevented by the defendant's obstruction of the highway from using the way for carting coals from his colliery, which coals were deteriorated by the delay: in this case the law on actions for obstructions of highways is well discussed. In *Mouch v. Saltmarsh*, 1 Keble, 847, the plaintiff was prevented by the defendant's obstruction from carrying his corn, and so the corn became damaged by rain. In *Hart v. Bissett*, 2 T. Jones, 156, the plaintiff, a farmer of tithes, [517] was prevented by the defendant's obstruction from carrying them home; and several grounds of special damage are suggested by Lord Holt in *Iverson v. Moore*, 1 Ld. Raym. 493. In *Fincham v. Hoeland*, Cro. Eliz. 664, the special damage mentioned as an example is damage caused directly by the obstruction of the plaintiff in the use of the way. In *Gresson v. Carling*, 2 Bingh. 263, 9 J. B. Moore, 489, the plaintiff was prevented by the defendant's obstruction from carrying his coals. In *Paine v. Partrick*, Carth. 191, the plaintiff's damage was not actionable, and the example of actionable damage is put thus:—"A particular damage, to maintain the action, ought to be direct, and not consequential, as, for instance, the loss of his horse, or by some corporal hurt in falling into a trench on a highway." In *Chichester v. Lethbridge*, Willes, 71, the obstruction was held actionable because the plaintiff was personally opposed by the defendant in an attempt to abate the obstruction and use the way. In *Hose v. Miles*, 4 M. & Selw. 101, the plaintiff was obstructed in his use of the navigable water, and was damaged by being obliged to unload his barge and carry the goods over-land. In all these cases the plaintiff was exercising his right of way, and the defendant obstructed that exercise, and caused particular damage thereby directly and immediately to the plaintiff. Here, there has been no obstruction to the exercise of the right of way by or on behalf of the plaintiff: neither he himself nor any one standing in a legal relation to him, such as servant, agent, tenant, or any other legal relation which gave to the plaintiff a legal interest in his use of the way, has been obstructed. But some unknown travellers, having a free option to pass from north to south either by Crawford Passage or any other pass, have chosen some other pass, because they did not like the steps at Coppice Row. The plain-[518] tiff has no cause of action against the defendants by reason of any obstruction direct to himself: the travellers who have chosen to turn out of their path to avoid the steps, have no cause of action against the defendants in respect of the obstruction; and it seems unreasonable that an obstruction which created no cause of action either for the plaintiff or the travellers separately, should by indirect consequence become a cause of action to the plaintiff, because the travellers exercised their choice as to their path and as to their refreshment,—a choice in which the plaintiff had no manner of legal right." After referring to *Wilkes v. The Hungerford Market Company*, 2 N. C. 281, 2 Scott, 446, his Lordship continues, "If the same question was raised in an action now, we think it probable that the action would fail, both from the effect of the cases that preceded *Wilkes's case*, and also from the reasoning in the judgment in *Ogilvie v. The Caledonian Railway Company*, 2 Macq. 229. There, a railway crossed a highway on a level, and the highway was stopped by two gates, for trains to pass, and the plaintiff lived near these gates, and suffered frequent inconvenience: but the judgment is that he could maintain no action for this inconvenience: it is the delay common to all who are exercising their right at that time; and although, from his proximity, the inconvenience to the plaintiff is frequently repeated, yet it is always the same in kind, and so not actionable as special damage; and, because an action would not have lain, therefore the plaintiff had no right to compensation from the railway: and Lord Cranworth adds the limitation above suggested, that even if the action lay, still that compensation would not be due, unless the injury was to the land. These are our reasons, for that an action would not have lain, and so the claim for compensation fails. But, secondly, even if the action would [519] lie for this obstruction, whereby the plaintiff was damaged in his trade, still such damage did not accrue to the plaintiff in his capacity of owner of an estate in land: and the title to compensation to which the statute relates is only in respect of land or an interest therein which has been injuri-

ously affected (a)¹. Here the plaintiff has a term in the house; and the point is, whether the house is shewn to be injuriously affected, because the profits of the plaintiff's trade carried on therein are diminished by reason of the obstruction. The trading carried on in the house is entirely distinct from the estate in the house: the procuring of refreshment, and the sale thereof, and the profit thereon, may either continue or cease, without affecting the plaintiff's interest in the house. If his licence was taken away, the business would cease, but the house and the estate therein would be the same as before; and it is clear that an estate in the house is not essential to the sale of refreshment, as many kinds are sold in the street by persons having no interest in the land where they sell. The statute limited the liability to compensation in respect of injuries to definite rights of a permanent nature,—that is, to rights in land." None of the reasoning there has any application to this case. The obstruction complained of there was to all Her Majesty's subjects, and therefore no action would lie. Here, the obstruction complained of is to the appellant's private right of access to his own premises. If the board had thought fit entirely to bar his passage to and from his premises, could it be said that there was no right of action and no damage to be compensated for under the act? If so, why is he not to have compensation for the partial obstruction, which is proved materially to have diminished his trade?

[520] Raymond (with whom was Mellish, Q. C.), for the respondents (a)². This is not like the case of a trading company established for the purpose of profit. The board are intrusted with large powers, which are to be exercised by them for the general benefit of the public. The legislature has thought fit to provide that they shall make compensation "for any damage done thereby." The question is, what is the meaning of those words. It is submitted that they mean damage to the premises themselves,—structural damage: not a mere temporary inconvenience sustained by one in common with all the other inhabitants of a street or district, through the exercise by the board of their duties in the construction or repair of a sewer or other work authorized by the statute. [Willes, J. This is a thing which hardly required statutory powers at all. The old commissioners were at liberty to re-construct an old sewer without making any compensation to any one, without the aid of this statute. If they or their contractors did the work negligently, so that damage accrued to an individual, an action would have lain: *The Grocers' Company v. Donne*, 3 N. C. 34, 3 Scott, [521] 356. But, for merely doing the work, nobody was entitled to compensation.] It never could have been intended that such an inconvenience as this should be the subject of compensation: and, unless an intention to that effect is clearly expressed, this claim cannot be entertained. The case of *Ogilvie v. The Caledonian Railway Company*, 2 Macq. 229, is a distinct authority upon the subject, and cannot be distinguished in principle from this case. The language of the clause giving a right to compensation under the Lands Clauses Consolidation Act, is even more flexible than that upon which this question arises. The decision of the Exchequer Chamber in *Ricketts v. The Metropolitan Railway Company* proceeded evidently on the ground that, assuming an action would lie for that which was there complained of, it was not such a damage as compensation could be given for upon the principle laid down by the House of Lords in *Ogilvie v. The Caledonian Railway Company*. "Damage done thereby," means damage occasioned by going through or touching the premises,—an actual injury to them, not a remote contingency such as is here suggested.

(a)¹ See *Bird v. The Great Eastern Counties Railway Company*, ante, p. 268.

(a)² The points marked for argument on the part of the respondents were as follows:—

"1. That the appellant's premises not having been injuriously affected, and not having sustained any direct or immediate damage, the appellant is not entitled to compensation:

"2. That the only damage the appellant has sustained has been the deprivation of the use of the public highway, viz. Northumberland Street, for a short time, which is a damage sustained by him in common with the general public having occasion to use that street during the same period, and is not a damage entitling the appellant to compensation:

"3. That the damage, if any, sustained by the appellant, is a loss of trade-profit merely, and is not the subject of compensation: see *Ricketts v. The Metropolitan Railway Company*, Exch. Ch., 13 W. Rep. 455."

Thesiger (by the permission of the court), in reply. The plaintiff in *Ogilvie v. The Caledonian Railway Company* was held not to be entitled to compensation, because the damage to the plaintiff and to the general public was the same in kind, though different in degree. Here, the damage sustained by the appellant is a damage of a totally different kind from that sustained by the rest of the inhabitants of Northumberland Street. He cannot use his premises for the purpose of his trade without incurring much additional trouble and expense. In *Moore v. The Great Southern and Western Railway Company*, 10 Irish Common Law Rep. 46, the plaintiff occupied a cottage and a small [522] piece of land on a level with and abutting on a public highroad, from which a short way or passage over the plaintiff's land afforded access to his cottage. A railway company, in the execution of the works of their railway, lowered the public highroad seven feet, leaving the plaintiff's land and cottage on the edge of a precipice of that height, and thereby obliging the plaintiff to make use of a step-ladder in order to obtain access from the public highroad to the way or passage leading over his land to his cottage. An action having been brought by the plaintiff against the railway company under the Railway Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), ss. 53, 55,—it was held by the Exchequer Chamber, affirming the judgment of the Queen's Bench, that the injury complained of being a permanent injury to the plaintiff's land, it was the subject of compensation by an arbitrator, pursuant to s. 6, and the 14 & 15 Vict. c. 70. The like was held in *Toshon v. The Great Southern and Western Railway Company*, 10 Irish Law Rep. 98, where the thing complained of was, raising the public highroad to the height of ten feet opposite to the plaintiff's house. In *Glover v. The North Staffordshire Railway Company*, 16 Q. B. 912, the plaintiff was the owner of land appertaining to which was a right of way over a road. A railway company, under the provisions of their act, constructed a railway crossing the road, on a level, and erected gates on the road at each side of the railway, which were kept locked, under the provisions of the act, a servant of the company (who resided between one and two hundred yards from the gate) keeping a key, and the plaintiff also having a key. From the nature of the ground, a person crossing the railway by the road would not see a train coming in one direction until it was at a distance ordinarily passed in seventeen seconds. The plaintiff claimed from the company [523] more than 50*l.*, on the ground that his land was injuriously affected, and required them to issue a warrant for summoning a jury. The company not having paid or issued their warrant, the plaintiff brought debt for the amount claimed: and issue was joined on a traverse of the allegation that the land was injuriously affected. The jury found the above facts specially, and also that the land was depreciated in value: and it was held that the land was injuriously affected, within the meaning of the Lands Clauses Consolidation Act, 1845, and the Railways Clauses Consolidation Act, 1845.

WILLES, J. It appears to me that the decision of the magistrate in this case was right. Without going the whole length of Mr. Raymond's argument, that there can be no case of compensation for damage under the Metropolitan Local Management Act, unless there be some structural injury to private property, I am clearly of opinion that, where the metropolitan board are engaged in the performance of a public work which renders it necessary to erect a hoarding or to deposit materials or rubbish in a public street, the mere fact that thereby the passage along the street becomes more difficult and inconvenient to A. than to B. and C., gives A. no claim to compensation under the act. The metropolitan board of works having all the main sewers of the metropolis vested in them, with large powers to alter and repair them, would *primâ facie* be entitled, as the commissioners were under the former acts, to reconstruct such sewers and to do all things for the proper and efficient performance of the duties intrusted to them, without rendering themselves liable to any action. Neither will any action lie against the contractors who do the work under them, unless they are guilty of some negligence: see *The Grocers' Company v. Dunn*, 3 N. C. 34, 3 Scott, 356. In other [524] words, it appears to me that, the construction of the hoarding being necessary for the due performance of the works by the board, and the obstruction not having been more than was necessary, or kept for an unreasonable time, would give the appellant no cause of action, and consequently no claim for compensation under the act. Upon that short ground, I am of opinion that the decision of the magistrate was right, because *damnum* must mean *cum* *sine injuriâ*. It would clearly be *sine injuriâ* to erect a hoarding to an extent and for a period not unreasonable. As Mr. Raymond well observed, these temporary inconveniences must from

time to time occur everywhere: and, if an action would lie against the metropolitan board of works each time a sewer is opened for repair, the burthen would be intolerable. Individuals must be content to bear these small inconveniences, in consideration of the general benefit to the public. I express no opinion as to whether or not damage in the 135th section of the 18 & 19 Vict. c. 120, is confined to what is called structural damage, though I very much incline to think it is. It certainly is a very nice question. The decision must, upon the whole, be confirmed; but I do not think it is a case for costs.

BYLES, J. I entirely agree with what has fallen from my Brother Willes. Though one of the judges who dissented from the conclusion arrived at by the Exchequer Chamber in *Ricketts v. The Metropolitan Railway Company*, I should be one of the first to bow to the authority of that decision. The case, however, has no bearing upon the matter now in hand. I agree with my Brother Willes that it is not necessary for us to say what the legislature meant by "damage." My judgment rests upon this ground, that the injury here [525] complained of, viz. the temporary obstruction of the public way, rendering the access to the appellant's premises more inconvenient for a short time, gave him no cause of action and no right to claim compensation. As a general rule, all the Queen's subjects have a right to the free and uninterrupted use of a public way: but, nevertheless, all persons have an equally undoubted right for a proper purpose to impede and obstruct the convenient access of the public through and along the same. Instances of this interruption arise at every moment of the day. Carts and waggons stop at the doors of shops and warehouses for the purpose of loading and unloading goods. Coal-shoots are opened on the public footways for the purpose of letting in necessary supplies of fuel. So, for the purpose of building, rebuilding, or repairing houses abutting on the public way in populous places, boardings are frequently erected inclosing a part of the way. Houses must be built and repaired; and boarding is necessary in such cases to shield persons passing from danger from falling substances. If this be the right of private persons, a fortiori must it be the right of a public body to which extensive power is intrusted for the general good of all. On the ground, therefore, that the obstruction here was of a temporary character, and was done for a proper purpose, and not continued for an unreasonable time, I am of opinion that this is not a case for compensation under the Metropolis Local Management Act.

MONTAGUE SMITH, J. I am of the same opinion. The legislature were dealing with a public body engaged in a public work for the public good, and therefore were not likely to have intended to fetter them in such a manner as to obstruct their general usefulness. Although the words of the 11th section are large, I [526] do not think they extend to a case of consequential damage like this. This damage is said to have arisen by reason of the erection of the boarding necessary for repairing the sewer in a public street rendering the access to the appellant's premises inconvenient, whereby, it is said, he has sustained a loss not common to the rest of the public or the rest of the inhabitants of the particular street. The house itself is not injured: the appellant's premises are untouched: the only damage complained of is a consequence, and a remote consequence, of the erection on a public thoroughfare of a boarding for the performance by the board of an authorized work. If a claim for compensation for such damage can be sustained, I see no reason why a claim might not equally be sustained for the loss of lodgers by reason of noises or stench arising from the opening of the sewer. The word "damage" must necessarily receive a more limited construction. It must be confined to something like actual damage to property. That view seems to me to be strongly supported by the collocation of the words in the clause. The words having reference to compensation for damage follow words which authorize the board to make such sewers and works, and such diversions or alterations of any existing sewers or works vested in them under the act, as they might from time to time think necessary, and to repair and maintain the sewers so vested in them: "and for the purposes aforesaid such board shall have full power and authority to carry any such sewers or works through, across, or under any turnpike road, or any street or place laid out as or intended for a street, as well beyond as within the limits of the metropolis, or through or under any cellar or vault under the carriageway or pavement of any street, and into, through, or under any lands whatsoever within or beyond the said limits, making compensation [527] for any damage done thereby." As I read the section, "damage done thereby" means, by passing through or under any cellar or vault, or

through or under any lands whatsoever. The great inconvenience which would result from the numerous claims of this sort which must be constantly arising, affords a strong argument against the probability of the legislature having intended this to be a subject of compensation. And, reading the whole clause together, I am clearly of opinion that the case is not within the words, and consequently that the magistrate's decision was right.

Decision affirmed, without costs.

WARD, Public Officer of the Leeds Banking Company v. GREENLAND.
June 26th, 1865.

The declaration in an action against the manager of a banking company, after alleging the retainer and employment of the defendant and the nature of his duties as manager, stated, amongst other things, that he "did not nor would take due and proper care not to advance the money of the company to persons of doubtful, insufficient, or bad means or credit, or on doubtful, insufficient, or bad securities, or to discount bad or forged bills and notes: and negligently and improperly advanced the money of the company to persons of doubtful, insufficient, and bad means and credit, and on doubtful, insufficient, and bad securities, and discounted and renewed bad and forged bills and notes, and wholly neglected to take due and proper care or to use or employ due and proper skill and diligence in and about the management of the affairs of the bank and the discharge of the duties of manager as aforesaid."—Plea to so much of the breach as above set out, that the deed of settlement of the company contained a clause, which provided, amongst other things, that "none of the directors, trustees, or other officers should be answerable or accountable for the insufficiency or deficiency of any security or fund in or upon which the moneys of the company might be placed out or invested, or for any loss, damage, or misfortune which might happen to the moneys, funds, effects, or property of the company, unless the same should happen in consequence of the *wilful neglect or default* respectively of such director, trustee, or other officer of the company;" that the defendant was the manager and an officer of the said company within the meaning of the said deed of settlement, and was employed as such upon the terms of the said last-mentioned clause: and that the said alleged breaches to which the plea was pleaded did not happen by reason or in consequence of the *wilful neglect or default* of the defendant as such manager as aforesaid:—Held that the plea was a good answer as to so much of the breach to which it was pleaded.

The first count of the declaration stated that, before and at the time thereafter mentioned, the said Leeds Banking Company was a company formed under the [528] provisions of the 7 G. 4, c. 46, and duly incorporated by deed of settlement bearing date the 19th of November, 1832: that thereupon the defendant, at his request, and for reward to him in that behalf, was retained and employed as the manager of the said company to manage the affairs of the said bank, and the defendant accepted and entered upon such retainer and employment, and promised to perform the duties of such manager: and thereupon it became and was the duty of the defendant as such manager to cause to be entered in the books of the company proper and correct entries and accounts of all receipts and payments and transactions of the company, and of all profits and losses arising therefrom, and of all dealings with and investments of the capital of the said company, and all moneys deposited with the said company: and to prepare for the inspection of the directors of the said company from time to time true and correct summaries or balance-sheets of the affairs of the company: and from time to time to cause the books of the company to be properly settled, adjusted, and balanced, and to prepare full, true, and explicit statements and balance-sheets of the affairs of the company, exhibiting the debts and credits, and the capital and property, and the profits and losses of the company, and containing all matters and things requisite for fully, truly, and explicitly manifesting the state and affairs of the company: and to give to the directors of the said company all other information in his power necessary and proper to enable them to make out such full, true, and explicit statements and balance-sheets of the affairs of the company as aforesaid: and from time to time to give information to the directors of all bad debts which had accrued to the said company, so as to enable the directors to distinguish between the

same and the good debts and assets of the company ; and to [529] take due and proper care not to advance the money of the said company to persons of doubtful, insufficient, or bad means or credit, or on doubtful, insufficient, or bad securities, or to discount or renew bad or forged bills of exchange or promissory notes ; and to take due and proper care and use and employ due and proper skill and diligence in and about the management of the affairs of the said bank and the discharge of the duties of the manager as aforesaid : Breach, that the defendant, not regarding his duty and promise in that behalf, did not nor would cause to be entered in the books of the said company proper and correct accounts of all receipts, payments, and transactions of the said company, and of all profits and losses arising therefrom, and of all dealings with and investments of the capital of the said company, and all moneys deposited with the said company ; and did not nor would prepare for the inspection of the directors of the said company from time to time true and correct summaries or balance-sheets of the affairs of the said company ; and did not nor would from time to time cause the books of the said company to be properly settled, adjusted, and balanced ; and did not nor would from time to time prepare full, true, and explicit statements and balance-sheets of the affairs of the said company, exhibiting the debts and credits, and the capital and property, and the profits and losses of the company, and containing all matters and things requisite for fully, truly, and explicitly manifesting the state and affairs of the company ; and did not nor would give to the directors of the company all the information in his power for the purpose of enabling them to make out such full, true, and explicit statements and balance-sheets of the affairs of the said company as aforesaid ; and did not nor would from time to time give information to the directors of all bad debts which had ac-[530]-rued to the said company, so as to enable the directors to distinguish between the same and the good debts and assets of the company ; and did not nor would take due and proper care not to advance the money of the said company to persons of doubtful, insufficient, or bad means or credit, or on doubtful, insufficient, or bad securities, or to discount bad or forged bills of exchange and promissory notes : and the defendant, not regarding his said duty and promise, caused to be entered in the books of the company improper and incorrect entries and accounts of the receipts, payments, and transactions of the company, of the profits and losses arising therefrom, and of the dealings with and investments of the capital of the said company, and of the moneys deposited with the said company ; and prepared for the inspection of the directors of the said company from time to time false and incorrect summaries and balance-sheets of the affairs of the said company ; and caused the books of the company to be settled, adjusted, and balanced in an improper and incorrect manner, and prepared statement and balance-sheets of the affairs of the company which were not full, true, or explicit statements and balance-sheets, and did not truly or fully exhibit the debts and credits and the capital and property of, and the profits and losses of the said company, and which did not contain all matters and things requisite for fully, truly, and explicitly manifesting the state and affairs of the company ; and the defendant neglected and refused to give to the directors of the said company, and concealed from them, information in his power necessary and proper to enable them to make out such full, true, and explicit statements and balance-sheets of the affairs of the company as aforesaid ; and gave to the directors insufficient and incorrect information of divers bad debts which accrued to the said company, and negli-[531]-gently represented the same to be goods debts ; and negligently and improperly advanced the money of the said company to persons of doubtful, insufficient, and bad means and credit, and on doubtful, insufficient, and bad securities : and discounted and renewed bad and forged bills of exchange and promissory notes, and wholly neglected to take due and proper care or to use or employ due and proper skill and diligence in and about the management of the affairs of the said bank and the discharge of the duties of manager as aforesaid : and the said company, by reason of the premises, sustained great losses, and were deprived of large sums of money which but for the misfeasance of the defendant they would have gained ; and the directors of the said company were induced to pay and give to the defendant divers large sums of money which they would otherwise not have paid or given to him.

The second count stated that the defendant, being manager of the Leeds Banking Company as in the first count mentioned, and in order to deceive the directors of the said bank as to the true state and condition of the said bank, and to induce them to increase his salary and emoluments as such manager, did falsely and fraudulently

prepare and make, and cause to be prepared and made, certain false and fraudulent accounts, balance-sheets, reports, and statements, and did fraudulently conceal from the directors of the company the true state and condition of the affairs of the said company and the prospects thereof, whereby it was made to appear to the said directors as aforesaid that the said company and the affairs and prospects thereof were in a thriving and flourishing condition, whereas in truth and in fact, as he the defendant well knew, the said company and the affairs and prospects thereof then were in a bad and unsatisfactory condition: and the said directors, believing and relying on the said [532] accounts, balance-sheets, reports, and statements being bona fide and genuine, and in ignorance of the said fraudulent concealment as aforesaid, were induced to increase the salary and emoluments of the defendant, and to advance to the defendant divers large sums of money by way of remuneration for his supposed services to the said company: whereby and by reason of the premises the said company sustained great losses, and were prevented from gaining large sums of money which they would otherwise have gained, and lost the said salary and emoluments of the defendant, and the money so from time to time advanced as aforesaid.

There was also a count for money had and received and for money due upon accounts stated.

Sixth plea, to the first count, so far as it charged that the defendant did not nor would take due and proper care not to advance the money of the said company to persons of doubtful, insufficient, or bad means or credit, or on doubtful, insufficient, or bad securities, or to discount bad or forged bills of exchange and promissory notes, and so far as it charged that the defendant negligently and improperly advanced the money of the company to such persons and on such securities, and discounted and renewed such bad and forged bills and notes, and neglected to take due and proper care or to use due and employ due or proper skill or diligence in and about the management of the affairs of the said bank and the discharge of his duties of manager in respect of the matters to which the plea is pleaded,—that, in the said deed of settlement or co-partnership in the said first count mentioned, there is contained a clause in the words and figures following, that is to say, "That the directors, trustees, managers, registered public and other officers, and proprietors of the company for the time being, shall from time to time and [533] at all times be saved harmless and kept indemnified by the company from and against, and it shall be lawful and the duty of the directors for the time being, by and out of the funds and assets of the company under their control, to replace and pay all costs, charges, losses, damages, and expenses which they or any of them shall or may sustain or be put unto in or about the execution and discharge of their respective trusts and offices, or in or about any action, suit, or proceeding, either at law or in equity or otherwise in which such directors, trustees, managers, officers, and other persons, or any of them, shall or may whilst acting in pursuance of these presents be the plaintiffs or defendants, plaintiff or defendant, or be otherwise concerned, or by reason whereof they or any of them may sustain or incur any loss or injury, *unless the same shall be sustained or incurred by reason of the wilful neglect or default of the parties sustaining or incurring the same respectively*; and the amount of such costs, charges, losses, damages, and expenses for which an indemnity is intended to be provided by this present clause, shall immediately after the same shall be so sustained or incurred, and although the same shall not be then ascertained, attach as a lien and charge upon the capital and property of the company, and as such shall, as between the parties to this or any subsequent deed or deeds of settlement, have priority over all other claims and demands whatsoever; and such lien or charge shall in the first place be satisfied and paid as far as may be out of the said fund called the reserved surplus fund: and none of the said directors, trustees, or other officers, shall be answerable or accountable for the others or other of them, nor for the receipts, acts, deeds, or defaults (if any) of the others or other of them, but each of them with and for his own *wilful acts, deeds, and defaults* (if any) only, or for any person [534] or persons with whom any money or effects of the company shall be deposited for safe custody or otherwise, or for the insufficiency or deficiency of any security or fund in or upon which the moneys of the company may be placed out or invested, or for any loss, damage, or misfortune which may happen to the moneys, funds, effects, or property of the company, *unless the same shall happen in consequence of the wilful neglect or default respectively of such director, trustee, or other officer of the company*:" That he the defendant was the manager and an officer of the

said Leeds Banking Company within the meaning of the said deed of settlement, and was employed as such upon the terms of the said last-mentioned clause: And that the said alleged breaches to which the plea is pleaded did not happen by reason or in consequence of the *wilful neglect or default* of the defendant as such manager as aforesaid.

To this plea the plaintiff demurred, the ground of demurrer stated in the margin being "that the indemnity clause set out in the said plea does not protect the defendant from liability for the general negligence and misconduct as manager as to which it is pleaded." Joinder.

Hannen (with whom was Mellish, Q. C.), in support of the demurrer (a). The first part of the 67th clause has no bearing on this matter: it contemplates a trustee [535] or manager being made party to proceedings. But the words relied on are at the end,—“None of the said directors, trustees, or other officers shall be answerable or accountable for the others or other of them, nor for the receipts, acts, deeds, or defaults (if any) of the others or other of them, but each of them with and for his own *wilful* acts, deeds, and defaults (if any) only, or for any person or persons with whom any money or effects of the company shall be deposited for safe custody or otherwise, or for the insufficiency or deficiency of any security or fund in or upon which the moneys of the company may be placed out or invested, or for any loss, damage, or misfortune which may happen to the moneys, funds, effects, or property of the company, *unless the same shall happen in consequence of the wilful neglect or default respectively of such directors, trustees, or other officer of the company.*” This, it is submitted, is not applicable to a case like this. The charge in the declaration is, that the defendant has been guilty of negligence in the performance of his duties as manager (specifying the particular acts of negligence relied on), whereby loss has been occasioned to the bank. It is not sought to make him responsible for any insufficiency or deficiency of any security or fund, nor for any misfortune happening to the funds or property of the company; but for a negligence independent of and anterior to the discovery of the insufficiency or deficiency of the securities. The measure of damages in the two cases would be entirely different. If he were charged with negligently receiving a bill of exchange insufficient or forged, the measure of damages would be the [536] amount of the insufficiency. But here he is charged with general negligence in the management of the affairs of the bank, and the measure of damages would be the extent to which the bank had been injured by that negligence. A continual disregard of the character and credit of the people he was dealing with would necessarily lead to a loss of reputation in the bank, and to pecuniary loss from inability to get their securities re-discounted by other banks [Willes, J. What sort of case do you say this was intended to meet?] It was intended to relieve the company's officers from responsibility where they have, without wilful default or misconduct, advanced money on securities which turn out inadequate or bad. [Montague Smith, J. What do you say would be the measure of damages here?] The extent to which the character and credit of the bank had been damaged, apart from the loss on the securities. Such damages would be the direct consequence of the defendant's misconduct. [Montague Smith, J. In order to prove negligence, you must go into specific instances.] No doubt. [Willes, J. The declaration, you say, charges wilful neglect or default. Forgetting that a person to whom he made an advance, or for whom he discounted a bill, had been bankrupt, might be inadvertence. Wilful neglect would be going out shooting or fishing, instead of going to business. The plea denies that there has been any wilful neglect or default. Montague Smith, J. Can you suggest

(a) The points marked for argument on the part of the plaintiff were as follows:—

“1. That the indemnity clause relied on in the sixth plea is not a protection against the negligence and misconduct of the defendant as to which it is pleaded:

“2. That the first part of the said indemnity clause is altogether inapplicable to the present case:

“3. That the latter part of the said indemnity clause is not applicable, because it is not sought to make the defendant answerable or accountable as therein mentioned, but for his general negligence and want of care and skill in the matters to which the said plea is pleaded:

“4. That there is no such legal distinction between neglect and *wilful* neglect as the plea seeks to set up.”

any negligence that the plea does not cover?] Wilful neglect is something like gross negligence,—negligence with an opprobrious epithet prefixed to it. The charge intended to be levelled against the defendant here is, general neglect and misconduct in the management of the affairs intrusted to him. [Byles, J. The word “wilful” is used twice in this clause. In the first instance, it applies to defaults of other persons: in the [537] second, to the individual’s own acts.] The defendant would be indemnified from all loss, except a loss arising from his wilful negligence: but that does not free him from liability for the breach of his general duty to the bank.

Quain, *contra* (a). Looking at the clause as a whole, its meaning is obvious. From the beginning to the end of it, it is framed on the idea that the officers of the company are only to be liable for the consequences of their own wilful acts and defaults. The first part of the clause explains the latter part. The matter here complained of falls more particularly within the words which free the officers of the company from responsibility “for the insufficiency or deficiency of any security or fund in or upon which the moneys of the company may be placed out or invested, or for any loss, damage, or misfortune which may happen to the moneys, funds, effects, or property of the company,” unless through wilful neglect or default. The charge in substance is, laying out the funds of the company on insufficient securities. [Byles, J. According to your argument, it would have been enough to say, —“You shall not be responsible for ordinary negligence, but you shall for wilful negligence.”] The rest is no doubt superfluous. [Byles, J. It is very serious to say that the defendant has not been guilty of anything short of *wilful* negligence.]

Hannan, in reply. It never could be intended that the officers of the company should be freed from the [538] consequences of all negligence except that which was premeditated.

WILLES, J. It may very well be that the court may be pronouncing judgment in this case upon speculative facts: and it may well be doubted whether the clause in question was not intended to provide for the case of persons who were not partners in the bank. We must, however, give credit to the plea “that the defendant was the manager and an officer of the said Leeds Banking Company within the meaning of the said deed of settlement, and was employed as such upon the terms of the said last-mentioned clause; and that the said alleged breaches to which the plea is pleaded did not happen by reason or in consequence of the wilful neglect or default of the defendant as such manager.” Taking that clause to express the terms upon which the defendant was engaged as manager, I find that the company undertake to indemnify him against liability for the insufficiency or deficiency of any security or fund in or upon which the moneys of the company might be placed out or invested, or for any loss, damage, or misfortune which might happen to the moneys, funds, effects, or property of the company, unless the same should happen in consequence of his wilful neglect or default: and, taking the averment in the declaration, that the defendant did not take due and proper care not to advance the money of the company to persons of doubtful, insufficient, or bad means or credit, or on doubtful, insufficient, or bad securities, or to discount bad or forged bills of exchange and promissory notes, but that he negligently and improperly advanced the money of the company to persons of doubtful, insufficient, and bad means and credit, and on doubtful, insufficient, and bad securities, and discounted and renewed bad and forged bills of [539] exchange and promissory notes, and wholly neglected to take due and proper care or to use or employ due and proper skill and diligence in and about the management of the affairs of the bank and the discharge of the duties of manager,—it follows that on the record it appears that the defendant has been guilty of no wilful neglect, and that he entered into the service of the company upon the terms that he was to be indemnified against the consequences of all losses which did not result from his own wilful neglect or default. That necessarily includes claims on the part of the company. Wilful neglect or default being negatived by the plea, it follows that upon this part of the record the defendant is entitled to judgment.

BYLES, J. I have nothing to add to what has fallen from my Brother Willes.

(a) The point marked for argument on the part of the defendant was as follows:—

“That the clause in the deed of settlement expressly refers to such negligence as that charged in the declaration, and makes the defendant liable only for *wilful* neglect or default.”

MONTAGUE SMITH, J. I also think the defendant is entitled to judgment on this demurrer. As I read the sixth plea, it is confined to that part of the declaration which charges the defendant as manager with negligently advancing the money of the company to persons of doubtful, insufficient, or bad means or credit, and on doubtful, insufficient, or bad securities, and discounting and renewing bad and forged bills. It must be assumed upon this record that what the defendant did was done without any wilful neglect or default. It may have been done negligently, that is, without due and proper care. It seems to me that the clause of the deed of settlement which is set out in the plea, and which is averred to have been incorporated in the terms of the defendant's engagement as manager, was intended to protect the officers of the company against liability for losses accruing otherwise than through their wilful neglect and default. Mr. Hannen felt the [540] full force of the difficulty. He admitted that the manager would not be liable for the losses sustained upon the specific securities, but insisted that he would be liable for negligence in taking them. But then arises the other difficulty; what would be the measure of damages? Upon the whole, it seems to me that the intention of the clause was, that the officers of the company should not be liable for losses arising from ordinary want of care, but only for something like intentional negligence or wilful disregard of the duties of their office. If the evidence at the trial should be such as Mr. Hannen suggests,—a long series of negligent acts,—that might warrant the jury in coming to the conclusion that the defendant had not been guilty of mere forgetfulness or want of care, but of something which amounted to wilful neglect. Upon the whole, reading the plea as I do, it seems to me to afford a good answer to so much of the declaration as it professes to answer.

Judgment for the defendant.

HENDERSON AND ANOTHER v. BAMBER. June 27th, 1865.

[S. C. 35 L. J. C. P. 65. Referred to, *Andrew v. Swansea Benefit Building Society*, 1880, 50 L. J. C. P. 432.]

1. No appeal lies to this court from the county-court, in respect of an order made in exercise of its powers in a winding-up proceeding under the 17th section of the Industrial and Provident Societies Act, 1862, 25 & 26 Vict. c. 87.—2. Whether the county-court, under the authority conferred upon it by that statute, has power to make an order restraining proceedings in the Liverpool Passage court against a member of an industrial society registered under the 25 & 26 Vict. c. 89, which is being wound up in the county-court by virtue of the jurisdiction conferred upon it by the 25 & 26 Vict. c. 87, s. 17,—*quære*?

This was an appeal from an order of Wheeler, Serjt., one of the judges of the county-court of Lancashire, holden at Liverpool, restraining the appellants from further proceeding in an action brought by them against the respondent under the following circumstances:—

1. The Liverpool Equitable Co-operative Society for [541] several years prior to the 17th of December, 1862, carried on business in Liverpool, being a society formed and registered under the Industrial and Provident Societies Act, 1852.

2. On the 17th of December, 1862, the society obtained a certificate of registration under the Industrial and Provident Societies Act, 1862, under the style of "The Liverpool Equitable Co-operative Society, Limited."

3. The respondent was a member of the society before such registration, and continued a member thereof after registration in respect of the interests which he had therein before registration.

4. On the 16th of April, 1863, winding-up orders under the said act of 1862 and the Companies Act, 1862, were made by the said county-court upon the said petition of the said Liverpool Equitable Co-operative Society, Limited, and the petition of one James Neville, a creditor of the society, in respect of debts incurred both before and after the registration of the society.

5. The appellants had supplied the society with goods both before and after

registration; and, at the last-mentioned date, the account as stated by the appellants was as under:—

“1862.	Oct. 8.	To goods	£38	6	3	payable Dec. 31			
	Nov. 12.	„	52	18	5	„ Feb. 12			
	Dec. 3.	„	50	5	5	„ March 3	£141	10	1
	Cr.								
1862.	Dec. 3.	By goods	.	.	.	£8	6	3	
1863.	Jan. 7.	„	.	.	.	4	10	3	
		By cash	.	.	.	20	0	0	
							£32	16	6
							£108	13	7
Goods supplied and cash paid for duty after registration							£20	5	11
Less cash, on account							15	0	0
							£5	5	11”

[542] 6. The respondent has been declared a contributory, and has had calls made upon him under the winding-up to the full extent of his interest in the society as a limited one under the act of 1862.

7. The appellants claimed to prove against the society under the winding up for the whole of the said sum of 113*l.* 19*s.* 6*d.*, and they were admitted to prove in respect thereof; but no dividend has yet been received by the appellants.

8. The appellants, on the 23rd of February, 1865, issued their writ against the defendant out of the court of Passage of the borough of Liverpool, for the sum of 108*l.* 13*s.* 7*d.*, as being the balance of their account for goods supplied before registration.

9. The respondent thereupon applied to the judge to restrain proceedings.

10. On behalf of the appellants it was contended that the judge had no such power.

11. On the 27th of March last, the judge made his order restraining the appellants, and ordered them to pay the costs of the said application and order.

The question for the opinion of the court, supposing the court to consider that the right of appeal exists, is, whether the county-court had power to make the order now appealed from.

The costs of and incident to the obtaining of the order and to the appeal therefrom were to abide the event of the appeal.

Macnamara (with whom was Hopwood), for the appellants (*a*). The question in this case arises upon the [543] Industrial and Provident Societies Act, 15 & 16 Vict. c. 31, as amended by subsequent acts. [Willes, J. The county-court judge has issued an injunction against a proceeding in the Passage court. The society is being wound up in the county-court under the Companies Act, 1862, 25 & 26 Vict. c. 89; and the question is whether the judge had power to make such an order, and whether any appeal lies.] Those are the questions. The 17th section of the Industrial and

(*a*) The points marked for argument on the part of the appellants were as follows:—

“1. That the right of appeal exists, and that this court is the proper court of appeal under the 17th section of the Industrial and Provident Societies Act, 1862, 25 & 26 Vict. c. 87, s. 17, and the Companies Act, 1862, 25 & 26 Vict. c. 89, s. 124:

“2. That the power of the county-court can be derived solely from some statutory enactment, and that neither the Industrial and Provident Societies Act, 1862, 25 & 26 Vict. c. 87, s. 17, nor the aforesaid Companies Act, 1862, 25 & 26 Vict. c. 89, s. 124, confer any such power as that alleged by the respondent and assumed by the county-court; and that the mere registration of the company as a limited company cannot take away the rights of a creditor of the unlimited company, at all events so far as regards goods delivered before registration:

“3. That the fact of proving against the estate of the company, and being wrongly admitted, is no bar to the suit which has been restrained.”

Provident Societies Act, 1862, 25 & 26 Vict. c. 87, enacts that "any society registered under this act may be wound up either by the court or voluntarily, in the same manner and under the same circumstances under and in which any company may be wound up under any acts or act for the time being in force for winding up companies; and all the provisions of such acts or act with respect to winding up shall apply to such society, with this exception, that the court having jurisdiction in the winding-up shall be the county-court of the district in which the office of the society is situate." This act, which passed on the 7th of August, 1862, repealed the former act relating to industrial and provident societies; and, until that act came into operation, this society was an irregular partnership only until it was registered, which [544] was on the 17th of December, 1863. All the goods for the recovery of the price of which the action was brought in the Passage court were supplied between the 8th of October and the 3rd of December, 1862: and the order for winding-up was made on the 16th of April, 1863. The action in the Passage court commenced on the 23rd of February, 1865, and the order for the injunction was made on the 27th of March, 1865. Now, the county-court could only have power to make that order under some statutory enactment. [Montague Smith, J. It will be said on the other side that the power is incidental to the power of winding up.] A mere partnership cannot be wound up. [Willes, J. An unregistered company may: 25 & 26 Vict. c. 89, ss. 200 et seq.] This is a society registered under the act; and the winding-up order treats it as a limited company (a). The 197th section,—which enacts that "the court may at any time after the presentation of a petition for winding-up a company registered in pursuance of this part (vii.) of this act, and before making an order for winding up the company, upon the application by motion of any creditor of the company, restrain further proceedings in any action, suit, or legal proceeding against any contributory of the company, as well as against the company, as hereinbefore provided, upon such terms as the court thinks fit,"—only applies where an action is brought in respect of a debt incurred by the company as a joint-stock company, and not by a mere partnership. In *Dean v. Mellard*, 15 C. B. (N. S.) 19, it was held that the effect of the repeal of the former acts by the 25 & 26 Vict. c. 87, was to render the members individually liable to be sued in respect of contracts made by the society prior to the passing of the repealing act, for which no action was then pending. [Byles, J. There [545] was no winding-up there. Here the defendant was within the jurisdiction of the winding-up court: and the debt also.] Here the company are not liable for the debt. This is a claim against a member individually, not against the company. If the proceeding is to be restrained at all, it should have been by the court in which the action was brought, as in *Thomas v. Wells*, 16 C. B. (N. S.) 508. Here, one court is put in conflict with another, whose jurisdiction is not inferior. [Byles, J. In *Thomas v. Wells*, the proceeding was in a superior court.] The contention there was, that the proper court to which to apply for a stay of the proceedings was the court in which the winding-up order was made. But Byles, J., in giving judgment, said: "The Master of the Rolls has no jurisdiction over the proceedings of this court: all he can do is, to operate upon the person of the plaintiff, and to restrain him under pain of contempt. The more natural course I conceive to be that the court in which the action is brought should stay the proceedings, when it is made to appear that the action is brought in violation of an act of parliament." That is a distinct authority to shew that the county-court was not the proper court to apply to to stay the proceedings in the Passage court. "The court," under s. 81 of the Companies Act, 1862, means the high court of Chancery, though jurisdiction in the winding-up is by s. 17 of the Industrial and Provident Act, 1862, given to the county-court. [Byles, J. By s. 17 of the last-mentioned act, the county-court judge is made the judge in equity for all purposes connected with the winding-up. The court of Chancery might have stayed the proceedings in the Passage court. I should think that power was intended to be given to the county-court, under this act.] The case of *Re the Sheffield and Hallenshire Ancient Order of Foresters' [546] Co-operative and Industrial Society (Limited)*, 12 Law T. (N. S.) 335, shews that the turning this partnership into a registered company cannot affect the rights of the creditors. The next question is, whether an appeal lies. That depends upon the construction to be put upon the 17th section of the 25 & 26 Vict. c. 87, and the 124th section of the 25 & 26 Vict. c. 89. The former

(a) The order was not set out in the case.

enacts "that any society registered under this act may be wound up either by the court or voluntarily, in the same manner and under the same circumstances under and in which any company may be wound up under any acts or act for the time being in force for winding up companies; and all the provisions of such acts or act with respect to winding-up shall apply to such society, with this exception, that the court having jurisdiction in the winding-up shall be the county-court of the district in which the office of the society is situate." And the latter enacts that "re-hearings of and appeals from any order or decision made or given in the matter of the winding-up of a company by any court having jurisdiction under this act, may be had in the same manner and subject to the same conditions in and subject to which appeals may be had from any order or decision of the same court in cases within its ordinary jurisdiction."

R. G. Williams (with whom was C. Hardy), *contra*, was stopped by the court (*a*).

WILLES, J. I am of opinion, upon the second point, that this appeal should be dismissed. The matter ap-[547]-pealed against does not appear to me to be one which it is competent for this court to entertain. The only enactment upon which reliance could be placed in order to sustain the affirmative of the proposition is, the 17th section of the Industrial and Provident Societies Act, 1862, 25 & 26 Vict. c. 87, which enacts that "any society registered under this act may be wound up either by the court or voluntarily, in the same manner and under the same circumstances under and in which any company may be wound up under any acts or act for the time being in force for winding up companies." This language is large enough to include the act passed in the same session (c. 89). The clause goes on,—"and all the provisions of such acts or act with respect to winding up shall apply to such society, with this exception, that the court having jurisdiction in the winding-up shall be the county-court of the district in which the office of the society is situate." Thus, all the provisions as to winding up companies, either voluntarily or compulsorily, under the Companies Act, 1862, 25 & 26 Vict. c. 89, may be applied, so far as they are applicable, to a society registered under the 25 & 26 Vict. c. 87: and the county-court may exercise all the powers given in Part IV. of the first-mentioned act. Now, it is material to see what those powers are, and by whom they were to be exercised. By s. 82, the power is to be put in motion by a petition; which is to be filed in the court of Chancery, or a similar jurisdiction: s. 83. The first order to be made is an order for winding up the company: s. 86. By s. 92, official liquidators are to be appointed, whose duties are defined by s. 95. Then follow various provisions defining the powers ordinary and extraordinary of the court. Amongst these latter is s. 124, which relates to appeals from orders. It enacts that "re-hearings of and appeals from any order or decision [548] made or given in the matter of the winding-up of a company by any court having jurisdiction under this act, may be had in the same manner and subject to the same conditions in and subject to which appeals may be had from any order or decision of the same court in cases within its ordinary jurisdiction; subject to this restriction, that no such re-hearing or appeal shall be heard unless notice of the same is given within three weeks after any order complained of has been made, in manner in which notices of appeal are ordinarily given according to the practice of the court appealed from, unless such time is extended by the court of appeal: Provided that it shall be lawful for the Lord Warden of the Stannaries, by a special or general order, to remit at once any appeal allowed and regularly lodged with him against any order or decision of the vice-warden made in the matter of a winding-up, to the court of appeal in Chancery, which court shall thereupon hear and determine such appeal, and have power to require all such certificates of the vice-warden, records of proceedings below, documents, and papers, as the Lord Warden would or might have required upon the hearing of such appeal, and to exercise all other the jurisdiction and powers of the Lord Warden specified in the 18 & 19 Vict. c. 32: and any order so made by the court of appeal in Chancery shall be final."

(*a*) The points marked for argument on the part of the respondents were as follows:—

"1. That no appeal lies to this court from the decision of the county-court judge upon the matter in question.

"2. That it was within the jurisdiction and power of the county-court judge to make the order in question."

Down to this point, the jurisdiction is one which is to be exercised only by the court of Chancery. It is necessary to bear that in mind, in considering whether the 124th section of the 25 & 26 Vict. c. 89, conjointly with the 17th section of the 25 & 26 Vict. c. 87, can give an appeal to a court of common law, which has neither an appellate nor original jurisdiction in respect of the 25 & 26 Vict. c. 89. I do not say that an appeal may not be given by implication: but I think it extremely unlikely that the legislature [549] should have intended, under the general words in the 17th section of the 25 & 26 Vict. c. 87, to give an appeal by implication to a court having no jurisdiction whatever under the 25 & 26 Vict. c. 89. The objection acquires additional force from the very first words of the 124th section, —“ Re-hearings of and appeals from any order or decision made or given in the matter of the winding-up of a company by any court having jurisdiction under this act, may be had in the same manner and subject to the same conditions in and subject to which appeals may be had from any order or decision of the same court in cases within its ordinary jurisdiction.” Here you have a section which is dealing with a jurisdiction in which every order for the winding-up of a company from the beginning to the end may be the subject of appeal. And it is impossible for us to assume a jurisdiction of this sort, unless we are prepared to assume it over all orders in a winding-up proceeding from the first to the last. There are many other reasons why an appeal should not lie to this court. I will particularly advert to two. Appeals from the county-court to the superior courts of common law are given in a cause or action (13 & 14 Vict. c. 61, s. 14), or an interpleader (19 & 20 Vict. c. 108). That clearly means a cause or action in the county-court: whereas, the order in question affects a proceeding in the Passage court. The appellate jurisdiction given to the superior courts by the statutes referred to can have no application to proceedings of that description. But, in the next place, this court and the other superior courts are not courts of appeal from the county-court in causes which are within its ordinary jurisdiction, but only in respect of certain specified things. In respect of small matters, it was originally intended that there should be no appeal. The original jurisdiction of the county-court was defined by the 58th section of the 9 & 10 Vict. c. 95, which enacts [550] that “all pleas of personal actions, where the debt or damage claimed is not more than 20l., whether on balance of account or otherwise, may be holden in the county-court, without writ; and all such actions brought in the said court shall be heard and determined in a summary way in a court constituted under this act, and according to the provisions of this act: Provided always that the court shall not have cognizance of any action of ejectment, or in which the title to any corporeal or incorporeal hereditaments, or to any toll, fair, market, or franchise shall be in question, or in which the validity of any devise, bequest, or limitation under any will or settlement may be disputed, or for any malicious prosecution, or for any libel or slander, or for criminal conversation, or for seduction or breach of promise of marriage.” When the jurisdiction of the county court was extended from 20l. to 50l. in respect of contracts, and from 5l. to 20l. in respect of torts, by the 13 & 14 Vict. c. 61, an appeal was given, by s. 14, in these words,—“If either party in any cause of the amount to which jurisdiction is given to the county-courts by this act, shall be dissatisfied with the determination or direction of the said court in point of law, or upon the admission or rejection of any evidence, such party may appeal from the same to any of the superior courts of common law at Westminster.” Then follows a provision for notice and for security to be given by the party appealing: and the section goes on,—“and the said court of appeal may either order a new trial on such terms as it thinks fit, or may order judgment to be entered for either party, as the case may be, and may make such order with respect to the costs of the said appeal as such court may think proper: and such orders shall be final.” Thus, the appeal, when given, is not from an order of the court made in the exercise of its ordinary jurisdiction, but only [551] where it is dealing with a point of law or a matter of judicial procedure. Then, the 68th section of the 19 & 20 Vict. c. 108, gives an appeal in some cases where none was given by the 13 & 14 Vict. c. 61, s. 14. It enacts that “an appeal from the decision of a county-court, on the same grounds and subject to the same conditions as are provided by the 14th section of the 13 & 14 Vict. c. 61, shall be allowed in all actions of replevin where the amount of rent or damage exceeds 20l., and in all actions for the recovery of tenements where the yearly rent or value of the premises exceeds 20l., and in proceedings in interpleader where the money claimed or the value of the

goods or chattels claimed, or of the proceeds thereof, exceeds 20*l.*, and in all actions where the parties agree that the court shall have jurisdiction." These latter words throw light upon what goes before. Therefore the probabilities which suggest themselves to the mind when the question is first presented to it, are precisely in accordance with what the language of the legislature is found to indicate. It would require direct language to shew this court to be a court of appeal in a matter which is properly and only within the jurisdiction of the court of Chancery. Construing the section of the act of parliament in question by the light afforded by those to which I have referred, it seems to me that this court has no power to entertain this appeal, and therefore that it must be dismissed. I avoid expressing any opinion upon the validity of the order, or its effect, because, in the particulars I adverted to in the course of the argument, we are not in possession of materials to enable us to form a decisive judgment. The ground upon which I dispose of the case is this, that no appeal lies to this court from the county-court, in respect of an order made in the exercise of its powers in a winding-[552]-up proceeding under the 17th section of the Industrial and Provident Societies Act, 1862.

BYLES, J. I entirely concur in the ground upon which my Brother Willes has rested his judgment. I cannot help thinking that, if we were to go further, some things would appear to be plain. It is plain that the county-court has jurisdiction in the case of registered societies. This person was a member both of the original society and of the registered society. The latter had all the property of the former. We are called upon to stay the proceedings under an order made in a matter in which the county-court had jurisdiction to make an order. We have not the order before us. It is difficult, therefore, to say whether it was one which it was competent to the court to make. We have no information as to what is the state of the assets of the company. We cannot therefore say that the county-court judge had not jurisdiction to wind up this society so as to include the debt in question. If he had jurisdiction, and had not power to stay the proceedings in the Passage court, his jurisdiction would be futile. I will only venture to say this much, that, as far as I have any information on the subject, I see nothing to satisfy me that the judge was wrong.

Montague Smith, J., had gone to Chambers.

Appeal dismissed.

[553] THE CITY OF DUBLIN STEAM-PACKET COMPANY v. THOMPSON.
July 10th, 1865.

[Affirmed in Exchequer Chamber, L. R. 1 C. P. 355 ; 35 L. J. C. P. 198.]

The 29th section of the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), which empowers the commissioners of customs, with the approval of the board of trade, to make "such modifications and alterations as from time to time become necessary in the tonnage-rules thereby prescribed, in order to the more accurate and uniform application thereof and the effectual carrying out of the principle of admeasurement therein adopted," does not authorise them to make rules for the measurement of the tonnage of steam-vessels which will have the effect of altering the allowance in respect of the space occupied by the propelling-power, as provided by s. 23.

This was a special case stated by consent, without pleadings, for the opinion of the court:—

1. The plaintiffs are a company trading between England and Ireland, and are possessed of many steam-vessels of large tonnage, which are used by them in their trade of carrying passengers and goods to and from England and Ireland.

2. The defendant is one of the surveyors of customs at the port of Liverpool, and represents the commissioners of customs, with whom the present question has arisen.

3. The question in dispute arises upon the construction of certain provisions of the Merchant Shipping Act, 1854, which regulate the mode of ascertaining the registered tonnage of steam ships, and as to the power of the commissioners of customs to refuse the allowance for propelling power, which, as the plaintiffs insist, is provided for by the act of parliament, as hereinafter mentioned.

4. By the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), s. 23, it is enacted,

that "in every ship propelled by steam or other power requiring engine-room, an allowance shall be made for the space occupied by the propelling-power, and the amount so allowed shall be deducted from the gross tonnage of the ship, ascertained as aforesaid (ss. 21, 22), and the remainder shall be deemed to be the register tonnage of such ship; and such deduction shall be estimated as follows, that is to say,—

(a) "As regards ships propelled by paddle-wheels, in which the tonnage of the space solely occupied by [554] and necessary for the proper working of the boilers and machinery is above 20 per cent. and under 30 per cent. of the gross tonnage of the ship, such deduction shall be 37 one hundredths of such gross tonnage; and, in ships propelled by screws, in which the tonnage of such space is above 13 per cent. and under 20 per cent. of such gross tonnage, such deduction shall be 32 one hundredths of such gross tonnage.

(b) "As regards all other ships, the deduction shall, if the commissioners of customs and the owner both agree thereto, be estimated in the same manner; but either they or he may in their or his discretion require the space to be measured and the deduction estimated accordingly; and, whenever such measurement is so required, the deduction shall consist of the tonnage of the space actually occupied by or required to be inclosed for the proper working of the boilers and machinery, with the addition in the case of ships propelled by paddle-wheels of one half, and in the case of ships propelled by screws of three fourths of the tonnage of such space; and the measurement and use of such space shall be governed by the following rules, that is to say,—

(1) "Measure the mean depth of the space from its crown to the ceiling at the limber strake; measure also three, or, if necessary, more than three breadths of the space at the middle of its depth, taking one of such measurements at each end and another at the middle of the length; take the mean of such breadths; measure also the mean length of the space between the foremost and aftermost bulkheads or limits of its length, excluding such parts, if any, as are not actually occupied by or required for the proper working of the machinery; multiply together these three dimensions of length, breadth, and depth, and the product will be the cubical contents of the space below the crown. [555] Then find the cubical contents of the space or spaces if any above the crown aforesaid which are framed in for the machinery or for the admission of light and air, by multiplying together the length, depth, and breadth thereof; add such contents to the cubical contents of the space below the crown; divide the sum by 100, and the result shall be deemed to be the tonnage of the said space.

(2) "If in any ship in which the space aforesaid is to be measured, the engines and boilers are fitted in separate compartments, the contents of each shall be measured severally in like manner according to the above rules, and the sum of their several results shall be deemed to be the tonnage of the said space.

(3) "In the case of screw steamers in which the space aforesaid is to be measured, the contents of the shaft-trunk shall be added to and deemed to form part of such space, and shall be ascertained by multiplying together the mean length, breadth, and depth of the trunk, and dividing the product by 100.

(4) "If, in any ship in which the space aforesaid is to be measured, any alteration be made in the length or capacity of such space, or if any cabins be fitted in such space, such ship shall be deemed to be a ship not registered until re-measurement."

(5) "If, in any ship in which the space aforesaid is to be measured, any goods or stores are stowed or carried in such space, the master and owner shall each be liable to a penalty not exceeding 100l."

5. And by the 29th section of the same act it is further enacted as follows,—
"The commissioners of customs may, with the sanction of the treasury, appoint such persons to superintend the survey and admeasurement of ships as they think fit, and may, with the approval of the board of trade, make such regulations for that purpose as may be necessary, and [556] also, with the like approval, make such modifications and alterations as from time to time become necessary in the tonnage rules hereby prescribed, in order to the more accurate and uniform application thereof, and the effectual carrying out of the principle of admeasurement therein adopted."

6. There are several other sections of the act which have some bearing on this question, and to which it may be useful to refer, viz. sections 20, 21, 84, 86, and 87.

7. On the 23rd of October, 1860, the commissioners of customs, with the approval of the board of trade, issued the following rules:—

"23rd October, 1860.

"In pursuance of the powers granted by the 29th section of the Merchant Shipping Act, 1854, the board, with the approval of the board of trade, direct, with a view to the more accurate and uniform application of the principle of granting a certain allowance to steamers for their propelling-power, that, in lieu of the rules set forth in section 23 of the Merchant Shipping Act, and in paragraphs 4, 5, 6, 18, and 20 of instructions to measuring surveyors of 1855, the following rule be adopted in future, viz.

"Rule. In every ship propelled by steam or other power requiring engine-room, an allowance of space or tonnage shall be made for the space occupied by the propelling-power, and the amount so allowed shall be deducted from the gross tonnage of the ship, and such deduction shall be estimated as follows, that is to say,—

(1) "Measure the mean length of the engine-room between the foremost and aftermost bulkheads in limits of its length, excluding such parts (if any) as are not actually occupied by or required for the proper working of the machinery; then measure the depth [557] of the ship at the middle point of this length, from the ceiling at the limber strake to the upper deck in ships of three decks and under, and to the third deck or deck above the tonnage deck in all other ships; also the inside breadth of the ship clear of sponging (if any) at the middle of the depth: multiply together these dimensions of length, depth, and breadth, for the cubical contents; divide this product by 100, and the quotient shall be deemed to be the tonnage of the engine-room, or allowance to be deducted from the gross tonnage on account of the propelling-power.

(2) "In the case of ships having more than three decks, the tonnage of the space or spaces betwixt deck, if any, above the third deck, which are framed in for the machinery or for the admission of light and air, found by multiplying together the length, breadth, and depth thereof, and dividing the product by 100, shall be added to the tonnage of such space.

(3) "In the case of screw-steamers, the tonnage of the shaft-trunk shall be deemed to form part of, and added to, such space, and shall be ascertained by multiplying together the length, breadth, and depth of the trunk, and dividing the product by 100.

(4) "In any ship in which the machinery may be fitted in separate compartments, the tonnage of each such compartment shall be measured, severally, in like manner, according to the above rules, and the sum of their results shall be deemed to be the tonnage of the said space.

"Ordered, That the proper officers in London, and the collectors and comptrollers at the outports, do govern themselves accordingly in all future operations for estimating the allowance to steamers for their propelling-powers: and, with regard to the engine-rooms or allowance to steamers already measured, that they be re-measured agreeably to the above modifica[558]-tion of the rule, on the application of their owners or agents, and on delivery of the original certificates for indorsement."

8. At the time of the passing of the Merchant Shipping Act, 1854, the plaintiffs were and still are possessed of (amongst other ships) the paddle-wheel steam-ship "St. Columba." Her tonnage-space solely occupied by and necessary for the proper working of the boilers and machinery was and is above 30 per cent. of her gross tonnage.

9. After the passing of the said act, the plaintiffs applied, in accordance with the provisions thereof, to have the said ship measured, and the vessel was accordingly measured by the proper officer, and a deduction for the space occupied by the propelling-power was allowed according to clause (b) of the 23rd section of the act, including the addition of one half the tonnage of the space of the propelling-power. Her register-tonnage for dues was then ascertained and fixed at 206 tons, and her tonnage was accordingly so entered in the registry of shipping in the port of Dublin.

10. In 1862 the plaintiffs lengthened the said ship "Saint Columba," by adding to her length forty feet: and, as this increased her tonnage, it became necessary, in accordance with the provisions of the Merchant Shipping Act, 1854, to have her re-measured; and she was accordingly re-measured by the proper officer for the purpose in the port of Liverpool, where the alterations in her were being made, and without any application for the purpose being made by the plaintiffs. Her tonnage-space solely occupied by the propelling-power was then above 30 per cent. of her tonnage, as before mentioned.

11. On this re-measurement, the gross tonnage of the ship was increased by 122 tons. The officers who con-[559]ducted the measurement measured her according to the directions contained in the new Customs Rules of October 23rd, 1860. They allowed only the exact space occupied by or required to be inclosed for the proper working of the boilers and machinery, and declined to allow the one half the tonnage of the said space, as directed by the 23rd section of the said act. By this mode of measurement, the tonnage for dues was increased to 456 tons. The plaintiffs objected to this mode of measuring and making the allowance for the propelling-power, and required to have the allowance made according to their views of the provision of the act of parliament, and insisted that the commissioners of customs had no power to refuse such allowance.

The question for the opinion of the court was whether the additional allowance of one half the tonnage of the space occupied by the propelling-power ought or ought not to have been made by the officers of registry at Liverpool. If the court should be of opinion in the affirmative, then judgment was to be for the plaintiffs for 40s. and costs. If in the negative, then judgment was to be for the defendant, with costs.

Bovill, Q. C. (with whom was Watkin Williams) for the plaintiffs, contended that, in calculating the tonnage space of their vessel, the "St. Columba," they ought to have been allowed the additional deduction of one half the tonnage of the engine and boiler space, in accordance with the express provisions of the Merchant Shipping Act, 1854, 17 & 18 Vict. c. 104, s. 23 (*h*); and that the commissioners of customs had no power by any rules or regulations to repeal or alter the express provision in the statute for such allowance. He referred more particularly to the 6th, 19th, 21st, 22nd, 23rd, 28th, 29th, 30th, 32nd, 35th, 36th, and 38th sections of the act; and submitted that the matter in [560] question was not a rule of measurement, which the commissioners were empowered by s. 29 to interfere with or alter, but a principle of allowance given by the statute, which could only be altered or taken away by the legislature.

The Solicitor General (with whom were H. Giffard, Q. C., and C. Pollock), for the defendant, contended that the commissioners of customs, with the consent and approval of the board of trade, were empowered by the 29th section of the Merchant Shipping Act, 1854, to alter the rules laid down in s. 32 for computing the allowance to steamers, in consequence of that rule, by its inaccurate and unequal working, having been found to violate the principle of allowance prescribed by that act, viz. the space occupied by the propelling-power. He submitted that it was obviously within the scope of the authority conferred upon the commissioners by the 29th section, to alter the rules laid down in s. 23, for the purpose of more perfectly and uniformly carrying out the principle of allowances contemplated by the legislature.

Bovill, Q. C., in reply. The object of the power conferred upon the commissioners by s. 29 is to secure uniformity of measurement, not to enable them to alter the allowances which the statute has expressly provided shall be made.

Cur adv. vult.

KEATING, J., now delivered the judgment of the court (*a*):—

In this case a steam-ship belonging to the plaintiffs, called the "St. Columba" (paddle-wheel), at the passing [561] of the 17 & 18 Vict. c. 104 (the Merchant Shipping Act), had been measured under the provisions of the 23rd section of that statute, and its register tonnage ascertained in the mode pointed out thereby. An increase, however, in the length of the ship in 1862, by augmenting her tonnage, rendered a fresh survey necessary, and she was accordingly re-measured in pursuance of the directions contained in certain new customs rules of October the 23rd, 1860, framed by the commissioners of customs, with the sanction of the board of trade, the application of which to the plaintiffs' ship increased the registered tonnage beyond that which would have resulted from a measurement under the former system. To this the plaintiffs objected, and contended that the new rules issued by the commissioners of customs were inoperative, as contrary to the provisions of the act of parliament: and the question for the court is, whether they are right in that contention: and we think they are.

The 23rd section of the Merchant Shipping Act provides that, in every ship propelled by steam, an allowance shall be made for the space occupied by the pro-

(*a*) The case was argued at the sittings in banco after last Trinity Term, before Willes, J., Byles, J., and Keating, J.

pulling power, and the amount so allowed shall be deducted from the gross tonnage of the ship, "and such deduction shall be estimated as follows," that is to say, as to paddle-wheel ships in which the tonnage of the space occupied by boilers, machinery, &c., is above 20 and under 30 per cent. of the gross tonnage, the deduction "shall be" $\frac{5}{100}$ ths of such gross tonnage; and, in screw steam-ships, where the tonnage of such space is above 13 and under 20 per cent. of such gross tonnage, such deduction shall be $\frac{3}{100}$ ths of such gross tonnage. In all other ships, where there is no agreement between the commissioners and the owner, the deduction shall consist of the actual space occupied by machinery, &c., with the addition, in case of paddle-[562]-wheels, of one half, and, in case of screws, of three-fourths of the tonnage of such space. "and the measurement and use of such space shall be governed by the following rules, that is to say,"—and then follow five rules for measuring the space referred to.

The 29th section of the act gives power to the commissioners, with the sanction of the board of trade, to make such modifications and alterations in the tonnage rules as from time to time become necessary, "in order to the more accurate and uniform application thereof, and the effectual carrying out the principle of admeasurement therein adopted."

It was under this section that the new rules referred to were made: and those rules in effect repeal the provisions of s. 23 of the statute as to all distinction between the different classes and kinds of steam vessels therein referred to, as well as the different deductions appropriated thereby to each class, and substitute one uniform allowance for all classes of steam vessels, together with a new mode of ascertaining by admeasurement such allowance.

The Solicitor-General, for the defendant, contended that the provisions in the statute establishing the distinctions referred to were not enactments properly so called, but merely tonnage-rules, the alteration of which by the commissioners came within the express powers conferred upon them by s. 29: that, although s. 23 was sub-divided into several rules, yet that it was itself a tonnage rule, and so within those powers: and he referred to the mode in which the rules were designated in the margin of the statute, in support of his view. On the other hand, it was insisted that the tonnage-rules referred to in s. 29 of the act were the rules specified as such in the different sections of that part of the statute, and which regulated the mode of measurement, and nothing more: that the allowance of any [563] deduction from the gross tonnage was not more clearly an enactment than the direction that such deduction should be estimated according to the specified differences in the classes of vessels enumerated in the section: whilst the mode of measuring the spaces according to such classification is expressly governed by the five rules set out at the end of the section: nor could the statements in the margin control or affect the terms of the enactment.

We think this the correct view of the statute, and that it was not the intention of the legislature to give to the commissioners the powers contended for by the defendant.

Whether the new rules, as framed, would or would not be beneficial to the merchant-service of the country, is a question which, although mooted at the Bar, we do not inquire into; the rules themselves being, in our opinion, *ultra vires*. Our judgment will therefore be for the plaintiffs.

Judgment for the plaintiffs.

JOHNSON AND ANOTHER v. CHAPMAN. July 10th, 1855.

[S. C. 35 L. J. C. P. 23; 15 L. T. 70; 14 W. R. 264. See *Shepherd v. Kottgen*, 1877, 2 C. P. D. 582, 585. Discussed, *Pirrie v. Middle Dock Company*, 1881, 44 L. T. 49. Commented on, *Wright v. Marquet*, 1881, 7 Q. B. D. 62. Referred to *Milburn v. Jamaica Fruit Company*, 1900, 2 Q. B. 548. See, *Greenfield v. Stephens*, [1908] 17 Q. B. 51.]

Deck-cargo (timber) lawfully laden pursuant to charterparty, having broken adrift in consequence of stormy weather, and impeding the navigation and endangering the safety of the vessel, was necessarily thrown overboard:—Held, that the shipper was entitled to claim general average in respect thereof, as against the ship owner.

The following case was stated for the opinion of the court, without pleadings, pursuant to the 46th section of the Common Law Procedure Act, 1852:—

1. The plaintiffs are the owners of the vessel the "Shooting Star," and the defendant is a merchant carrying on business in London, under the name and firm of E. H. Chapman & Co.

[564] 2. On the 26th of May, 1863, a charterparty was made by and between the plaintiffs and the defendant, as follows:—

"Memorandum of charterparty.

"Liverpool, 26th May, 1863.

"It is this day mutually agreed between John S. De Wolf & Co., agents for owners of the good ship or vessel called the 'Shooting Star,' George Perkin, master, and of the measurement of 1160 tons or thereabouts, now in Bristol, and E. H. Chapman, Esq., of London, that the said ship, being tight, staunch, and strong, and every way fitted for the voyage, shall with all convenient speed sail and proceed to Quebec, with liberty to take cargo from Bristol Channel for owners' benefit, or so near thereto as she may safely get, and there load from the factors of the said charterers a full and complete cargo of deals, *including a deck-load*; one half the cargo to be floated deals at the bottom, and the remainder dry deals, and deal-ends and staves as required by the master for broken stowage only, with deals or deal-ends or [and] staves and [or] for broken stowage, not exceeding what she can reasonably stow and carry over and above her tackle, apparel, provisions, and furniture; and, being so loaded, shall therewith proceed to London or so near thereunto as she may safely get, and deliver the same on being paid freight as follows:—For timber, per load of 50 feet (Customs calliper measure); deals per Petersburg standard hundred, 4l. 17s. 6d.; deal-ends, per ditto, 3l. 5s.; staves, per mille of standard pipe, 9l.; lath-wood, per fathom of 4 feet : the act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, navigation, of whatever nature and kind soever during the said voyage, always excepted: One third of the freight to be paid in cash on arrival, and the remainder by good and approved bills [565] payable in London at four months' date from right delivery of cargo, or in cash deducting four months' interest: Twenty-five running days are to be allowed the charterer, if the ship be not sooner dispatched, for loading, and to discharge in London as fast as she can deliver, according to the custom of the port, and ten days on demurrage over and above the said laying days, at 15l. per day. It is hereby agreed the owners of the vessels shall have a lien on the cargo for freight, dead-freight, and demurrage. The custom of each port to be observed in all cases. Penalty for non-performance of this agreement, estimated amount of freight. Charterers to pay two thirds dock-dues, as usual."

3. In pursuance of the said charterparty, the "Shooting Star" duly proceeded to Quebec, and loaded there from the defendant's factors a full and complete cargo of deals and staves, *including a deck-load*: and, being so loaded, duly proceeded, in pursuance of the said charterparty, from Quebec to London:

4. During the aforesaid voyage from Quebec to London, certain portions of the deck-load on board the "Shooting-Star" were jettisoned: and the circumstances under which this took place were those which are stated in the following protest; all the facts stated in which protest were to be taken as admitted, and as forming part of this special case:—

"By this public instrument of protest, Be it made known that, on the 3rd day of November, 1863, before me, W. Duff, of the city of London, notary public duly admitted and sworn, personally came and appeared George Perkin, mariner, master of the ship or vessel called the 'Shooting Star,' of Liverpool, of the burthen of 1160 tons or thereabouts, Which said appearer declared that the said ship, being tight, staunch, and strong, and well and sufficiently manned, fitted, [566] victualled, tackled, apparelled, provided, and furnished for a voyage from Quebec to the port of London, and having received and well and properly loaded and stowed on board of her at Quebec aforesaid a cargo of deals and staves, with the deck-load and boats properly secured, for the said port of London, did on the 5th day of October last past weigh anchor and set sail from Quebec aforesaid on her said voyage, and prosecuted the same with for the most part fair winds and moderate weather, and without material occurrence to the knowledge of him the said appearer, until towards noon of the 13th day of the same month, when the breeze freshened, and at about 1 o'clock p.m. of the

same day it blew a strong and increasing gale from W. S. W., and being accompanied by a fast rising sea, and causing the said ship to labour and strain excessively. Sail was reduced to close reefs to ease her: but she nevertheless laboured and strained very severely, and took so many heavy seas on board that her decks were continually flooded, and the deck-load was broken adrift, whereupon the same was secured as well as possible: and the pumps were kept constantly attended: and at dusk of the same day the carpenter, having sounded the well, reported three feet of water in the ship: and the gale strengthening and raging with great fury, and the said ship being on a lee-shore was hauled to the wind, there being no room to heave her to, and all hands were set to work at the pumps, the water in the well at midnight having increased to five feet: That, at _____ a.m. of the following day, the gale raged with unabated fury, accompanied by a tremendous heavy cross sea, which broke over the said ship in such immense bodies as to keep her decks continually inundated: and the said ship, labouring and straining excessively, and making a great deal of water, and the deck-load constantly breaking adrift, [567] and having damaged one of the boats, the said appearer was compelled, for the safety and preservation of the said ship, her cargo, and of all on board, to throw part of her deck-load overboard, to prevent it doing further damage: but the said ship nevertheless made very bad weather of it until _____ p.m. of the same day, when, the gale somewhat abating, the upper top-sails were set reefed, to keep the ship's head to the sea, and all hands were on deck keeping the pumps constantly going, until about 6 o'clock p.m., when one of the pumps sucked, and the people, being much exhausted, were sent below: That, at _____ a.m. of the 20th day of the same month, the said ship experienced a strong gale blowing in heavy squalls, with a high sea running, causing the said ship to labour and strain excessively: and at 6 o'clock of the same morning the main-sail was reefed, to ease the ship: but she nevertheless made very bad weather of it: and, as the day advanced, it blew a very strong and increasing gale, with a tremendous sea on, and the said ship took such immense bodies of water over all that her decks were continually inundated, and she made so much water that her pumps were of necessity constantly kept going, and at 4 p.m. she was kept more before the sea, and the upper top-sails and jib were furled, to ease her: but she suffered bitterly, and made very heavy weather of it: That the following day commenced with very heavy gales and a mountainous cross-sea, and the said ship, making fearful weather of it, took immense bodies of water over all: and at half-past 2 a.m. she shipped a very heavy sea on the port-beam, which stove the long boat in bits, split the port side of the whale-boat from the keel upwards, knocking the skid on which the boat was resting against the gig, thereby staving in four planks of the gig's starboard bow, and opening her along from the stem to the keel, knocking [568] the port-quarter away, and breaking the gunwales, and damaging a fourth boat, at the same time shifting the deck-load against the pumps on both sides, so that they could not be worked, and filling the cabin with water, and doing other considerable damage: That, as soon as possible, the deck-load was secured as well as circumstances would permit, and the pumps set to work, and they were kept at work until 4 o'clock p.m. of the same day, when they sucked: and shortly thereafter the gale abated, the wind hauling to the N. E., and continuing to moderate: and, the sea subsiding, sail was made, as necessary: That, in the morning of the 23rd day of the same month, the said ship experienced a heavy swell from the eastward, which caused her to labour and strain very much throughout the day, and at about 5 o'clock p.m. of the same day she was struck by a heavy squall, which carried away the jib-sheet, thereby splitting the jib, and shortly thereafter the wind increased to a gale, and sail was shortened: and at midnight, it blowing a strong gale, accompanied by a tremendous heavy sea, and the said ship suffering bitterly, she was brought under lower top-sails and fore-top-mast stay-sail, to ease her, and she continued to labour and strain very severely, and made very bad weather of it until about 3 o'clock a.m. of the following day, when, the weather moderating, sail was made, as necessary: the pumps being at all times well and carefully attended: That, at 2 o'clock p.m. of the same day, the wind increased, blowing from N. E., and all light sails were taken in, and at 6 o'clock, the wind still increasing and blowing a heavy gale, and the said ship suffering bitterly was brought under lower fore and main top-sails and fore-top-mast stay-sail, to ease her: but she nevertheless laboured and strained very heavily, rolling about fearfully: and she made so much water throughout the day that her [569] pumps were obliged to be kept con-

stantly going, to keep her free: and at 4 a.m. of the 25th day of the same month, the gale increasing to a perfect hurricane, and being accompanied by a tremendous high and heavy sea, which broke over the said ship in such immense bodies as to flood her deck, her deck-load was again broken adrift, and knocked against the pumps on both sides: and the said appearer was compelled, in order that the crew might work the pumps, and to prevent damage to the bullwarks and pumps, and for the safety and preservation of the said ship, her cargo, and of all on board, to throw a further portion of the deck-load overboard: and, the said ship shipping and making so much water, there being five feet six inches in the well, the pumps were of necessity kept constantly going: That the said ship continued to labour and strain very much, and to suffer bitterly: and at 2 o'clock p.m. of the same day, the main-top-sail was split by the violence of the gale, whereupon it was unbent, and the mizen-top-sail set close reefed, and the said ship continued to make very bad weather of it, notwithstanding every endeavour was made to ease her, until the following morning, when the gale abated, and sail was made, as necessary, the pumps being at all times carefully attended: That thereafter the said ship prosecuted her said voyage with for the most part fair winds and moderate weather, and without material occurrence, to the knowledge of him the said appearer: and, finally, on the 2nd day of November aforesaid, arrived in safety in the Commercial Dock, in the said port of London: And, lastly, the said appearer declared, that, throughout the whole of the said voyage, every exertion was made and endeavour was used, by pumping and otherwise, to ease and prevent damage to the said ship, her appurtenances, and cargo: and that the losses and damages aforesaid, and any other loss or [570] damage which may have happened or come thereto in the course and prosecution of the said voyage, were and are in no wise owing unto or occasioned by any unfitness or insufficiency of or in the said ship, her tackle, apparel, or appurtenances, nor unto or by any neglect, default, misconduct, or malconduct of him the said appearer, his officers or mariners: but solely and entirely unto and by the gales and bad weather and high seas aforesaid, and the perils of the seas, and the winds and the waves, and the violence thereof: And therefore he the said appearer required of me the said notary to protest in manner following: Whereupon I the said notary, at the request aforesaid, have protested and by these presents do solemnly protest against all persons whom these presents and the matters and things herein contained, do, shall, or may concern, for all losses, average losses, sums of money, costs, charges, damages, and expenses suffered, sustained, incurred, paid, laid out, and expended, and to be suffered, sustained, incurred, paid, laid out, and expended by reason, on account, or in consequence of the premises," &c.

5. All the goods loaded on board the "Shooting Star" at Quebec as aforesaid have been duly delivered to the defendant, with the exception of those goods which were jettisoned as aforesaid.

6. The plaintiffs contend that the loss of the goods so jettisoned as aforesaid is a particular average loss, in respect of which no contribution is due from them to the defendant. The defendant, on the other hand, contends that the said loss is a loss in respect of which contribution is payable by the plaintiffs to the defendant.

7. It is admitted that hitherto it has been the practice of average adjusters not to allow as general average the jettison of such portion of the deck-load as is immediately before the jettison in a state of [571] wreck. But this admission is to be taken without prejudice to the right of the defendant to contend that such practice cannot affect the law.

8. The court was to be at liberty to draw inferences of fact, in the same way as a jury would be entitled to do.

The question for the opinion of the court was, whether the defendant was under the circumstances of the case entitled to any contribution from the plaintiffs in respect of the goods jettisoned as aforesaid.

If the court should be of opinion in the negative, then judgment was to be entered up for the plaintiffs for 103l. 14s. 7d., together with interest from the 16th of March, 1864, and costs of suit. If the court should be of opinion in the affirmative, then judgment of nolle prosequi, with costs of defence, was to be entered up for the defendant.

Cohen, for the plaintiffs (*a*). The deck-cargo was not thrown overboard in order

(*a*) The points marked for argument on the part of the plaintiffs were as follows:—

to lighten the ship. It was only when it had broken adrift that it was sacrificed; [572] and then it was done for the purpose of preventing it from occasioning further damage. Both jettisons are alike in this respect. The case therefore falls within the principle enunciated in *Baily on Average*, 2nd edit. 25,—“The loss must not be caused by the sacrifice of an article which is the immediate cause of the impending injury which renders its sacrifice necessary.” At p. 28, the author treats of the necessity of throwing overboard cargo which has become heated. He says: “Cargo may be so heated that the voyage cannot be continued with it on board the vessel, unless it be cooled. When there is no possibility of cooling it, a jettison of it is justifiable; but, when it can be cooled, which is often practicable, by putting into a port of refuge, and there discharging and airing it, a jettison of it is not justifiable.” [Willes, J. Does Mr. Baily draw a distinction between heating by a peril insured against, and heating by reason of an inherent defect of the cargo?] He does not. In 2 *Arnould on Insurance*, § 329, it is said: “Jettison is defined in the Rhodian law (a) to be *jactus mercium factus levandæ navis gratiâ*, a heaving overboard of the goods in order to save the ship. It is the most perfect example of a general average loss, and, when made intentionally, for the sake of saving the whole adventure from imminent danger, is generally admitted as giving a claim to contribution.” “Where, in the course of the voyage, in order to save a ship from foundering, to float her after stranding, or to enable her to make a port of distress, part of the cargo is put into boats and lighters, and lost before reaching the shore, such loss gives a claim to general average contribution” (b). In 2 *Phil-[573]-lips on Insurance*, § 1288, it is said: “If goods put into boats out of the usual course, for the purpose of floating the ship when she is aground, or to lighten her that she may pass over a shoal or bar, or otherwise for the relief of the ship and cargo, are lost, they must be contributed for. A vessel having sprung a leak at sea, a part of the goods were taken out and put on board of other vessels to lighten her, that the leak might be found and stopped. She was thus enabled to proceed on her voyage, and finally arrived at her port of destination. The goods taken out were captured. The goods thus lost were contributed for in general average.” Again, § 1289, “In case of goods being put into a lighter from a stranded ship, not to lighten it, but merely to save the goods, and of a jettison of part of them, the ship and cargo, being saved, do not contribute for the jettison.” *Arnould*, in § 339, thus sums up the result of the authorities,—“On the whole, therefore, the law on this subject seems to be, 1. That, where goods are sold by the captain in order to raise funds for repairing particular average losses, or for defraying the ordinary expenses of the navigation, the loss arising from their sale must be made good by the ship-owner alone, who must, in such case, pay the merchant the price which the goods would have fetched at their place of destination, deducting therefrom the freight which would have been due for their conveyance. 2. Where, on the other hand, they are sold for the purpose of defraying expenses or repairing losses which are themselves of the nature of general average, the loss arising from their sale gives a claim to a general average contribution: the goods sold are considered as though they had been jettisoned, and are made good, as we shall presently have occasion to remark, upon precisely the same principles of contribution.” Again *Baily* says, p. 56: “Cargo may also be [574] jettisoned because it is in ‘a state of

“1. That it appears from the protest that the cargo jettisoned would have been lost had it not been thrown overboard:

“2. That the necessity of throwing the cargo overboard was the immediate consequence of damage which the cargo had sustained, and of an accident which the cargo met with, and that the *causa causans* of the loss by jettison was not a peril which threatened the safety of the ship:

“3. That the jettison was under the circumstances a particular average loss, and that it was not a loss entitling the defendant to any contribution from the plaintiffs:

“4. That the practice set out in the seventh paragraph of the special case is not inconsistent with any legal principle, and is binding on the defendant:

“5. That the cargo jettisoned was practically lost before the jettison.”

(a) *Dig. lib. xiv., tit. 2, fo. 1.*

(b) Referring to *Emerigon*, chap. xii., s. 41, vol. i, p. 599, edit. 1827; *Benecke*, *System des Assecuranz*, vol. iv., pp. 56, 57, edit. 1810; and *Baily on Average*, 60, 2nd. edit.

wreck,' i.e. in a position, owing to an accident to the cargo itself, inconsistent with the proper navigation of the ship; in which case principle 7 (*a*) excludes from general average the loss caused by such a jettison. Principle 7 excludes from general average everything that is the cause of the danger which renders its sacrifice necessary: but it may not at first sight appear evident why cargo is the cause of danger when in this state, more than when it is in its place. The application of principle 7 to it when in 'a state of wreck,' therefore, requires explanation. When a vessel puts to sea in moderate weather, properly equipped, and with her cargo well and properly stowed, she is in perfect safety, so far as that expression is applicable to a vessel at any time; and therefore the cargo is not the cause of danger under such circumstances; for no danger exists. If, with similar weather, she went to sea with part of her cargo adrift, so that it was liable to shift from side to side, no nautical man would contend that the ship went to sea in perfect safety. Danger, therefore, exists in this case, and the cargo which is adrift must be the cause of it; for, all other circumstances are the same as in the previous case, when no danger existed. The same principle and reasoning apply when the vessel is at sea in a storm; for, however violent the storm may be, if it is not necessary to throw overboard any portion of the cargo when it is in its place properly secured, and it is necessary when it is adrift and out of its place, the cargo which is adrift and out of its place is the cause of the danger which renders its sacrifice necessary. This principle will apply, *in practice*, to exclude the loss caused by [575] the jettison of cargo in a state of wreck, when even it might have been necessary to throw it overboard if it had not been adrift and out of its place; for its being adrift and out of its place is *prima facie* a cause of danger,—and that it is out of its place is a fact; whereas, that the circumstances were such that the sacrifice would have been necessary if it had not been in that state, can be but an opinion: and a fact should always be preferred to an opinion. This principle does not apply to anything not itself in a state of wreck, but sacrificed because something else is in a state of wreck; for instance, it does not apply to the leeward side of a deck-load in the following case:—The windward side is washed adrift, and the vessel in consequence has a list to leeward, owing to the leeward side being without the counterpoise of the windward side: this list renders necessary the jettison of the leeward side, and by the jettison the danger is avoided. In such a case, the absence of the windward side is the cause of the danger which renders necessary the jettison of the leeward side." [Willes, J. Does not Bailly mean cargo adrift in consequence of bad stowage, not by reason of the storm?] It is submitted not. In Arnould, § 331, it is said: "If part of the ship be sacrificed for the general safety, it is contributed for in general average. Thus, masts cut away, anchors heaved overboard, cables cut, guns and ship's stores jettisoned in order to save the whole adventure, are everywhere the subjects of general average. If a mast be carried overboard by the wind, it is, of course, only a particular average loss: if, however, a mast or spar be snapped or sprung by the wind, and left hanging in the rigging, so that, in order to save the ship and cargo, it becomes necessary to cut away entirely both the mast and the rigging, and throw both overboard, the damage caused by the act of so cutting them away is a [576] general average loss, and is to be contributed for to the extent of the value of the mast and rigging, as they lay after the accident. If cables are cut or anchors abandoned, in order to avoid any impending peril, as for the purpose of putting to sea in order to escape a lee-shore in a gale of wind, this is a general average loss:" and for this are cited the following authorities,—2 Phillips on Insurance, 3rd edit. 80; 1 Magens, Case 27; and Bailly on General Average, 2nd edit. 67. Bailly, at p. 61, says: "Guns, spars, chains, anchors, hawsers, boats, and other ship's stores are sometimes jettisoned, either to relieve the ship in a case of extreme peril, or to get at the cargo in order to jettison it for the same purpose. The loss so accruing is allowable in general average, subject to the following exceptions:—When the reason for the jettison is, that they are 'in a state of wreck,' their loss is, under principle 7, excluded from general average. Under this head will come,—spars thrown overboard because they have been broken adrift, and, rolling about the deck, endanger the lives or impede the actions of the crew. A boat washed from its chocks to leeward, and thrown overboard, either in a damaged or undamaged state, because it impedes the navigation of the vessel." Upon

(a) "The loss must not be caused by the sacrifice of an article which is the immediate cause of the impending injury which renders its sacrifice necessary."

these authorities, it is submitted that the practice set out in the 7th paragraph of the special case is not inconsistent with the law, and that consequently the plaintiffs are entitled to recover.

Sir G. Honyman, *contra*. No *authority* has been cited in support of the argument for the plaintiffs, except Baily, who, after all, is only theoretical. The circumstance of this being deck-load does not take it out of the general rule. The case of *Gould v. Oliver*, 4 N. C. 134, 5 Scott, 445 shews the principle upon which this case must be determined. Tindal, C. J., in *deli*-[577]-vering the judgment of the court there, says: "The general rule laid down by the foreign authorities, and adopted by our own law, is, as is well known, that all goods thrown overboard, for the preservation of the ship and cargo, shall be entitled to contribution. Upon this general rule, however, there is engrafted an exception by the foreign writers, 'that goods laden on the deck and cast into the sea shall not receive contribution; saving to the owner of the goods his recourse against the master or ship-owner.' Consul. del. Mare, 183; Ordinance, liv. 3, tit. 8, art. 13; Emerigon, ch. 12, s. 42; Code de Commerce, art. 421. Now, where the loading on the deck has taken place with the consent of the merchant, it is obvious that no remedy against the ship-owner or master for a wrongful loading of the goods on deck can exist. The foreign authorities are indeed express on that point: Valin, tit. du Capitaine, art. 12; Consul. del. Mare, c. 183. And the general rule of the English law, that no one can maintain an action for a wrong, where he has consented or contributed to the act which occasioned his loss, leads to the same conclusion. Unless, therefore, the owner of the timber in this case has a claim for contribution against the owner of the ship, he is without any remedy whatever against any one, but must himself bear the whole of the loss in consequence of his timber having been thrown overboard for the benefit of all, an inference directly at variance with the general rule above laid down, and, indeed, contrary to the authority of the foreign writers. For Valin lays it down that the rule of art. 13 does not apply in respect of boats and other small vessels going from port to port, 'where the usage is to load merchandizes on the deck.' The latter words of which text-writer give the reason for throwing such a case out of the exception into the general rule for contribution, at least so far as the ship is *con*-[578]-cerned. As to the authorities in the English courts, there is no one which states directly that goods laden on deck shall in no case be entitled to contribution. The question, whenever it has arisen in our courts, has been between the owner of the goods thrown overboard and the underwriter. And the rule generally established seems to have been that for goods so laden, the underwriters are not responsible: *Ross v. Thwaite*, Park, Ins. 26; *Backhouse v. Ripley*, *ib*. But in the case of *Da Costa v. Edmunds*, 4 Campb. 142, it was left to the jury to say whether there was a usage to carry on deck goods of the description of those thrown overboard; and, the jury having found such usage, the underwriters were held liable. The case now under consideration does not, indeed, arise between the same parties; but it appears to fall within the same principle of decision." Assuming the principles there laid down to be correct, let us see if there be anything in the circumstances of this case to protect the ship-owner from liability. It cannot be denied that the goods in question were thrown overboard for the general safety of the adventure. *Prima facie*, therefore, it is a case for general average. [Willes, J. "Wreck," in paragraph 7 of the case, means that which has been rendered useless or irrecoverable by a peril of the sea.] In Stevens on Average (edit. 1833), p. 67, the rule is thus stated,—“When a mast is carried away or sprung, and in consequence the sails and rigging which are hanging over the ship's side are obliged to be cut away, some foreign authorities say that the value, after being thus damaged, shall be made good by general contribution (a). But it should be remarked that the situation in which these articles are placed by the breaking of the mast, renders them of no value what-[579]-ever.” Baily, in support of his 7th proposition, which is relied on by the other side, refers to *Da Costa v. Edmunds*, 4 Campb. 142, and the case of *The Neptune*, 1 W. Rob. Adm. R. 297. The former has no application at all to the subject, and the latter very little. His reasoning would equally apply where cargo was thrown overboard in consequence of its shifting. He goes on at p. 26,—“It is clear that a man cannot be called upon to pay damages for doing that which in principle he is

(a) Referring to the Ordinance of Konigsburg, art. xxv., and the Ordinance of Copenhagen, art. 1, § 10.

justified in doing: for instance, when his life is endangered by another, he may even take the life of that other, if no other means exist of avoiding the danger, and cannot be called upon to make any compensation for the loss caused by his act. On the same principle, when another's property endangers his, and no other means exist of avoiding that danger, he may destroy it, and cannot be called upon to pay damages for his act. A fortiori, he may destroy it when it endangers his life also; which is the case at sea under such circumstances. When, therefore, property is destroyed because it endangers other property, the owner of the property destroyed is not entitled to compensation from the destroyer. The application of this principle will at first sight appear difficult; but, by adhering closely to the principle, the difficulty will vanish. For instance, when a vessel is making so much water forward that it is necessary to lighten her forward by throwing overboard a particular twenty bales of cotton stowed forward, it may at first sight appear that, since the danger exists because the vessel is at that time too much by the head, and since she is not too much by the head when those twenty bales of cotton are removed, those twenty bales of cotton are the cause of the danger which renders their sacrifice necessary, and therefore the loss of them should not be allowed in general average. This, however, is not the [580] correct view of the case. The twenty bales of cotton were in the same place in the ship before she sprung a leak, when, in fact, she was in safety, and no danger existed, and therefore they cannot be the cause of danger. The real cause of the danger is the leak in the ship forward, which, by the jettison of the twenty bales of cotton is brought out of water; and thus the real cause of danger is prevented from acting on the vessel." If the article jettisoned is the cause of the danger, irrespective of a peril of the sea, then of course the owner has no claim for general average. This is exemplified by Mr. Baily, at p. 53. A jettison may become necessary, he says, "in order to get rid of goods or ship's stores, which, if retained on board, will cause a total loss of the ship and of the property in her, or of the lives of the crew, if no new circumstances arise to prevent it; as in the case of heated hemp, which is liable to ignite. In such a case, principle 7 will exclude from general average the loss caused by such a jettison." [Montague Smith, J. Suppose guns cast loose by a storm, and thrown overboard necessarily,—are they excluded from general contribution?] It must be contended that they are, in order to sustain the plaintiffs' argument. In the case of hemp or any other article igniting from its own inherent heat, that would not be the subject of general average if thrown overboard. But, if the heating is caused by its becoming saturated with salt-water in consequence of a peril of the sea, there it would be. Upon the whole, it is submitted there is nothing to deprive the owner of this deck-loading of the right to participate in general average.

Cohen, in reply. No authority has been cited on the part of the defendant to countervail the high reputation of Mr. Baily's book. It is clear from the pro-[581]-test that the goods in question were thrown overboard solely because they had broken adrift. It is, therefore, a case of particular average only.

Cur. adv. vult.

WILLES, J., now delivered the judgment of the court:—

In this case, which was argued in the course of the last term, before the Lord Chief Justice and my Brothers Byles and Montague Smith and myself, our judgment is for the defendant.

I may mention, lest it should appear that any confusion is likely to be introduced into the law by our decision, that we do not at all mean to throw doubt upon the propriety of the practice of average-staters in disallowing for that which can properly be called wreck. That appears to be a very general practice; and it is a practice which has found its way into the treatises upon the subject. The question is, what is wreck? In order to make jettison the subject of a general average contribution, two conditions must be fulfilled. First of all, there must be common danger. It must be a maritime peril, and it must be common to the whole adventure, which would exclude some of the cases which Mr. Cohen very ingeniously put, of a subject-matter that had within itself the elements of destruction which developed themselves during the storm: as, for instance, cotton which was brought on board in a damp state bursting out into a flame, and being thrown overboard. You cannot say there is a common danger, but a peculiar danger from the fault of the person putting it on board. And then, secondly, there must be a sacrifice, in the sense of intentional sacrifice. That is

a second condition which must be fulfilled : and that seems to exclude all those cases [582] in which the average-staters ought to refuse to allow a contribution upon the ground of wreck. Certainly, the reasoning is all consistent. All the writers in this country and abroad appear to be agreed that the question is, whether there is common danger, and whether there is voluntary sacrifice. They are not all agreed, it must be admitted, upon the application in practice of these rules. But there is one case upon which our average staters appear to be agreed, that is to say, if a mast were sprung, and a part of it were to go overboard with a quantity of spars and sails attached to it, hanging on by a stay which must give way in a minute or two, whilst in the meantime, by battering against the side of the vessel, it adds to the danger, and if the stay were cut to let it go at once, it would be very difficult to say that that was anything more than wreck. A lawyer could not lay down as a matter of pure law that all lumber cut loose is wreck. But what I say is, if it was virtually lost, if not recoverable, if the act of cutting the rope was only hastening the moment at which it would be lost, you would properly call that wreck, and you would not say it was general average. The reason given is because you cannot keep it. There is no intentional sacrifice in cutting it away. You must lose it, and the losing it a minute or two sooner can make all the difference of its doing great injury or not ; but you cannot help losing it. But if, instead of cutting away what is virtually lost only, you cut away a portion of what is still on board and safe, except for the common danger ; for instance, a mast or bowsprit, for the purpose of facilitating the getting rid of the wreck which is only encumbering the vessel, if you do that, you ought to receive average in respect of the portion you so cut away, because that you do sacrifice. It may be it is exceedingly difficult [583] in some cases,—one can conceive it must be,—for average-staters consistently to apply the principle. But the principle appears to be clear that, if the danger is common, and the thing is voluntarily sacrificed, it is contributed for rateably.

In this case, there was a deck-cargo. And the first observation naturally would arise upon its being a deck-cargo, and upon the exception with regard to deck-cargoes : but that is taken out of the case most effectually by reference to the charterparty. This is an action by the shipper of cargo against the ship-owner ; and the charterparty contemplates a deck-cargo. It is not suggested there is any statute to make a deck-cargo illegal ; therefore it seems something more than custom to have deck-cargoes. I think, it was from Quebec : but it is not necessary to refer to any custom affecting the voyage, because, according to the contract between the parties, there was to be a deck-cargo. Then, immediately you find that the deck-cargo is within the contemplation of the parties, you must deal with it as if shipping a deck-cargo was lawful. When you have established that it is a deck-cargo lawfully there by the contract of the parties, it becomes subject to the rule of general average.

Now, dealing with that case, and taking one of the jettisons,—because I presume there was enough thrown overboard on each occasion to satisfy the plaintiff's claim, if he was liable to contribute,—the question is, whether there was any liability for any jettison. If so, the amount is agreed on in the case. Therefore, I take only one of the jettisons, and I take the one which Mr. Cohen himself most insisted upon, that is, most addressed himself to in his argument, and which was most striking. The cargo appears to have broken away,—appears to have got loose on deck : it was not washed overboard : it had not [584] become valueless ; it was not spoiled with the water ; and, if the weather had been fine, it could have been restowed, and it might have come on and been just as valuable except getting a little wetting with salt water. It was once re-stowed, or part of it, during the voyage : so that it clearly was not in a state of wreck, in the sense of having become lost property, which they could not recover, or make use of if they recovered it. Then there was this peculiarity about its being thrown overboard : it not only encumbered that part of the vessel, but it interfered with the pumps, which it was particularly necessary at that time to work. The persons on board the vessel naturally selected that part which was near the pumps as first to throw overboard : and, no doubt, they would throw over the rest, if there was imminent danger of its getting loose, and taking the same course as the first part. But the same sort of question might arise in various forms as to cargo stowed in the hold. For instance, if there was an exceedingly heavy part of the cargo below, and the vessel was labouring very much,—when I say very heavy, I mean heavy in the sense of great specific gravity,—and, working upon a particular part

of the vessel, it had strained the vessel, and so threatened to let in the water and sink her: if you took that and flung it overboard, in no other sense can it be said that the cargo in question, or that part of the cargo so thrown overboard, to be more precise, was exposed to danger different from the rest of the cargo, except in that circumstance, the circumstance that it was by reason of its weight and position the best thing to choose to throw overboard, and the thing which, in that sense, it was especially necessary to throw overboard for the benefit of the whole concern.

Was the jettison in this case voluntary? Was it to ward off a common danger? It is only necessary to [585] look at the protest to find the answer. The danger was caused to all, both ship and cargo and crew, by the storm: and, to save the whole adventure from that storm, the timber was voluntarily thrown overboard; and it was not wreck. In short, the special danger caused to and by the timber was only a circumstance of the common peril to which the whole adventure was exposed.

For these reasons, we think that the set-off is good, and that our judgment ought to be for the defendant.

Judgment for the defendant.

IRWIN v. SIR GEORGE GREY, BART. July 10th, 1865.

[Affirmed in Exchequer Chamber, L. R. 1 C. P. 171; 35 L. J. C. P. 43: and in House of Lords, L. R. 2 H. L. 20; 36 L. J. C. P. 148. See *Wilson v. Metropolitan Railway*, 1871, L. R. 6 C. P. 381; *O'Brien v. R.*, 1890, 26 L. R. Ir. 499.]

It is no ground of error in fact, that the whole of the special jurors struck were not summoned, or that the special jury panel was called over and a tales prayed before 10 a.m., the time for which the special jurors were summoned,—it not being competent to the party to aver anything that is inconsistent with the record.

This was error in fact brought by the plaintiff. The record was as follows:—

“Middlesex. George O'Malley Irwin, in person, sues the Right Hon. Sir George Grey, Bart., who has been summoned to answer the said George O'Malley Irwin, by virtue of a writ issued on the 19th day of June, 1862, out of Her Majesty's court of Common Pleas, for that the plaintiff, having a claim for damages, to wit, to the amount of 100,000*l.*, against Her Majesty, heretofore, to wit, on the 24th day of April, 1861, duly and according to the Petitions of Right Act, 1860, presented a petition of right to Her Majesty, dated, to wit, the day and year aforesaid, and intituled in the court of Queen's Bench, being a court in which the subject-matter of the said petition would have been cognizable if the same had been a matter in dispute between subject and subject, and stated in the margin the venue for the trial of the said petition: and the [586] said petition was addressed to Her Majesty in the form and to the effect in the schedule to the said act in that behalf annexed, and stated the Christian and surname and usual place of abode of the plaintiff, being the suppliant in the said petition, and of his attorney by whom the same was presented, and set forth with convenient certainty the facts entitling the plaintiff to relief, and was signed by the plaintiff's said attorney: which petition was duly left with the secretary of state for the home department, in order that the same might be submitted to Her Majesty, for Her Majesty's gracious consideration, and in order that Her Majesty, if she should think fit, might grant her fiat that right be done: And afterwards, before the said petition had been submitted to Her Majesty for Her Majesty's gracious consideration, the defendant became and was secretary of state for the home department, and had due notice of the premises and of the said petition: And thereupon, and whilst the defendant was such secretary, the plaintiff requested the defendant to bring, and as such secretary to submit the said petition to Her Majesty for Her Majesty's gracious consideration, in order that Her Majesty, if she should think fit, might grant her fiat that right be done: And the plaintiff did all things necessary on his part, and all things on his part necessary to happen and exist happened and existed, and all times necessary to elapse elapsed, to entitle the plaintiff to have the said petition submitted by the defendant to Her Majesty for Her Majesty's gracious consideration, in order that Her Majesty, if she should think fit, might grant her fiat that right be done: And it became and was the duty of the defendant to submit the said petition to Her Majesty for Her Majesty's gracious consideration, in order that Her Majesty,

if she should think fit, might grant her fiat that right be done: Yet the defendant did not nor would submit the said petition [587] to Her Majesty for Her Majesty's gracious consideration, in order that Her Majesty, if she should think fit, might grant her fiat that right be done: but wholly neglected and refused so to do, and therein wholly failed and made default: And the plaintiff avers that he is personally interested in the performance of the said duty, and that he has sustained and may sustain damage by the non-performance by the defendant of his said duty in that behalf: and that the performance of the said duty by the defendant has been demanded by the plaintiff of the defendant, and the defendant has refused and neglected to perform the same; and all conditions have been fulfilled, and all things have happened, and all times have elapsed necessary to entitle the plaintiff to the performance of the said duty by the defendant, and to claim a writ of mandamus in that behalf: And the plaintiff hereby claims a writ of mandamus commanding the defendant to submit his said petition to Her Majesty for Her Majesty's gracious consideration, in order that Her Majesty may, if she should think fit, indorse her fiat that right be done: And the plaintiff claims 100,000l."

Here followed a plea of not guilty, a joinder of issue, and a venire facias juratores.

"The 14th day of January, in the year of our Lord, 1863.

"Afterwards, on the said 14th day of January, 1863, come the plaintiff in person, and the defendant by the attorney aforesaid, and the Right Hon. Sir William Erle, Knight, Her Majesty's Chief Justice assigned to hold pleas in Her Majesty's court of the Bench hath sent hither his record had before him, in these words,—Afterwards, on the 26th day of November, 1862, at Westminster Hall, in the county of Middlesex, before the Rt. Hon. Sir William Erle, Knight, Her Majesty's Chief Justice assigned to hold pleas in Her Majesty's court of the Bench come the within-named plaintiff [588] in person, and the within-named defendant by his attorney within named: *and a jury of the said county, being summoned, also come*, who, being sworn to try the matters in question between the said parties, upon their oath say that he the defendant is not guilty.

"Therefore it is considered that the plaintiff take nothing by his said writ, and that the defendant do go thereof without day, &c., and that the defendant do recover against the plaintiff 162l. 4s. for his costs of defence.

"The 15th day of January, 1863.

"Afterwards, on the said 15th day of January, 1863, the plaintiff in person delivered to one of the Masters of this court a memorandum in writing, according to the statute in that behalf, alleging that there was error in fact in the record and proceedings aforesaid, together with an affidavit of the matter of fact in which the said error consisted; and the said Master, according to the said statute, filed the said memorandum and affidavit.

"The 22nd day of January, 1863.

"Afterwards, on the said 22nd day of January, 1863, comes here the said George O'Malley Irwin, the plaintiff in person, and says that in the record and proceedings aforesaid, and also in the giving the judgment aforesaid, there is manifest error, in this, to wit, that, after the issue was joined in this cause, and before the trial of the said issue, to wit, on the 25th of October, 1862, it was duly ordered by the rule of this Honourable court dated Trinity Term, in the 26th year of the reign of Queen Victoria, Saturday, the 25th October last, on the motion of Mr. Welsby, for the above named defendant, 'That, at the expense of the defendant, 48 special jurors should be nominated out of the jurors' book and special jurors' list for the county of Middlesex, and be reduced before the under-sheriff of the said county, of whom 12 should be struck [589] out by each party, and the remaining twenty-four jurors should be placed on a panel for the trial of the said cause, pursuant to the statute 6 G. 4, c. 50, and the Common Law Procedure Act, 1852; and that the sheriff of the said county do cause the said 24 jurors to be summoned to attend at the said trial, and that they do attend accordingly.' And the plaintiff further says that the following persons were, in pursuance of the said rule and the said statute in such case made and provided, duly struck as the jurors to be returned for the trial of the said issue,—Robert Gardner, 33 Gloucester Gardens, merchant, George Thomas Stroud, 6 Shepper-

ton Street, Islington, merchant, John Carter, 25 Durham Terrace, merchant, William Sparks, 16 Crescent Road, merchant, Peter Adams, 5 York Terrace, Islington, merchant, Edwin Abbott, 30 Dorchester Place, Marylebone, Esq., Hector Maclean Hay, 37 Howland Street, Esq., James Walker, 7 Park Village West, merchant, Henry Thompson, 12 St. John's Wood Park, merchant, George Blaylock, 20 Stock Orchard Crescent, merchant, George Poole, 13 Clarendon Villas, Islington, merchant, George Stapley, 13 Devonshire Road, merchant, Thomas Jones Gibb, 54 Porchester Terrace, merchant, James Bryant, Avenue Road Gardens, merchant, Frederick Appleford, 14 Aberdeen Park, merchant, Horatio Bebb, 13 Gloucester Place, Marylebone, Esq., William Beachcroft, 7 Devonshire Terrace, Esq., William Thackery, 13 Amptill Square, merchant, James German, 63 Inverness Terrace, Esq., John Phillip Judd, 49 Sussex Gardens, merchant, Thomas Goodson Albany, Esq., Sir Richard Frederick, 52 Berkeley Square, Bart., Richard Bell, 23 Northampton Square, merchant, Thomas Foster, 4 Cleveland Terrace, Esq.; and that the following persons, although so struck, were not summoned to attend as jurors on the trial of the said issue,—George Thomas Stroud, 6 Shepperton Street, Islington, merchant, Hector Maclean Hay, 37 [590] Howland Street, Esq., Peter Adams, 7 York Terrace, Islington, merchant, George Poole, 13 Clarendon Villas, Islington, merchant, George Stapley, 13 Devonshire Road, merchant, Thomas Jones Gibb, 54 Porchester Terrace, merchant, James Bryant, Avenue Road Gardens, merchant, John Phillip Judd, 49 Sussex Gardens, merchant: That, *by reason of the said persons not having been summoned to attend the court on the trial of the said issue, and the names of the aforesaid special jurors not having been called over in court at or after ten o'clock*, which was the hour named in the said summons for the said jury to attend the court on the trial of the said issue, *twelve of the said special jurors did not attend to try the said issue, but that only ten of the said special jurors attended and were sworn on the said jury*; and that a tales was thereupon prayed on behalf of the above-named defendant, and divers, to wit, *two talesmen were accordingly sworn on the said jury*: And this the said plaintiff is ready to verify, wherefore he prays that the judgment aforesaid may be revoked, annulled, and altogether held for naught, and that the plaintiff may be restored to all things which he hath lost by occasion thereof."

"The 4th day of February, 1863.

"The defendant, Sir George Grey, Bart., by the said H. T. Raven, his attorney, says that there is no error either in the record and proceedings aforesaid, or in the giving the judgment aforesaid."

The plaintiff in error, in person (*a*). The first ground [591] of complaint is, that all the special jurors who were struck ought to have been summoned. This is required by the express words of the Jury Act, 6 G. 4, c. 50, ss. 25, 26. The second is, that the jury struck ought to have been the jury returned for the trial of the issue. This is required by the enactment contained in s. 30. The third is, that a tales can only be prayed when the jury are *in default* by not appearing, which they are not if they have not all been summoned. This is required by s. 37, which enacts that, where a full jury shall not appear, &c., or where, after appearance of a full jury, by challenge of any of the parties, the jury is likely to remain untaken for default of jurors, every such court, on request made by the parties in any action or suit, shall command the sheriff to name and appoint so many of such other able men of the county then present as shall make up a full jury: and the sheriff shall, at such command of the court, return

(*a*) The points marked for argument on the part of the plaintiff in error were as follows:—

"1. That all the special jurors who were struck ought to have been summoned: 6 G. 4, c. 50, s. 25:

"2. That the special jury struck ought to have been the jury returned for the trial of the issue in this cause: s. 30:

"3. That a tales can only be prayed when the jury are in default by not appearing, which they are not if they have not all been summoned: s. 37:

"4. That, the issue not having been tried by a duly constituted jury, the verdict is not binding, is a nullity, and the judgment founded on it is erroneous:

"5. That the names of the special jurors were not called over at or after 10 o'clock, the hour named in the summons."

such men duly qualified as shall be present or can be found to serve on such jury, and shall add and annex their names to the former panel: and the court shall proceed to the trial of every such issue with those jurors who were before impanelled, together with the talesman so newly added and annexed, as if all the said jurors had been returned upon the writ or precept awarded to try the issue. A further objection is, that the names of the special jurors were not called over at or after 10 o'clock, the hour named in the summons. If the ordinary practice in this respect had been adhered to, peradventure it would have been unnecessary to pray a tales. The whole subject is elaborately discussed in the opinions delivered by the judges to the House of Lords in the case of *The Queen v. Edmund*, 11 Clark & Fin. 155. Lord Denman, at p. 362, says: "There is one thing too remarkable to be overlooked. In that short passage in Lord Coke, which contains the whole of the learning upon this subject (Co. Litt. 156), he cites a case from the Year Books, which is twice reported, once in the 17th of E. 3. and once, I believe, in the 20th of E. 3. The sheriff returned a list, which the bailiff of the franchise ought to have returned: that was held to be wrong *prima facie*, because it deprived the party of his challenge against the bailiff individually. But then it was argued, 'Oh, but there are good names enough returned by the sheriff to ensure the party a fair trial:' exactly the argument which appears to have succeeded in Dublin. But the court held, in the time of Edward 3, that, as the array was one entire indivisible thing, one error would vitiate the whole: and the whole was accordingly set aside. In that very case, the sheriff was charged with unindifferency: the question of his unindifferency was tried: he was acquitted upon that charge: and yet the fact of his having done, though not with any corrupt or partial intention, that which gave a different jury, was deemed a default sufficient to set aside the whole proceeding." That plainly shews that any irregularity in the mode of procuring the attendance of a jury renders the whole proceeding erroneous. Lord Denman, in the same case, at p. 353, quotes the opinion of Coleridge, J., to the following effect: "It seems to me that all questions touching the formation of juries must be examined by the judges with very critical eyes." In *Hobdane v. Beauchamp*, 3 Exch. 658, 6 D. & L. 642, where the defendant had obtained a rule for a special jury, which was nominated and struck, but no special jury process issued, and the [593] cause was tried by a common jury as undefended, the court set aside the trial, with costs. [Willes, J. That case is disposed of by the 113th section of the Common Law Procedure Act, 1852.] In *Hague v. Hall*, 5 M. & G. 693, 6 Scott, N. R. 705, where a cause was entered as a *special jury* cause, but was taken in the defendant's absence, and tried by a *common jury*, as an undefended cause, the court set aside the trial and verdict, with costs. "The words," says Tindal, C. J., "of the Jury Act (6 G. 4, c. 50, s. 30) are very strong,—that 'every jury so struck shall be the jury returned for the trial of such issue.' The trial was clearly irregular." In *Newman v. Graham*, 11 C. B. 453, it was held that, where the defendant has duly obtained a rule for a special jury, and the jury has been struck and reduced, it is not competent to the court to direct that the cause be tried by a common jury, on the defendant's failure to summon a special jury. "The statute," says Cresswell, J., "is imperative, that the jury struck shall be the jury to try the issue." And Jervis, C. J., adds: "It is not competent to any court to repeal a positive enactment of the legislature. The practice on the subject is quite settled." In *Montague v. Smith*, 21 Law J., Q. B. 73, the court of Queen's Bench held themselves to be bound by the decision of the court of Exchequer in *Haldane v. Beauchamp*. Lord Denman there says: "After great consideration, looking to the interpretation put upon the Jury Act by the court of Exchequer, I will express no other opinion in this case, except that I feel bound by *Haldane v. Beauchamp*. In points of practice, it is extremely desirable that there should be an uniformity of proceeding in all the courts." Willes, J. The simple question of fact here is, whether the circumstance of all the special jurors not having been summoned, and of the names having been called over before 10 o'clock, is ground for error in fact.]

[594] The Solicitor-General (with whom were the Attorney-General, T. Jones, and Hannen), contra (a). It is not competent to the plaintiff to set up as a ground of error

(a) The points marked for argument on the part of the defendant in error were as follows:—

"1. That the matters alleged by the plaintiff as grounds of error in fact do not in point of law, nor do any of them, amount to error in fact:

"2. That the allegation in the assignment of errors that, by reason of the matters

that the whole of the special jurors struck were not summoned, because that would be to contradict the record: and, if there was any irregularity in the mode of summoning or calling them, the plaintiff by his appearance waived it. The authorities upon this subject are very numerous. In *Bac. Abr. Error* (K.), 3, it is said: "It seems a general rule that nothing can be assigned for error that contradicts the record; for the records of the courts of justice, being things of the greatest credit, cannot be questioned but by matters of equal notoriety with themselves; wherefore, though the matter assigned for error should be proved by witnesses of the best credit, yet the judges would not admit of it. Hence it is that, in a writ of error to reverse a fine, the plaintiff cannot assign that the [595] conusor died before the teste of the dedimus, because that contradicts the record of the conusance taken by the commissioners, which evidently shews that the conusor was then alive, because they took his conusance after they were armed with the commission and the dedimus issued. If a writ of error be brought upon a judgment in an inferior court, and the record certified of a court held before the mayor, bailiffs, and burgesses of A. by custom, it cannot be assigned for error that there is no such custom, for this is contrary to the record, and even what the writ of error itself supposes, viz. that they have a court. In a writ of error upon a judgment in the palace court held 'coram Jacobo Duce Ormond,' it cannot be assigned for error that the duke was not there, because that is contrary to the record, though in fact the court was held before his deputy, according to the patent. If A. B. is sworn upon the principal panel, and another of the same name is sworn upon the tales, it shall not be assigned for error that the A. B. first sworn and A. B. the talesman were one and the same person, so as to make it a trial by eleven jurors only; for this is contrary to the record, which says that they who were sworn on the tales were alii de circumstantibus; he could not be *idem* consistently with the record, which says that he was *alius*; and therefore such an averment, contrary to the record, shall not be admitted. So, it shall not be assigned for error that A. B., who was sworn as a juror returned upon the principal pannel, was never returned by the sheriff; for, after the joinder in issue, the record goes on to the award of a venire facias returnable at such a day, 'ad quem diem,' it says, 'jurata inter partes præd. ponitur in respectu' till the next term, nisi prius the justices come, &c.; at which time they come, et juratores unde infra sit mentio exacti unus eorum (that is, one of those returned by the sheriff), [596] viz. A. B., venit et in juratam illam juratus existit; so that the record expressly says that the A. B. who was sworn was one of them who was returned by the sheriff, and therefore the error assigned is contrary to the record." In *Helbut v. Held*, 2 Ld. Raym. 1414, Stra. 684, Held brought an action of assault and battery in the Common Pleas against Helbut, and, upon his pleading the general issue, verdict and judgment was given for Held; upon which Helbut brought this writ of error in the King's Bench, and assigned for error, quod per recordum prædictum apparet quod prædictus Edwardus Richier (mentioned in the postea to be the only jurymen who appeared on the principal panel) jurator nominatus in pannello prædicto de habendo corpora juratorum summonitorum inter prædictum Hugonem et Isaacum annexo exactus venit, and was sworn on the jury, and gave his verdict simul cum juratoribus prædictis de novo appositis; whereas, by the record of the venire facias, it appeared that the said Edward Richier was not returned nor impanelled by the sheriff of London in the panel to the said writ of venire facias annexed, and returned as by law he ought, &c. For the plaintiff in error, it was urged that the verdict, being given by a person not named in the panel upon the venire, was ill, and the judgment thereupon given was erroneous. For the defendant in error it was insisted, and so adjudged, by the court, that this was not assignable

therein alleged, twelve special jurors did not attend and were not sworn to try the issue, does not shew any ground of error, and is bad, as contradicting the record, which states that a jury of the county of Middlesex, being summoned, came and were sworn to try the matters in question between the parties:

"3. That, if the matters alleged in the assignment of errors be true, the same amounted at most to an irregularity, in respect of which the plaintiff ought to have made his objection before the jury were sworn; and that the plaintiff, having submitted his case to a jury so summoned and sworn as in the said assignment of errors mentioned, cannot be heard to allege that the mode of summoning or swearing the said jury, or any of them, is a ground of error."

for error, it being against the record. At the end of that case is a note of a case of *Plummer v. Webb*, M. 3 G. 2, B. R., as follows,—“Debt on bond: non est factum pleaded: verdict and judgment for the plaintiff in the Common Pleas: on error on this judgment, error was assigned that Webb died before the day of nisi prius: and held it was not assignable for error, because the record mentioned that he appeared that day. Judgment was affirmed.” In [597] *Molins v. Webb*, 1 Lev 76, it is said that “error that the judge was not in court, is against the record, and not assignable.” In *The King v. Carlib*, 2 B. & Ad. 362, a return to a writ of error directed to the commission of oyer and terminer of the city of London, set out the record of an indictment found against the defendant, before the lord mayor and others: and stated that he was tried upon the said indictment by a jury of the country at the next session holden before the lord mayor, several of the judges, aldermen, recorder, and others, assigned by certain letters-patent under the great seal directed to them, *or any two or more of them*, to inquire of certain offences: that he was by the verdict of such jury found guilty: and that thereupon judgment was given *by the court* against him. Upon this return the defendant assigned as error in law that the judgment was insufficient and that it should have been for the defendant, and as error in fact (amongst others), that, when the jury gave their verdict, there was but one of the justices named in the commission present in court. The King’s coroner and attorney answered “in nullo est erratum,” and prayed that the judgment might be affirmed: and it was held that, as it appeared by the record that the verdict was given at a session holden before several of the commissioners and justices, the plaintiff in error could not be allowed to aver, in contradiction to the record, that only *one* of the justices was present when the jury gave their verdict: and that the answer “in nullo est erratum,” is no admission of the fact assigned for error, unless it could be lawfully assigned, and is well assigned in point of form. Lord Tenterden, in delivering the judgment of the court, there said: “We think ourselves bound by the authorities in the books, which are numerous and consistent, to decide that the plaintiff in error cannot be received to make the averment contrary to the [598] record.” [Byles, J. Do the court say what ought to be done in such a case? No. In *Ex parte Newton*, 24 Law J., C. P. 148, 16 C. B. 97, upon an indictment charging felony committed within the jurisdiction of the Central Criminal Court, the prisoner was convicted and sentenced to imprisonment. After sentence, application was made to the court of Common Pleas for a writ of habeas corpus to bring up the prisoner to be discharged, upon an affidavit alleging that the offence was committed out of the jurisdiction of the Central Criminal Court: and it was held that the record was an estoppel, and the writ was refused. The cases upon the subject are uniform. [Willes, J. The plaintiff has not cited any authority for a writ of error: all the cases he relies on are cases of motion.] A motion for a new trial was made in this case, and refused. Nothing could be more inconvenient and obstructive of the course of justice, than to hold that the mere neglect of the officer to summon one of the special jurors, renders the whole proceeding nugatory and void. [Willes, J. How does it appear that the jury were called over and sworn before 10 o’clock? Only by the plaintiff’s affidavit. The record, however, alleges all that is necessary to shew that the proceedings were regular: the court will assume omnia rite esse acta. The plaintiff was present: and, if he had anything to object to, he ought to have urged it at the time. [Byles, J., referred to *Holt v. Maddamcroft*, 4 M. & Selw. 467.] There the defendant protested. Here the plaintiff did not. Besides, it was a proceeding by motion. There are many authorities to shew that even matter of error may be cured by appearance: see Bac. Abr. Error (K.), 5. “A man shall never assign that for error which he might have pleaded in abatement, for it shall be accounted his folly to neglect the time of taking that exception. As, if a feme [599] covert brings an action in her own name per attornatum, and the defendant plead in bar to the action, he shall never afterwards assign the coverture for error. So, if a feme sole brings trespass, and recovers, and a writ of inquiry of damages is awarded, and before the return thereof the plaintiff takes husband, and after the writ is returned, and judgment given thereupon, without any exceptions taken by the defendant, he shall not have advantage of this in a writ of error, because the writ was only abateable by plea.” [Willes, J., referred to *Andrews v. Elliott*, 5 Ellis & B. 502, 6 Ellis & B. 338.] There, Mr. Bramwell, then a Queen’s counsel, was in the commission of nisi prius, and could have tried the case with a jury: and the statute 17 & 18 Vict. c. 125, s. 1, under certain limited conditions, gave him

power to try by himself. The court of Queen's Bench and the Exchequer Chamber thought that the plaintiff, by his consent to the case being tried without a jury, was estopped from denying that the statutable conditions had been fulfilled. Here, the plaintiff does not allege that all the facts did not come to his knowledge at the time.

The plaintiff, in reply. The authorities already cited,—*Newman v. Graham*, 11 C. B. 153, *Haldane v. Beauclerk*, 3 Exch. 658, *Montague v. Smith*, 21 Law J., Q. B. 73, *Hague v. Hall*, 5 M. & G. 693, 6 Scott, N. R. 705, and *The Queen v. O'Connell*, 11 Clark & Fin. 351,—clearly shew that the proceedings here are erroneous, and that this is the proper way, and indeed the only way, of taking advantage of the irregularity. As to the suggestion of waiver, it is enough to say that a man cannot waive an irregularity of which he has no knowledge: 2 Chitt. Archb. 11th edit. 1461: and here the plaintiff could not at the time know that the jurors had not all been summoned. It is true, a jury [600] came: but not a proper one. [Byles, J. You knew that the whole panel did not attend. That which you did not know was, that some of them were not summoned.] Exactly so. [Willes, J. In *Doe d. Lord Ashburnham v. Michael*, 16 Q. B. 320, on the trial of a special jury cause, when the names of the special jurymen, who had retired to consider their verdict, were called over on their return into court, it was discovered that a person on the impanelling of the jury summoned as a special jurymen on another cause had answered by mistake to the name of a jurymen summoned for the cause on trial, and had served in his stead. The defendant then objected to take the verdict of the jury so impanelled: the plaintiff insisted on taking it: and the jury gave a verdict for the plaintiff. It was held that this was a mis-trial, as the objection was taken before verdict, and that there must be a venire de novo. But that was upon motion.]

Cur. adv. vult.

WILLES, J., now delivered the judgment of the court:—

This is error in fact upon a judgment for the defendant founded upon a verdict in his favour pronounced by a jury of the county of Middlesex upon a trial before the Lord Chief Justice. The argument took place on the 19th and 20th of June, before my Brother Byles and myself, when we took time to consider.

The assignment of errors states in effect that the defendant obtained a rule for a special jury, whereupon twenty-four jurymen were duly struck pursuant to the statute as the jurors to be returned for the trial of the said issue; that eight of the special jury so struck were not summoned to attend as jurors on the trial; [601] that, by reason of those persons not having been summoned, and the names of the special jurors not having been called over in court at or after 10 o'clock, the hour named in their summons, only ten of the special jurors appeared and were sworn on the said jury.

The precise objections upon which this assignment of errors is founded are, therefore,—first, that eight of the special jury were in fact unsummoned,—secondly, that the names of the special jurors were not called over at or after 10 o'clock,—and, lastly, that, as a consequence, there were only ten special jurors on the jury, upon which therefore there must have been two talesmen.

The plaintiff in error relied upon the Jury Act, 6 G. 4, c. 50, s. 30, by which it is enacted, that when a special jury is struck, “the jury so struck shall be the jury returned for the trial of such issue.” And he shewed much industry in citing numerous cases in which a trial by a common jury after a special jury had been struck was set aside by the court, upon motion,—amongst which are, *Holt v. Meddowcroft*, 4 M. & Selw. 467, *Hague v. Hale*, 5 M. & G. 693, 6 Scott, N. R. 705, *Newman v. Graham*, 11 C. B. 153, and *Montague v. Smith*, 21 Law J., Q. B. 73: and he placed much reliance upon the opinion expressed by Lord Denman in *O'Connell's case*, 11 Clark & Fin. 155, as to the right to challenge the array, where the jury-list is improperly made up. It was further insisted by the plaintiff that, notwithstanding the language of s. 37 of the Jury Act, viz. “if a full jury shall not appear,” a prayer of tales can only be made when the jury are in default, which they are not if they have not been summoned, that the issue not having been tried by a lawful jury, the judgment is a nullity; and that the names of the jury ought to have been called over at or after 10 o'clock.

On the part of the defendant, this line of argument [602] was not traversed; nor was it denied that each party has a right to challenge the array, if improperly constituted, or the individual jurymen if disqualified; nor that he has a right to object

to a prayer of tales made before the proper jury pannel has been called; nor that the court would, by virtue of its general jurisdiction to prevent abuse of its process, set aside the verdict upon motion, absolutely in the event of the defect of special jurors having been caused by mal-practice; nor that the court would, in case of neglect, besides punishing the officer, redress any injustice which such neglect might have occasioned. But it was insisted that defects of the kind suggested in these proceedings, if not raised by challenge or motion, must be treated as mere irregularities or as defects which have been passed by: and that the assertion of them at the present stage is in contradiction of the record, which either expressly or impliedly alleges regular proceedings; and so that the assignment of errors is in violation of the well-established and wholesome rule that there shall be no averment of error against the record. Upon this point numerous authorities were cited, which were cited and commented upon by Lord Tenterden in *The King v. Carlile*, 2 B. & Ad. 362. It was further argued that, consistently with the record, the plaintiff may have appeared at the trial and assented to the proceeding, intending to take his chance of the verdict being in his favour, and that so the objection, if any, had been waived.

As to the first ground of objection, viz. that eight of the special jurors were not summoned by the sheriff, the assignment of errors does not state how this omission took place. It imputes no fault to the defendant or to the sheriff. So that the objection falls nothing short of maintaining that an omission, whether wrongful or not, to summon any one or more jurymen or [603] jurymen, makes all the subsequent proceedings void, if such omission either alone or conjointly with any other irregularity may have led to a talesman being upon the jury. This proposition is so novel as to require some authority to sustain it; and none has been adduced. Many causes have been tried and are tried at every sitting by a jury partly composed of talesmen, in cases where either without any default on the part either of the parties or the sheriff's officer, or because of the inadvertence of the latter, one or more of the special jurymen have not been summoned. Similar irregularities, if they be such, must have been over and over again committed without objection, since the passing of the Jury Act. It is simpler and safer, however, to conclude, not that all these trials have been unwarranted, and the judgments founded thereon erroneous as contrary to the Jury Act, but that the express language of the 37th section of that statute was framed to exclude any such objection, and that a prayer of tales may be made when and "if a full jury shall not appear," without regard to the causes of their not appearing, over which the court in banc may exercise a control by motion, if justice so requires. And this is consistent with what is stated in 3 Blackstone's Commentaries, 365 (and Appendix xi., that, "if, by means of challenges or *other cause*, a sufficient number of unexceptionable jurors doth not appear at the trial, either party may pray a tales."

As for the alleged error in not calling over the names of the special jurors in court at or after 10 o'clock, the hour named in their summons, it is not quite clear whether it is meant to say that the court sat before ten, or that, sitting after ten, it proceeded without calling over the names of the special jurors, in a slipshod fashion, directing such of the special jury as were in court to get into the box without naming [604] them, and then proceeding to swear two talesmen to make up the jury. Whichever be the true construction of the assignment of error, the court has full control over such and similar irregularities, upon motion; and in that proceeding it is enabled to decide according to the merits, and to interfere or not according as the irregularity complained of has wrought injustice in the particular case; of which good examples will be found in *Curtis v. Marsh*, 3 Exch. 866, where the court granted a new trial because the judge through mistake had sat before ten, and a verdict was found against a defendant, who was taken by surprise, and *Williams v. The Great Western Railway Company*, 3 Exch. 869, where the court refused a new trial upon a verdict properly found for a railway company by a jury one of whom was a shareholder, though that fact was unknown to the opposite party.

In this form of proceeding we have no such control, but must decide aye or no whether there be ground of error; and, if there be, we have no alternative, but must reverse the judgment, though no injustice appears to have been done, and even if we should be of opinion that there is no cause of action upon the record. And in our opinion that equitable jurisdiction, to which the plaintiff might have appealed if he had sustained any real injustice, is the limit of our authority over such irregu-

larities; for, the record of a superior court when made up is the conclusive statement of a proceeding conducted with all the formalities required for a judgment, and it states either expressly or by necessary implication that the proceeding was one in which the court exercised its jurisdiction in a judicial way, and therefore that the jury was one not merely in name, but in law and fact, and that the court sat at a time when, and was otherwise constituted so that, it could properly exercise its jurisdiction.

[605] It is scarcely necessary to observe that, with respect to the objections urged, a writ of error in fact does not lie to correct an error of the court, which can only be set right by a writ of error in law, when such error does appear and ought to appear (*Mellish v. Richardson*, 1 Clark & Fin. 224) upon the record, and that the record of the *postea* is equally conclusive as the record of the court itself: *Lil. Pr. Reg. Error*.

To shew that the errors assigned are in contradiction to the record, it is only necessary to refer to the old form of entry of the *postea* upon the record in Tidd's Forms, 315, as follows, viz. "And the jurors of that jury being summoned, some of them, that is to say, E. F., &c., come, and are sworn upon that jury; and, because the residue of the jurors of the same jury do not appear, therefore others of the by-standers, being chosen by the sheriff of the county aforesaid, at the request of the said A. B., and by the command of the said chief justice, are appointed anew, whose names are annexed to the within-written panel, according to the form of the statute in that case made and provided; which said jurors so appointed anew, that is to say, G. H., &c., being called, likewise come, who, together with the said other jurors before impanelled and sworn, being chosen, tried, and sworn to speak the truth of the matters within contained, say upon their oath," &c., &c.

The judges, in framing the present compendious form of record, did so, not to alter the law in so material a point, but to express shortly and in a manner not so open to formal objections, that all the requisites for having a sufficient jury had been observed.

Upon this ground, the validity of which has been so often affirmed, and for such convincing reasons, in the authorities referred to by the Solicitor-General, which [606] we need not re-cite, we are satisfied that the judgment is not open to either of the objections urged against it by the plaintiff, and that it ought to be affirmed.

To prevent misapprehension, we may add that these and like objections are not for all purposes admitted by demurring to the assignment of errors, but only so in the event of their being properly assigned and lawfully assignable as ground of error.

In this case it was useless to inquire into the facts, because, admitting them for argument sake to be true, they are not capable of being assigned as errors in fact; and we cannot allow of their efficacy without departing from antient and established principles of law.

Judgment affirmed (*a*).

THE RT. HON. HENRY JOHN CHETWYND EARL OF SHREWSBURY AND EARL TALBOT AND THE RIGHT HON. GEORGE RICE BARON DYNEVOR v. KEIGHTLEY AND OTHERS. June 6th, 1865.

[Affirmed in Exchequer Chamber L. R. 2 C. P. 130; 36 L. J. C. P. 17.]

By a private act of 6 G. 1, c. 29, passed in 1720 for the purpose of confirming a prior settlement of the Shrewsbury estates, those estates were limited to the issue of the settlor as they should succeed to the earldom; and the act contained powers for each successive tenant for life or in tail, to charge the lands for portions for younger children, to jointure, and (by s. 10) to lease all or any part of the lands for three lives or twenty-one years, or for any term of years determinable on three lives, so as there should be reserved and made payable by every such lease *the usual and accustomed yearly rents*, boons, and services, with a proviso of re-entry for non-payment.—By a subsequent act, passed in 1803, certain out-lying portions of the estate (set out in a schedule annexed to the act, and which included all the lands in the township of Oxtou) were conveyed to trustees,—“for ever freed,

(a) The plaintiff has brought error in law in the Exchequer Chamber.

released, and discharged, and absolutely acquitted, exempted, and exonerated of and from all and every the uses, trusts, estates, entails, remainders, charges, *powers*, provisoes, limitations, and agreements in and by the settlement and the act of 1720 respectively created, limited, provided, and declared of and concerning the same hereditaments and premises, or any of them, except only such leases as had been theretofore made or granted of the same in pursuance of the powers contained in the said settlement act,"—in trust to sell, and, on payment of the purchase-money, to convey the same to the purchasers "freed and discharged, and acquitted, exempted, and exonerated as aforesaid,"—the proceeds of such sales to be laid out in the purchase of other lands, to be subject to the same uses, &c. as the lands so sold.—By the 7th section of the act of 1803, it was enacted and declared that, "in the meantime and until the said manors, lands, &c., thereby directed to be sold, should be sold in pursuance of the trusts aforesaid, the same premises respectively should be held, possessed, and enjoyed, and the rents, issues, and profits thereof should be had, received, and taken by and be applied to and for the benefit of such person and persons as would have been entitled thereto, and ought to have held, possessed, or enjoyed and received the same respectively in case that act had not been made."—In 1838, the then earl granted to one Pim a lease of a portion of the land so vested by the act of 1803 in trustees for sale (and which had not been sold), for ninety-nine years, provided three persons named, or either of them, should so long live, at the yearly rent of 30*l.* Pim covenanting to lay out 1000*l.* in building on the land within five years:—Held that the settlement and act of parliament gave the earl no power to lease the land in question, so as to bind succeeding tenants in tail of the Shrewsbury estates.

This was an action of ejectment brought by the plaintiffs against the defendants, to recover possession of certain messuages, lands, and hereditaments, in the [607] township of Oxtou, in the parish of Woodchurch, and county of Chester, to the possession whereof the plaintiffs, or one of them, claimed to be entitled.

The cause came on for trial before Williams, J., at the Chester Spring Assizes, 1864, when a verdict was found for the plaintiffs, subject to the opinion of the court upon the following case:—

1. Charles Earl and Duke of Shrewsbury, being seised in his demesne as of fee of the whole of the township of Oxtou, in the county of Chester, by indentures of lease and release dated the 30th and 31st of October, 1700, settled the said township, with other lands, after his own death and failure of his issue, and after other uses not necessary to be here mentioned, and since determined, to the use of George Talbot for life, remainder to the first and other sons of the said George Talbot successively in tail male, remainder to John Talbot for life, remainder to his first and other sons successively in tail male, remainder to Sir John Talbot for life, remainder to his first and other sons successively in tail male, with reversion to the said Charles Earl and Duke of Shrewsbury in fee; and the said settlement contained powers of jointuring and leasing.

2. On the 1st of February, 1717, the said duke died, having by his will, dated the 19th of July, 1712, [608] devised other estates to the use of the aforesaid settlement, and leaving his cousin Gilbert Earl of Shrewsbury his heir-at-law.

3. By indenture of lease and release dated the 3rd and 4th of March, 1718 (being the settlement on the marriage of the said George Talbot and Mary Fitzwilliam), the said Gilbert Earl of Shrewsbury and certain other persons, according to their respective interests, conveyed (inter alia) the said township, after the determination of certain estates therein (which have long since determined) to the use of the said George Talbot for life, remainder (subject to a jointure rent charge) to the use of the first and other sons of the said George Talbot on the body of the said Mary Fitzwilliam, in tail male successively, remainder to his first and other sons by any after-taken wife successively in tail male, remainder to the said John Talbot for life, remainder to his first and other sons successively in tail male; and the now stating settlement contained powers of jointuring and of leasing.

4. By the Shrewsbury Estate Act, 1720 (6 Geo. 1, c. 29), the said marriage-settlement and all the uses therein limited were ratified and confirmed.

5. By section 2 of the said act it was enacted that, after the decease of the said George Talbot and John Talbot, and failure of issue male of their respective bodies

(which events have happened), certain lands formerly of the said duke, including the said township, should be and remain to the use of the said Gilbert Earl of Shrewsbury for life, remainder to his first and other sons successively in tail male, remainder to the use of all and every person and persons being issue male of the body of John the first Earl of Shrewsbury, to whom the title, honour, and dignity of Earl of Shrewsbury should, after the decease of the said Gilbert Earl of Shrewsbury, George Talbot, and John [609] Talbot, without issue male of their respective bodies, by virtue of the letters-patent of creation of the said earldom, descend and come, severally and successively, one after another, as they and every of them should succeed to and inherit the said earldom, and of the several and respective heirs male of the body and bodies of all and every such person and persons issuing, to attend and wait upon the said earldom, and to be annexed to and descend with the same; and the said act contained powers to charge portions and other sums, and to jointure, and a restriction on alienation of the said estates.

6. By section 10 of the said act it was enacted that it should be lawful for the first and all and every other son and sons of the body of the said George Talbot, and the several and respective heirs male of the body or bodies of all and every such son and sons lawfully issuing, and to and for the first and every other son and sons of the body of the said John Talbot, of Longford, and the several and respective heirs male of the body or bodies of all and every such son and sons lawfully issuing, and also to and for all and every other person and persons to whom the said hereditaments and premises were limited by the said act successively as aforesaid, by any deed or writing by them respectively to be signed in the presence of two witnesses, to demise or lease all or any parts of the said hereditaments and premises, whereof the person making such lease should be actually possessed, to any person or persons in possession, and not in reversion, for the term of three lives or twenty-one years, or for any term or number of years determinable upon the death or determination of three lives, so as upon all and every such lease and leases there should be reserved and made payable yearly during the continuance thereof *the usual and accustomed yearly rents, boons, [610]* and services for the same, with power of re-entry for non-payment thereof, and with the usual provision as to a counterpart of such leases.

7. At the time of the passing of the next-stated act, the said George Talbot was dead, and the said Gilbert Earl of Shrewsbury was also dead, and the title of Earl of Shrewsbury, and the aforesaid hereditaments and premises, had descended to Charles, fifteenth Earl of Shrewsbury, who was grandson and heir male of the body of the said George Talbot by the said Mary his wife.

8. By an act passed in 1803 (43 G. 3, c. 40), intituled "An act for vesting part of the settled estates of the Right Honorable Charles Earl of Shrewsbury, in the counties of Salop, Chester, Berks, Wilts, and Oxford, in trustees, to be sold, and for laying out the moneys to arise by such sale in the purchase of other lands to be settled in lieu thereof to the same uses and subject to the same restrictions," after recitals shewing the purposes of the act, it was enacted that certain hereditaments limited and settled by the said indentures of the 3rd and 4th of March, 1718, and the Shrewsbury Estate Act, 1720, and mentioned in the schedule to the now stating act (which schedule included the whole of the township of Oxtou), should, from and after the passing of the said Shrewsbury Estate Act, 1803, be, and the same were thereby, vested in and settled upon Thomas Wright and Charles Conolly, Esquires, their heirs and assigns for ever, freed, released, and discharged, and absolutely acquitted, exempted, and exonerated of and from all and every the uses, trusts, estates, entails, remainders, charges, powers, provisoes, limitations, and agreements, in and by the said indentures of settlement of 30th and 31st of October, 1700, the said will of the said Charles Duke of Shrewsbury, the said indentures of the 3rd [611] and 4th of March, 1718, and the said Shrewsbury Estate Act, 1720, respectively created, limited, provided, and declared of and concerning the same hereditaments and premises, or any of them, except only such leases as had been theretofore made or granted of the same respectively, in pursuance of the powers contained in the said settlements and act of parliament, upon trust that they the said Thomas Wright and Charles Conolly should, with all convenient speed, with the consent and approbation of the said Charles, then Earl of Shrewsbury, to be testified by some writing under his hand, and, after his decease, then with the consent of the person or persons who should then be in possession of the said estates respectively by virtue

of the limitations before mentioned, sell and dispose of the said hereditaments and premises, so by the said act of 1803 vested in them as aforesaid, either together or in parcels, by public sale or private contract, unto any person or persons who should be willing to become the purchaser or purchasers thereof, for the best price that could be reasonably gotten for the same; and, upon payment of the purchase-moneys for which the said hereditaments and premises should be sold, should convey and assure the same respectively unto and to the use of the purchasers, their heirs and assigns respectively, or as they should direct or appoint, freed and discharged and acquitted, exempted, and exonerated as aforesaid. The said act also provided for the reinvestment of the proceeds of such sales in the purchase of other estates, to be settled to the same uses and subject to the same powers as the lands which had been sold.

9. By the 7th section of the said Shrewsbury Estate Act, 1803, it was enacted that, in the meantime, and until the said hereditaments and premises by the said act directed to be sold should be sold in pursuance of [612] the trusts aforesaid, the same premises respectively should be held, possessed, and enjoyed, and the rents, issues, and profits thereof should be had, received, and taken by and be applied to and for the benefit of such person as would have been entitled thereto, and ought to have held, possessed, or enjoyed and received the same respectively, in case the said last-mentioned act had not been made.

10. The 8th section of the said act conferred powers of appointing new trustees of the said act.

11. The said George Rice Lord Dynevor has been duly appointed and is now the sole surviving trustee of the said act, and the lands for the recovery of which this action is brought are now vested in him as such trustee as aforesaid, but subject to the leases hereinafter mentioned, or one of them, in case the same are or is valid and subsisting.

12. The lands, for the recovery of which this action is brought, have not, nor has any part thereof, ever been sold under the provisions of the said act.

13. By indenture of lease, made the 2nd of November, 1830 (which for the purposes of this case is admitted to have been executed and perfected in conformity with the powers contained in the act of 1720, save in so far as herein appears to the contrary), the Right Honorable John Earl of Shrewsbury, being then heir male of the body of the second son of George Talbot (whose first son had died without leaving any issue male), son of Gilbert Talbot in the said Shrewsbury Estate Act, 1720, mentioned, demised eighty acres in the said township of Oxtou (part of which are the lands sought to be recovered in this action) to Samuel Ackerley, for ninety-nine years from the said 2nd of November, 1830, if three persons in the said indenture mentioned should so long live, at the yearly rent of 20*l.* for the first ten years, and 30*l.* for every [613] year after the first ten; the said Samuel Ackerley covenanting to lay out 250*l.* in building on the said land within five years.

14. By indenture of lease of the 2nd of February, 1838 (executed and perfected in like manner), the said John Earl of Shrewsbury, in consideration of the surrender of the said lease of the 2nd of November, 1830, demised seventy-eight acres in the township of Oxtou (which are the lands sought to be recovered in this action) to Joseph Robinson Pim, for ninety-nine years, if three persons named in the said lease, or either of them, should so long live, at the yearly rent of 30*l.*, the said Pim covenanting to lay out 1000*l.* in building on the said land within five years.

15. One of the three persons named in the last mentioned lease, upon whose deaths the same is determinable, is still living.

16. On the 9th of November, 1852, the said John Earl of Shrewsbury died without leaving any male issue, and thereupon Bertram Arthur, the seventeenth and last Earl of Shrewsbury, succeeded to the title and estates annexed to it. He died a bachelor on the 10th of August, 1856, and thereupon the issue male of George Talbot, on whom the estates were by the settlement of the Duke of Shrewsbury and by the said act of 1720 settled in tail male, became extinct; and thereupon (upon failure and in default of issue male of the said Gilbert Earl of Shrewsbury, of the said George Talbot, and of the said John Talbot, in the said Shrewsbury Estate Act, 1720, named) the present Earl of Shrewsbury became and now is the person, being issue male of the body of the said John, first Earl of Shrewsbury, to whom the said title, honour, and dignity of Earl of Shrewsbury did, after the decease as aforesaid of the said Gilbert Earl of Shrewsbury, George Talbot, and John Talbot, without issue

[614] made of their respective bodies, by virtue of the said letters-patent of creation of the said earldom, descend and come.

17. Copies of the said Shrewsbury Estate Acts, 1720 and 1803, respectively, and copies of the leases of the 2nd of November, 1830, and of the 2nd of February, 1838, respectively, accompanied and were to be taken as part of this case.

The question for the opinion of the court was,—whether John Earl of Shrewsbury had power to demise by the said indenture of lease of the 2nd of February, 1838, the lands by the Shrewsbury Estate Act, 1803, vested in the trustees for sale, so as to bind the plaintiffs.

If the court should be of opinion in the negative the plaintiffs, or such one of them as the court should direct, were or was to have judgment to recover the lands described in the writ, with costs. If the court should be of opinion in the affirmative, the defendants were to have judgment in the said action, with costs.

Manisty, Q. C. (with whom was Hannen), for the plaintiffs (*a*). The question to be determined in this [615] case is whether John the then Earl of Shrewsbury had in February, 1838, power, by virtue of the 10th section of the Shrewsbury Estate Act of 1720 (6 G. 1, c. 29), to grant a lease of lands which were vested in trustees to sell by an act of 1803, 43 G. 3, c. 40. The state of the title to the Shrewsbury estates at the time of the passing of the act of 1720 is fully recited in the preamble to the first section. There had been a settlement by the Duke of Shrewsbury by indentures of the 30th and 31st of October, 1700, and a will of the duke of the 19th of July, 1712: then the lands came to Gilbert Earl of Shrewsbury, who made a settlement on the marriage of his younger brother George Talbot, dated the 3rd and 4th of March, 1718, which last-mentioned settlement was ratified and confirmed by the act of 1720. All that is now material to be stated is that, under that settlement and act of parliament, George Talbot took an estate for life, with remainder to the heirs male of his body in tail. The 2nd section of the act limited the estates (subject to an exception and to certain charges) to Gilbert Earl of Shrewsbury for life, remainder to his first and other sons, remainder to the issue of the first earl to whom the earldom should descend. The 4th section contains a power for George Talbot to charge the lands (except those in the county of Oxford) to raise portions for daughters. The 6th and 7th sections gave further powers of charging. The 8th section gave rise to the great contest between the present Earl of Shrewsbury and the executors of Bertram Arthur the seventeenth earl, reported 6 C. B. (N. S.) 1. The 9th section gave the successive tenants for life a power of jointuring. And the 10th section, which [616] gives rise to the present contest, is as follows:—"Provided always, and be it further enacted and declared, that it shall and may be lawful to and for the first and all and every other son and sons of the body of the said George Talbot, son of the said Gilbert Talbot, lawfully to be begotten, and the several and respective heirs male of the body or bodies of all and every such son and sons lawfully issuing, and to and for the first and all and every other son and sons of the body of the said John Talbot of Longford lawfully to be begotten, and the several and respective heirs male of the body or bodies of all and every such son and sons lawfully issuing, and also to and for all and every other person and persons to whom the said manors, lands, tenements, hereditaments, and premises are limited by this present act of parliament, successively, as aforesaid, by any deed or deeds, writing or writings, by them respectively to be signed in the presence of two or more credible

(*a*) The points marked for argument on the part of the plaintiffs were as follows:—

"1. That neither of the acts mentioned in the case conferred a power to make the lease in question:

"2 That, by the act of 1803, the lands thereby vested in trustees for sale were entirely taken out of settlement, and the previously existing power to lease them was put an end to:

"3 That the continuance of the previously existing power to lease the lands vested in trustees for sale would be inconsistent with the trust for sale:

"4. That the 1st section of the act of 1803 by implication declares that the only leases which were to be valid were such as had been made *before* the passing of that act, and therefore that any lease subsequently made should be void:

"5. That there was not, after the passing of the act of 1803, any power to lease any of the lands which by it were vested in trustees for sale."

witnesses, to demise or lease all or any part or parts of the said manors, lands, tenements, hereditaments, and premises whereof the person making such lease shall be actually possessed, except the capital messuage, outhouses, gardens, and park of Heathropp, in the county of Oxon, to any person or persons, in possession, and not in reversion, for the term of three lives or twenty-one years, or for any number of years determinable upon the death or determination of three lives, so as upon all and every such lease and leases there be reserved and made payable yearly during the continuance thereof *the usual and accustomed yearly rents*, boones, and services for the same, and so as in every such lease there be contained a condition of re-entry for non-payment of the said rent and rents thereby to be reserved, and so as the lessee and lessees to whom such lease and leases shall be made do seal and execute counterparts of such lease [617] and leases." It was under that section that John Earl of Shrewsbury, one of the heirs male of George Talbot, professed to grant the lease in question. If he had power so to do, it is conceded that the lease is in all other respects in conformity with the act. But, in the year 1803, an act was passed (43 G. 3, c. 40), by virtue of which the plaintiffs contend that the whole township of Oxton, including the 78 acres demised by the lease in question, was amongst other lands taken out of settlement, and vested in trustees, freed from the uses, trusts, and powers, whether of jointuring, charging or leasing, contained in the act of 1720, and from all the limitations contained in the former settlements, in trust to sell, and to re-invest the purchase money in other lands to be settled to the same uses, &c. This act of 1803 recites the antient settlements and the act of 6 G. 1, c. 29: it then recites, that "whereas the Right Hon. Charles now Earl of Shrewsbury is the heir male of the body of the said George Talbot, deceased, on the body of the said Mary, his wife, his late grandfither and grandmother, and is entitled to an estate in tail-male in possession of the said settled manors and estates, subject to the restriction imposed by the said recited act: and whereas the said Charles Earl of Shrewsbury hath not any issue of his body, and, on his decease without issue male, the honor, title, and dignity of Earl of Shrewsbury, and the said manors, lands, tenements, and hereditaments, will, under the limitations in the said indenture of settlement of the 4th of March, 1718, and the said act of parliament, descend and accrue to the Hon. John Joseph Talbot, his brother, and his issue male: and whereas certain parts of the estates settled and limited by the said settlement of the 4th of March, 1718, and the said act of parliament, consist of undivided parts or shares, and others are dispersed in many parcels, and lie in a [618] number of parishes and places very distant from each other, in the several counties of Salop, Chester, Berks, Wilts, and Oxford, and are remote and at a great distance from the principal estates of the said Charles Earl of Shrewsbury situate in the counties of Oxford, Worcester, Stafford, and Chester, and from the family seat of Heathropp, which is situated in the parish of Heathropp, in the said county of Oxford, and the management and receipt of the rents of the remote parts of the said estates is, by reason of such their situation, attended with additional expense and much inconvenience: and, as most parts of the said estates in the said counties of Salop, Chester, Berks, Wilts, and Oxford would sell to great advantage, it therefore would be greatly for the benefit of the said earl and those entitled in remainder after him under the limitations in the said settlement and act of parliament, if all the said estate situated in the said counties of Salop, Chester, Berks, and Wilts, and certain detached parts of the said estates in the said county of Oxford, were sold: and whereas it is desirable to purchase and acquire other estates in the said counties of Oxford, Worcester, Stafford, and Chester, which lie more convenient and advantageous to be enjoyed with the bulk of the said earl's estates in those counties, and the said Earl of Shrewsbury and the said John Joseph Talbot are well satisfied that it would be greatly for the benefit and advantage of themselves and such other persons as may become entitled to the bulk of the said settled estates by virtue of the limitations contained in the said settlement and act of parliament, that power should be given to sell the said estates in the said counties of Salop, Chester, Berks, Wilts, and Oxford, and to lay out the moneys arising by the sale thereof in the purchase of other estates lying within the said counties of Oxford, Worcester, [619] Stafford, and Chester, or some of them, to be settled as nearly as may be to the same uses as by the said settlement and act of parliament are directed and limited of and concerning the said estates thereby settled: but, although such sale and disposition will be for the benefit and advantage of the said

Charles Earl of Shrewsbury, John Joseph Talbot, and their issue male, and the several other persons in remainder, yet the said earl is, by reason of the restrictive clause (s. 8) contained in the said act of parliament, although tenant-in-tail in possession of the said estates, deprived of the powers by law incident to an estate-tail, and the salutary purposes before mentioned cannot be effected without the aid and authority of parliament." The section then proceeds to vest the estates mentioned in the schedule to the act, in trustees for ever, "freed, released, and discharged, and absolutely acquitted, exempted, and exonerated of and from all and every the uses, trusts, estates, entails, remainders, charges, *powers*, provisoes, limitations, and agreements in and by the said hereinbefore-recited indentures of settlement of the 30th and 31st of October, 1700, the said will of the said Charles Duke of Shrewsbury, the said indentures of the 3rd and 4th of March, 1718, and the said recited act of parliament respectively created, limited, provided, and declared of or concerning the same manors, lordships, messuages, lands, tenements, hereditaments, and premises, and undivided parts and shares of manors or lordships, messuages, lands, tenements, hereditaments, and premises respectively, or any of them, except only such leases as have been heretofore made or granted of the same respectively, in pursuance of the powers contained in the said settlements and act of parliament," in trust for sale; and, on payment of the purchase-money, to convey and assure the same manors, lands, &c., unto and to the use of the [620] purchasers "freed and discharged, and acquitted, exempted, and exonerated as aforesaid." The 7th section contains a declaration, which was perhaps unnecessary, "that, in the meantime and until the said manors, messuages, farms, lands, tenements, hereditaments, and premises thereby directed to be sold, should be sold in pursuance of the trusts aforesaid, the same premises respectively should be held, possessed, and enjoyed, and the rents, issues, and profits thereof should be had, received, and taken by and be applied to and for the benefit of such person and persons as would have been entitled thereto, and ought to have held, possessed, or enjoyed and received the same respectively, in case that act had not been made." That was the state of things in the year 1803: and it is submitted that it was not competent to the then Earl of Shrewsbury, or to John Earl of Shrewsbury in 1838 (of the lands in Oxtou none having then been sold), to execute the power of leasing contained in the act of 1720, seeing that the lands had become vested in trustees, freed, exempted, and discharged from all the uses, limitations, *powers*, &c., to which they were subject under that act. Suppose the present earl, being the person now entitled to the rents and profits of those lands under the settlement and act of 1720, were to call upon the surviving trustee to perform the trust imposed by that act, and a purchaser were to object that the land was charged with the lease of 1838,—would not the short answer be, that the power of leasing under the act of 1720 no longer existed, and that the lease so granted was therefore void? As well might it be contended that the lands taken out of settlement by the act of 1720 might be charged with jointures or portions for younger children, as to say that they may be leased. The case is, in truth, too plain for argument.

[621] Sir Hugh Cairns (with whom was Kay), for the defendants (a). The lease

(a) The points marked for argument on the part of the defendants were as follows:—

"That John Earl of Shrewsbury had power to demise by the indenture of lease of the 2nd of February, 1838, the lands therein comprised, so as to bind the plaintiffs, because the power of leasing such lands which was conferred upon him by the Shrewsbury Estate Act, 1720, was not affected by the Shrewsbury Estate Act, 1803, as to lands which at the time of the exercise of such power had not been sold under the trust for sale contained in such last-mentioned act; and that therefore the said lease is valid for all the term and interest thereby demised: Or that, at any rate, the said lease is valid until the land therein comprised shall be sold and conveyed to a purchaser under the said last-mentioned trust for sale: Or that, if the said power of leasing conferred by the said act of 1720 would otherwise have been affected by the provisions of the said act of 1803, such power was re-limited and re-created for all purposes by the 7th section of such last mentioned act as to all lands not actually sold under the aforesaid trust for sale at the time of exercising such power: Or that at least such power was thereby re-limited or re-created, so as to enable leases to be made thereunder which would be valid and binding until the lands therein comprised

in question was a valid exercise of the power contained in the act of 1720. It is conceded that the township of Oxtou was included in that act, that the act gave power to the successive tenants in tail to grant leases, and that the lease granted by John Earl of Shrewsbury on the 2nd of February, 1838, was a good compliance with that power, supposing it to remain unaffected by the provisions of the act of 1803. The last-mentioned act having authorized the trustees to sell the land, the court is asked to hold that all the machinery of the former act for the management of the Shrewsbury estate is thereby destroyed and put an end to; and [622] that without the slightest necessity. It appears by the schedule annexed to the act of 1803, that the quantity of land thereby authorized to be sold was very considerable, amounting to nearly 3000l. a year in value: and the whole or nearly the whole of it remains unsold to the present time. By that act the scheduled lands are vested in the trustees, Wright and Conolly (now represented by Lord Dynevor), for ever, freed and discharged from the uses, limitations, powers, &c., in the settlement and act of 1720, in the manner already mentioned. It may be conceded that the effect of these words is, to vest the fee-simple in the lands in the trustees. But s 7 shews that, until the trust has been carried into execution by a sale, there is to be no disturbance of the possession or beneficial enjoyment of the lands,—in the meantime and until the lands, &c., shall be sold in pursuance of the trusts aforesaid, the same premises respectively “shall be held, possessed, and enjoyed, and the rents, issues, and profits thereof shall be had, received, and taken by and be applied to and for the benefit of such person and persons as would have been entitled thereto, and ought to have held, possessed, or enjoyed and received the same respectively, in case this act had not been made.” Until sale, there is to be no disturbance of the tenant in tail for the time being in the possession or beneficial enjoyment of the lands,—there is to be the same character, measure, and mode of enjoyment, and the same identity of person enjoying, as there was before the act passed. The argument on the part of the defendants seems to assume that John Earl of Shrewsbury had no estate at all in the lands in question, but was a sort of tenant at will to the trustees. It is submitted, however, that he was equitable tenant in tail: he was in as of his old estate, subject only to be defeated in the event of a sale of the land by the trusts [623]—tees in pursuance of the trusts created by the act of parliament. Suppose a question of waste to arise: suppose John Earl of Shrewsbury had, whilst the lands remained unsold, claimed as tenant in tail to cut down timber, and the trustees interposed to prevent it, alleging that the fee-simple was vested in them,—might not the earl say, “The statute provides that I am to hold, possess, and enjoy the rents, issues, and profits of the lands as I might have done if it had not passed?” A court of equity would unquestionably hold that there was nothing to interfere with the exercise of his right. The whole scope and object of the act was, not to qualify or lessen the enjoyment of the lands by the tenant in tail, but merely to provide means for giving a good title to a purchaser of the lands directed to be sold. The tenant in tail would in the meantime have an equitable estate tail, with all the rights incident to such an estate; one of which is the power of leasing, without which there could be no complete enjoyment of it. Such a power is of the very essence of a settled estate. The argument on the part of the plaintiff must go this length that, since the passing of the act of 1803, there could be no power to lease any of these lands, even from year to year. The trustees have no power to lease: they have merely a trust to sell, and make a title to a purchaser. Lord Mansfield thus speaks of the power of leasing, in a very elaborate judgment in *Taylor v. Horde*, 1 Burr. 120,—“Of all kinds of powers, the most frequent is that ‘to make leases.’ For the encouragement of farmers to occupy, stock, and improve the land, it is necessary that they should have some *permanent* interest. Unless the owner of the estate for life was enabled to make a *perpetual* lease, he could not enjoy to the best advantage during his own time: and they who come after must suffer by the land being untenanted, [624] out of repair, and in a bad condition. The plan of this power is for the *mutual* advantage of possessor and successor. The execution thereof is checked with many conditions, to guard the successor that the annual revenue shall not be diminished, nor those in succession or remainder at all prejudiced in point of remedy or other circumstances of full and

should be sold and conveyed under the said trust for sale contained in the said last mentioned act.”

ample enjoyment." [Erle, C. J. What was Lord Mansfield speaking of there? Was the question whether there was a leasing-power in the instrument before him, or was he dealing with the construction of the power?] The question was, whether the power in that case had been properly pursued. His Lordship's general observations tended to shew that the existence of a leasing-power was essential to the beneficial enjoyment of the estate,—essential as well with regard to the interest of the tenant for life or in tail, as to that of the remainder-man. The observations of the Vice-Chancellor of England, in *Steeles v. Shearley*, 8 Simons, 153, are pretty much to the same effect. "As it is impossible," he says, "that a settled estate can be enjoyed except by means of the exercise of a power to lease, the courts never allow leases granted by the tenant for life under his power to be defeated by the exercise of a power in the trustees to appoint new uses with the concurrence of the tenant for life." The reason assigned by Sir L. Shadwell is this, that the power to lease is not, like any other power, one which the tenant for life is to exercise according to his will or caprice, but is a power which is essential to the enjoyment of the estate, to make it productive, and which becomes a part of the estate itself; and therefore it is favoured in a way in which no other power is favoured. [Montague Smith, J. Your argument is that, under the 7th section of the act of 1803, the earls are equitable tenants for life, and that they have still the power of leasing created [625] by the 10th section of the act of 1720?] That they are equitable tenants in tail. In Sugden on Powers, 8th edit. p. 712, the learned author says: "Lord Mansfield truly observed that of all kinds of powers the most frequent is that 'to make leases.' For the encouragement of farmers to occupy, stock, and improve the land, it is necessary they should have some permanent interest. Unless the owner of the estate for life was enabled to make a permanent lease, he could not enjoy to the best advantage during his own time; and they who come after must suffer by the land being untenanted, out of repair, and in bad condition." Then, after referring to several authorities, he says: "The books abound with authorities in favour of the liberal construction of the power." The observations of Lord Redesdale in the well-known case of *Shannon v. Bradstreet*, 1 Sch. & Lefr. 61, afford a complete answer to a suggestion which has been made that the exercise by the tenant for life or in tail of the power of leasing under this 7th section would impede the performance of the trust for sale. "It is objected," says his Lordship, "that a leasing-power differs from all these cases of powers,"—that is, powers of charging for portions for younger children, or of jointuring,—"and the difference is said to consist in this, that, in the other cases, the remainder-man has no interest in the mode in which the power is executed, that he claims nothing under it: but that, under the leasing-power, he claims the rent reserved. Now, on what ground can it be contended that that which is a mere charge upon a remainder-man is to receive a more liberal construction than what is not a mere charge upon him, but may be much for his benefit? In the case of powers to make leases at the best rent that can be obtained, it is evident that the author of the power looks to the benefit of the estate, and that [626] the power is given for the benefit both of the tenant for life and of all persons claiming after him; for, where the tenant for life can give no permanent interest, and his tenant is liable every day to be turned out of possession by the accident of his death, it is hard to procure substantial tenants: and therefore it is beneficial to all parties that the tenant for life should have a power to grant such leases. It is evident that the occupying tenant can afford to give a better rent under such circumstances, than if he were only to have a precarious tenure. We see from the lettings for three years in this court, and under custodians in the court of Exchequer, how disadvantageous short and precarious lettings are. But, if the letting be for twenty-one or thirty-one years, the tenant does not consider the amount of the profits for the first years so much as the profit during the term; and can afford to be out of pocket by expenditure for the first years, because in the subsequent years he will make it up by the improvements the estate receives in consequence of his expenditure. This, therefore, is a power which is calculated for the benefit of the *estate*. Other powers, generally speaking, such as jointuring powers and powers to make provisions for younger children, are calculated for the benefit of the *family*: they may be indirectly beneficial to the remainder-man in some respects; but they are no direct benefit to him; nor can I conceive why these powers should be construed more liberally than powers to make leases, except where it is evident that such power is abused: and, in case of letting

leases, the power is certainly more liable to be abused than in making provisions for wife or children: in these latter cases, the sum to be raised is generally limited, and cannot be exceeded: but a power of leasing is to a certain extent a power of charging: if a fine is taken, it is unquestionably so: [627] and, even where no fine can be taken, it is to a certain degree a charge and for the benefit of tenant for life as well as the remainder man, for, tenant for life will get a better rent than if he had no such power." It is obvious, therefore, that the exercise of this power of leasing is for the benefit of the remainder-man: it is beneficial to the estate, and can in no degree interfere with the due exercise of the trust for sale. The intention of the 7th section was, that the earl for the time being should possess the estate as before until sale,—as tenant in tail in point of interest: and that the mode of managing and conducting the estate should continue the same: the only difference being, that his estate would be equitable instead of legal. [Erle, C. J. Your argument would have been more cogent if the 7th section had said that the person for the time being entitled should enjoy the same "estate" as before.] It was intended to preserve to him an equitable interest measured and defined by what his estate was before, but not to interfere with the legal estate vested in the trustees. No formal words are required to create a power. In Sugden on Powers, p. 102, it is said: "To the valid creation of powers there should be, first, sufficient words to denote the intention; secondly, an apt instrument: and, thirdly, a proper object. First, then, no precise form of words is necessary. Powers are mere declarations of trust, and therefore any words, however informal, which clearly indicate an intention to give or reserve a power, are sufficient for the purpose. In favour of the intention, the same rule prevails as to common-law authorities created either by deed or will." It is now perfectly well settled that it is not inconsistent with the fee-simple being in trustees, that the power in the tenant for life to lease should enable him to give to the lessee [628] a legal estate in the term. This is well stated by Lord Tenterden in delivering the opinion of the judges in the House of Lords, in a case of *Long v. Hookin*, which is set out in the Appendix to Sugden, p. 895. "It is not essential," says that learned judge, "to the validity of a leasing power, or of a lease granted in virtue of such a power, that the lessor should have any interest whatever in the land demised; such powers are not unfrequently given to persons to whom no estate in the land is given. They are often, and more often, given to persons to whom, as in the present instance, a life-estate is also given. On such occasions they are more or less guarded, according to the discretion of the settler, with provisoes as to rent and other matters for the benefit of the remainder-man, and, so guarded, they are considered beneficial to the whole inheritance, and to all who may successively become entitled to portions of it, as providing the means of keeping the land continually in a proper state of cultivation. A leasing-power given to a tenant for life is usually spoken of in our books as a power appendant to the estate of the tenant for life: and it is said that the estate of the lessee is in such a case derived out of the estate of the tenant for life, for such period of the term as he may happen to live. It would probably be more correct to say that it operates upon that estate, than to say it is derived out of it even during that period. It is not necessary to say in the present case that a leasing-power may not by the terms in which it is given be inseparably annexed to the estate of the tenant for life, so as to become void and inoperative if he parts with his estate and transfers it to another. This probably may be so by the terms in which the power is given, because he who gives it may give it with what qualifications he [629] pleases: but, as I have already observed, it is not essential to the validity of such a power that it should be appurtenant, or annexed to any estate in the land. It is also immaterial to the remainder-man whether or not it be so annexed: his security depends upon the conditions and qualifications under which the power is to be executed, and not upon the estate or interest of the person by whom it is executed. If these are not duly observed, the lease is void as against him; and, if they are duly observed, it matters not to him whether the estate originally given to his predecessor continued vested in that predecessor at the time of granting the lease, or had been previously transferred to another person." What object could those who procured this act of parliament have in extinguishing the leasing power? The recitals clearly shew that they had no such desire, but that the sole object of the act was to facilitate the sale of certain outlying parts of the estate, and the acquisition of other lands which might be more conveniently held with the main part of the property. Powers

of jointuring and to raise money for younger children are powers for the benefit of the person exercising them, or that of his family: but the power of leasing is for the benefit of the estate, and in no way affects the power of sale or exchange. Lord St. Leonards, dealing with this subject, says,—Sugden on Powers, 489,—“The nature of the powers, in most instances, sufficiently points out the priority to which the estates created under them are entitled. Thus, a power of sale must defeat every limitation of the estate, whether created directly by the deed or through the medium of a power, except estates limited to persons standing in the same situation as the purchaser; for example, a lessee, for the very object of a power of sale is to enable a conveyance to a purchaser discharged of the uses of the settlement, and it is immaterial whether [630] any particular use was really contained in the original settlement, or was introduced into it in the view of the law by the execution of a power contained in it. The same principle applies to a lease. As to powers executed in favour of the family, a jointure, whether created before or after a provision for the jointress's younger children, ought to take precedence of it; but they must both give way to a subsequent execution of a power to sell and exchange, or lease. As we have seen, the jointure and portions will be transferred to the new estates under the usual powers in settlements, and the leases will operate for their benefit. If a tenant for life had a power to charge a sum generally, and also powers to sell and exchange, and lease, &c., it is said that the use or estate appointed by either of those powers would vest in the appointee in possession, and no subsequent act of the tenant for life could defeat his own previous appointment in favour of a purchaser. If the subsequent could defeat the previous appointment, the appointee under the previous appointment would not take an estate in possession according to the express purport of the appointment. But this cannot be considered a general rule, for in some cases the charge appointed may be defeated by an exercise of the power of sale, and transferred to the estate to be purchased in lieu of it. In a case where, under a will, the tenant for life had a power of leasing, and the executors had a power to sell or mortgage, although it was held that an exercise of the latter power over-reached the life-estate, and all estates created by way of interest out of it; yet it was assumed, both at the Bar and by the Bench, that a lease granted by the tenant for life under his power, before the exercise of the power by the executors, had continuance *after* a mortgage executed under the latter power: and it was held that the mortgagee took the [631] immediate reversion expectant upon the lease.” *Bringlee v. Goodson*, 4 N. C. 726, 6 Scott, 502. That case affords a very good illustration. In the act of 1720, there was a power for each successive tenant in tail to jointure. The argument on the part of the plaintiffs must go the length of contending that that power also was destroyed as to those lands by the act of 1803, and was not restored by the 7th section. It is unnecessary for the purpose of the defendants' case to grapple with that, because the power to lease stands upon much higher ground than the power of jointuring or any other power connected with the mere personal interest of the holder of the estate. If it be said that the power of jointuring still exists, it can only be on the ground that it is restored by the 7th section: and, if the power of jointuring is restored, why not also the power of leasing? By the act of 1720, the exercise of the power of leasing is attached as an incident to the actual possession of the estate. The proper mode of dealing with the 7th section of the act of 1803 is to treat it as forming the first trust,—upon trust, until the manors, &c., should be sold, to permit and suffer the Earl of Shrewsbury for the time being to possess and enjoy the estates with all the incidents of enjoyment he would have had in case that act had not been made; and then upon trust to sell, &c. The possession and enjoyment are attributed to the limitations in the old settlement and in the act of 1720. By s. 1, a purchaser would take free from the power of leasing for the future, but subject to any lease which might have already been granted. Upon the whole, therefore, it is submitted that the leasing power was not destroyed by the act of 1803, but that, on the contrary, it was necessary to the enjoyment of the estate, an incident to the possession of it, and it was properly exercised upon the occasion in question.

[632] Manisty, Q. C., in reply. The substance of the argument on the part of the defendants is, that the 7th section of the act of 1803 restores to the Earl of Shrewsbury for the time being the estate he had before, with all the incidents to its possession and enjoyment,—that he has still, in equity, an estate tail, with all the rights and powers he had before the passing of that act, including the power of leasing. [Erle, C. J.

The possession and enjoyment of the lands, not the estate.] In order to arrive at that conclusion, the court has been invited to transpose the provision in s. 7, and read it as the first trust imposed upon the trustees by the 1st section of the act. The authorities which have been referred to are not controverted. They all resolve themselves into this, that when you find in a settlement a variety of powers which are all in a sense concurrent, you must look at the general scope of the instrument,—be it deed, or be it will,—in order to ascertain the order in which they are to take effect. It is in all cases a question of intention: and here it is submitted, that the language used in the act leads to a conclusion precisely opposed to that contended for by the defendants. The power was to lease, not at the best rent that could be obtained, but at the old and accustomed rents, boons, and services, so as to enable the lessor to take a fine, and lease at a mere nominal rent. [Byles, J. And of an estate vested in trustees to be sold.] Yes. It is impossible to conceive a mode of defeating the very object of the act more effectual and more certain than such form of leasing. When a power is repealed, it is always with a saving of all that had been done under it: this was the foundation of the decision of the Exchequer Chamber in *The Earl of Shrewsbury v. Scott*, 6 C. B. (N. S.) 221. It would be contravening the very intention of the legislature, to read the 7th section of the act of [633] 1803 as it is proposed on the part of the defendants: it can only be done by introducing words which are nowhere to be found in the act, and which certainly would have been introduced had the legislature so intended. The provision in s. 7 is the ordinary provision that is found in every estate act and in every marriage-settlement,—until the marriage shall take effect or the power of sale be exercised, the person entitled to the possession shall have and enjoy the rents and profits. Nothing is more common. As a mode of enjoyment, no doubt, the earl for the time being would be entitled to grant leases, but not such as to prejudice the remainder-man, or to extend beyond his own time. The power of leasing is not given to the person in possession, simpliciter, but to the persons holding under the limitations of the settlement and act of 1720, all which limitations are annihilated and put an end to by the act of 1803. The intention is abundantly expressed by the words found in the various parts of the act: and there is nothing to oppose to them but surmise and conjecture.

ERLE, C. J. I think our judgment in this case ought to be for the plaintiffs. The question turns upon the 7th section of the statute of 1803, 43 G. 3, c. 40: and the result of the several enactments leading up to that point, is this:—In the year 1720, the Shrewsbury estates had been settled in the manner recited in the statute 6 G. 1, c. 29 (a), and the settlement was confirmed by that act, the 10th section of which gave power to the persons therein named, and also to all and every other person and persons to whom the said manors, lands, hereditaments, and premises were limited by that act, “by any deed or deeds, &c., to demise or lease all or [634] any part or parts of the said messuages, lands, tenements, hereditaments, and premises whereof the person making such lease should be actually possessed, except the capital messuage, outhouses, gardens, and park of Heathropp, in the county of Oxon, to any person or persons in possession, and not in reversion, for the term of three lives or twenty-one years, or for any number of years determinable upon the death or determination of three lives, so as upon all and every such lease and leases there be reserved and made payable yearly during the continuance thereof the usual and accustomed yearly rents, boones, and services for the same, and so as in every such lease there be contained a condition of re-entry for non payment of the said rent and rents thereby to be reserved, and so as the lessee and lessees to whom such lease and leases shall be made do seal and execute counterparts of such lease and leases.” This power of leasing is one which is greatly for the benefit of the tenant in possession: it is not a power to grant leases at the best rent that could be obtained, but at “the usual and accustomed rents;” and these on most of the old estates were merely nominal. So stood the Shrewsbury estates until the statute of 1803, whereby certain portions of the estate situate in the several counties of Salop, Chester, Berks, Wilts, and Oxford (of which the land now in question formed part), were taken out of settlement, and vested in trustees to sell and re-invest the purchase-money in other lands to be subject to the same uses, limitations, &c., as the lands so sold were subject to. The words of the 1st section are remarkably clear and absolute to exonerate the lands to be so sold from all uses, trusts,

(a) See the statute set out in 6 C. B. (N. S.) 64 et seq., in the notes.

&c.: the trustees are to take them "for ever, freed, released, and discharged, and absolutely acquitted, exempted, and exonerated of and from all and every the uses, trusts, estates, entails, [635] remainders, charges, powers, provisoes, limitations, and agreements in and by the thereinbefore recited indentures of settlement of the 30th and 31st of October, 1700, the will of Charles Duke of Shrewsbury (July 19th, 1712), the indentures of the 3rd and 4th of March, 1718, and the recited act (6 G. 1, c. 29), respectively, created, limited, provided, and declared of and concerning the same manors, &c., or any of them." That particularly exonerates them from all powers: it vests the lands, so exonerated from all powers, in the trustees, upon trust to sell, and, on payment of the purchase-money, to convey and assure the same respectively to the use of the purchaser or purchasers thereof, and his, her, or their heirs and assigns respectively, "freed and discharged, and acquitted, exempted, and exonerated as aforesaid." There could be no doubt, if there was nothing more in the act, that there would be an end of the power of leasing in respect of the lands dealt with by the act of 1803. But the 7th section enacts that, "in the meantime and until the said manors, messuages, farms, lands, tenements, hereditaments, and premises thereby directed to be sold, should be sold in pursuance of the trusts aforesaid, the same premises respectively should be held, possessed, and enjoyed, and the rents, issues, and profits thereof should be had, received, and taken by and be applied to and for the benefit of such person and persons as would have been entitled thereto, and ought to have held, possessed, or enjoyed and received the same respectively in case that act had not been made." Now, the question between the parties is, whether these words are to be construed in their literal sense, to give to the earl for the time being holding the Shrewsbury estates a right to the *possession* of the lands and premises comprised in the statute of 1803, and to receive the rents and profits of those lands [636] merely, or whether in respect of those lands and premises it revived all the powers contained in the settlement and act of 1720, and among them the power of leasing contained in s. 10 of the last-mentioned act. It was contended on behalf of the plaintiffs that the words must be construed according to their ordinary acceptation, and that their ordinary acceptation would be, that the trustees should allow the Earl of Shrewsbury for the time being to possess and to receive the rents and profits of such of the lands as should not be sold under the power given to them for that purpose. But the question is, whether the section is to be so construed, or whether the Earl of Shrewsbury for the time being was to have the right to exercise in respect of those lands the leasing power granted by the former act. I was much impressed with the argument of Sir Hugh Cairns, being very desirous of upholding estates which have been granted, and of preventing them from being defeated by doubtful words. The line of argument would have been most clear and satisfactory to my mind, if the tenant for life had been required to reserve the best and most improved rent that could be obtained for the premises so leased; because then the power to sell and exchange might have been read into the settlement and the act of 1720, and that would have produced pretty nearly the same result. But it is not so. The history of settlements and the doctrine of powers was perhaps not so well understood then as it has since become. We cannot, however, be swayed by considerations of that sort: we can only deal with the language which is before us. I think we should be defeating the object of the statute of 1803, if we were to hold that the tenant for life might grant leases for ninety-nine years, determinable on lives, at a nominal rent, and taking a fine, which would in effect be selling the land for so long a time as the leases should endure. [637] I cannot believe,—the statute contemplating an immediate sale by the trustees,—that the 7th section intended to re-create the power contained in the 10th section of the act of 1720, and so to a great extent defeat the power of sale which was its main object. I therefore come to the conclusion that the power of leasing was not revived, and consequently that the lease of the 2nd of February, 1838, came to an end with the life of the grantor, and that the plaintiffs are entitled to succeed.

WILLES, J. I am of the same opinion. At one time, under the influence of the able argument addressed to us on the part of the defendants, I was disposed to think that the enjoyment contemplated by the 7th section of the act of 1803 included the power to make such a lease as that now in question. But I am now satisfied that that is not the point upon which the decision of this case ought to turn. The question is, whether the enjoyment spoken of in s. 7 involves the making of such a lease as was contemplated by the 10th section of the 6 G. 1, c. 29,—not only the making of such

a lease as might come within the terms of the 10th section of that act, but of every lease which would come within the terms of that section, because it seems to be impossible to divide the power, and to say that the 7th section gives the tenant in tail for the time being a power to make some or one of the leases which the 10th section of the act of 1720 would authorize, without holding that he may make all or any of such leases: the power must extend to all, or it can justify none at all. Take, for instance, one lease which might be made under the 10th section, viz. a lease of property which had become much improved between the time of G. 1 and the act of 1803, and in respect of which only the rent accustomed at the [638] time of the 6 G. 1, or before that time, had been reserved, and in respect of which the Earls of Shrewsbury from time to time had been in the habit of taking fines for renewals,—it is clear that in such a case a large fine might have been taken, instead of, as in this case, a stipulation that the lessee should lay out a sum of money on the land. There are no words in that 10th section prohibiting the taking of any fine or foregift. So long as the accustomed rent was reserved, there was nothing to prevent the lessor from stipulating for a fine in respect of the improvements on the land. Such a fine would obviously be a payment for the enjoyment of the land during the term: it would in effect be a sale of the land in future. Whether such a lease comes within the 7th section of the act of 1803 or not, depends upon whether that section provides for the enjoyment of the profits of the land arising between the period of the vesting of the estate in the trustees for sale and the sale, or whether it meant to deal with the future profits of the land to be received by way of fine upon the granting of leases. I am of opinion that it deals with the former, and not with the latter: and that it would be doing violence to the words to give them a construction which should make them include the latter. I am further of opinion that the 7th section, being declaratory in terms, cannot authorize anything which would be in opposition to what the trustees are required to do by s. 1. That leads to the conclusion that present profits only were intended to be dealt with by s. 7. The words are plain,—“In the meantime and until the said manors, messuages, &c., hereby directed to be sold, shall be sold in pursuance of the trusts aforesaid, the same premises respectively shall be held, possessed, and enjoyed, and the rents, issues, and profits thereof shall be had, received, and taken by and [639] be applied to and for the benefit of such person and persons as would have been entitled thereto, and ought to have held, possessed, or enjoyed and received the same respectively in case this act had not been made.” That is not an enactment that the rents are to be received and taken as if the act had not been made: but that the person who is to enjoy is the person who would have enjoyed if the act had not been made. It is clear that these words, which in themselves only import an enjoyment of the rents, issues, and profits as they arise from time to time, could not have been intended to have any further effect, so as to entitle the equitable tenant in tail to acquire to himself, not only the profits from time to time, but also the profits of the future interest in the land, because the power to dispose of the future interest in the land had already by the 1st section been vested in the trustees. By whatever road, therefore, one approaches the 7th section, it appears to be one which not only does not include, but expressly excludes, the power now asserted: it excludes everything but a temporary enjoyment of the rents and profits. I am fortified in that construction of the 7th section by a reference to the exception in s. 1,—“except only such leases as have been heretofore made or granted of the same respectively in pursuance of the powers contained in the said settlements and act of parliament.” That shews that the framer of the act had in his mind this very power of leasing. Notwithstanding what has taken place, I cannot but think that it was intended that the contemplated sales should be effected with all convenient speed. I must own I was at one time almost convinced by the arguments urged by Sir Hugh Cairns in favour of the lease: but, looking at the nature and character of the power contained in the 10th section of the act of 1720, a power which goes beyond the present enjoyment of the pro-[640]-fits, I come at last without any hesitation to the conclusion arrived at by my Lord and the rest of the court, viz. that the lease in question was not warranted by the power, and is void.

BYLES, J. I also am of opinion that the plaintiffs are entitled to the judgment of the court. The key to the right interpretation of the act of 1803 is to be found in the recitals which are contained in the first section, that certain of the estates settled and limited by the settlement of the 4th of March, 1718, and the act of 1720, consisted

of undivided parts and shares, and others were dispersed in many parcels, and lay in many parishes and places very distant from each other, and that it would be greatly for the benefit of the then earl and those entitled in remainder after him under the limitations in the said settlement and act, if all the estates situated in the counties of Salop, Chester, Berks, and Wilts, and certain detached parts of the said estates in the county of Oxford, were sold, and that the money arising from the sale thereof should be laid out in the purchase of other estates lying within the counties of Oxford, Worcester, Stafford, and Chester, or some of them, to be settled as nearly as might be to the same uses. The first and paramount object of the act of 1803, therefore, was to sell the lands in the schedule thereto for the best price that could be got for them. Now, it is obvious that that object would be at once defeated by a sale of premises which had just been demised for twenty-one years or three lives at what might be nominal rents. All powers of leasing contained in the act of 1720 are extinguished by the later act: and by the 7th section of the last-mentioned act it is declared that in the meantime the premises shall be held and enjoyed, and the rents, issues, and profits thereof received and taken by and [641] be applied to and for the benefit of such person and persons as would have been entitled thereto in case that act had not been made. Upon the construction contended for by the defendant, they would be taking the rents and also a portion of the purchase money on the sale of the premises, for the term for which the leases were granted. Are we to imply any such power? There is no express power: all express powers are extinguished. It was thought possibly, although the words are "estates and powers," that the leases already granted would be extinguished: therefore the act of parliament expressly excepts "such leases as have been heretofore made or granted of the same respectively in pursuance of the powers contained in the said settlements and act of parliament." Why should the legislature with so much care preserve those leases, if it left to the persons in possession of the estates for the time being the power to make leases far more disadvantageous to those in remainder, because they would have a longer period to run, if it allowed them to deal with the estate in the way in which the original power allowed them to deal with it? Why should not the power be expressed? I see no reason why it should not be expressed, except that it was never meant. Besides, it is to be observed that a speedy sale was intended: it never was contemplated that the sale would be delayed for sixty years and upwards, but that it would take place within a short or at all events a reasonable time. The power to lease, therefore, is not express; and to imply it would, as it seems to me, frustrate the manifest intention of the act. I trust no injustice will be done by our decision. If the lease contains a covenant for quiet enjoyment, the lessee will have a sufficient remedy; and, if not, such a covenant is implied under the word "demise." For these reasons, I concur with my Lord and my Brother [642] Willes that our judgment in this case must be for the plaintiffs.

MONTAGUE SMITH, J. I am of the same opinion. The only question is, whether the leasing power created by the 10th section of the Shrewsbury Estate Act of 1720 was in existence in 1838, when the lease referred to in the special case was granted. I am of opinion that it was not. The 1st section of the act of 1803 vests the fee-simple of those portions of the estates now in question in trustees for sale, freed, released, and discharged, and absolutely acquitted, exempted and exonerated of and from all and every the uses, trusts, estates, entails, remainders, charges, powers, provisoes, limitations, and agreements in and by the recited settlements, will, and act of parliament respectively created, limited, provided, and declared of or concerning the same, —except only such leases as had been theretofore made or granted of the same respectively, in pursuance of the powers contained in the said settlements and act of parliament. It may be that that exception was not necessary: but, at all events, it was useful, to remove all doubt as to those leases. If it had been intended to preserve the future power of leasing, that would have been a very apt place to insert it. The question is, whether that power is preserved or re-created by the 7th section of the act of 1803. The enactment in s. 1 being so perfectly clear and distinct, one would expect to find very strong words to shew that that direct effect was not intended. I find no such words in the act. It is admitted by Sir Hugh Cairns that no new power of leasing is given in direct words: but he says, and says very truly, that, if we can collect from the language which the legislature has used an intention to restore or to re-create the power, we must give effect to it, though no formal [643] words are used for the purpose. I find nothing to warrant me in thinking that any such intention

was entertained. I conceive that every word of the 7th section may be fully satisfied without putting upon it the construction for which Sir Hugh Cairns has contended. He insists that the whole object of the act of 1803 was to add a power of sale to the limitations already found in the settlements and in the act of 1720. If that had been intended, it might have been effected without disturbing any of the existing legal estates. It seems to me that the intention clearly was, and is clearly expressed, to vest the legal estate in fee-simple in the trustees. No doubt, a power of leasing may be exercised by one who has not the legal estate; but then there must be clear and unambiguous words to shew such an intention. I should have been glad if we could have supported the lease. But I am clearly of opinion that the power of leasing had no existence at the time this lease was granted.

Judgment for the plaintiffs.

THE RIGHT HON HENRY JOHN CHETWYND, EARL OF SHREWSBURY AND EARL TALBOT, AND THE RIGHT HON. GEORGE RICE, BARON DYNEVOR, v. HARBORD AND OTHERS. June 6th, 1865.

[See note to the preceding case.]

This was an action of ejectment brought by the plaintiffs against the defendants to recover possession of certain messuages, lands, and hereditaments, in the township of Oxtou, in the parish of Woodchurch, and county of Chester, to the possession whereof the plaintiffs, or one of them, claimed to be entitled.

[644] The cause came on for trial before Williams J., at the Chester Spring Assizes, 1864, when a verdict was found for the plaintiffs, subject to the opinion of the court upon the following case:—

[The first twelve paragraphs were substantially the same as in *Keightley's case*, ante, p. 606. The case then proceeded as follows:]

13. In the year 1827, Charles Earl of Shrewsbury died, without issue male; and, upon his death, the title and the last-mentioned lands descended to John Earl of Shrewsbury, the lessor named in the leases hereinafter mentioned.

14. By "The Shrewsbury Estate Act, 1843" (6 & 7 Vict. c. 28), after reciting, amongst other things (as the fact was), that the said John, the then Earl of Shrewsbury, had no issue male, and that he was the heir male of the body of the said George Talbot, and tenant in tail male in possession of the said settled hereditaments and premises; and that it would be for the benefit of the said John Earl of Shrewsbury and those who might succeed to the settled estates, if certain hereditaments were vested in trustees in trust to sell the same, with a provision for investing the moneys to arise thereby in the purchase of other hereditaments, to be settled to the uses and under the restrictions which should be subsisting or capable of taking effect in the settled estates not vested by the act of 1803 in trustees to be sold: and that it would be for the benefit of the said John Earl of Shrewsbury and those succeeding to the settled estates, if the said John Earl of Shrewsbury and the successive takers of the said settled estates were enabled to lease, and to enter into contracts for leasing, any part or parts of the said settled estates, for such terms of years and under such provisions as would induce persons to build upon or improve the same, or to repair the messuages or [645] tenements or other buildings standing thereon, or to build others in lieu thereof,—it was enacted that all and singular the manors or lordships, messuages or farms, lands, tenements, and other hereditaments particularly mentioned and described in the second schedule to the said act of 1843 (which schedule does not include any of the lands in the township of Oxtou) should from and after the passing of the said act be vested in certain persons in the said act mentioned, their heirs and assigns, for ever, freed and absolutely acquitted, exempted, exonerated, and discharged from all and every the uses, trusts, estates, entails, remainders, charges, powers, provisoes, limitations, and agreements, in and by the said indenture of the 31st of October, 1700, the said will of the said Charles Duke of Shrewsbury, the said indenture of the 4th of March, 1718, and "The Shrewsbury Estate Act, 1720," respectively created, limited, provided, and declared of and concerning the same manors, messuages, farms, lands, tenements, hereditaments, and premises, or any of them, upon trust with all convenient speed to sell and dispose of all and singular the said manors, &c., so by the said act vested as aforesaid, subject and without prejudice to any lease or leases

which might have been made under the power of leasing in the said act thereafter contained.

15. By section 11 of the said act, the aforesaid power of leasing contained in the said act of 6 G. 1 was repealed; and by section 12 new powers of leasing were created.

16. By the 13th section of the new act, it is enacted that it should be lawful for the said John Earl of Shrewsbury, during his life, and, after his decease, for every other person to whom the said hereditaments and premises limited by the said indenture of the 4th of March, 1718, and the said Shrewsbury [646] Estate Act of 1720, were by the said settlement and act respectively limited, as and when they should respectively, by virtue of the limitations aforesaid, be in the actual possession or entitled to the receipt of the rents, issues, and profits of the said settled estates, to accept a surrender or surrenders of any lease or leases which had been granted for lives, or for years determinable upon lives, under the power of leasing contained in the said "Shrewsbury Estate Act, 1720," and, upon such surrender, to demise to the person making such surrender, or to such person as he should nominate, the hereditaments comprised in the said surrendered lease, for any term of years absolute, in possession, not exceeding sixty years, to be computed from the date of the surrendered lease, so as upon every lease to be so granted there should be reserved and made payable during the continuance thereof such and the same rents, boons, and services, as would have been payable for the premises if the surrendered lease had been a lease for a like term of years absolute to the lessee to be named in such new lease.

17. By the 33rd section of the said act it was enacted that it should be lawful for the said John Earl of Shrewsbury, during his life, and, after his decease, for all and every other person and persons to whom the said hereditaments and premises limited by the said indenture of the 4th of March, 1718, and the said "Shrewsbury Estate Act, 1720," are by the said settlement and act respectively limited successively as aforesaid, as and when they should respectively, by virtue of the limitations aforesaid, be in the actual possession or entitled to the receipt of the rents and profits of the lands which should for the time being stand limited and settled to such of the uses limited by the said settlement of 1718 and the said act of [647] 1720 respectively as aforesaid, as should be then subsisting or capable of effect, by indenture, to be sealed and delivered by him in the presence of two or more credible witnesses, to demise or lease all or any parts of the same lands, for any term or number of years, not exceeding ninety-nine years, in possession, to any person whomsoever, upon building leases, so as in such lease should be reserved the best yearly rent that could be reasonably had or gotten for the same, and that such leases should contain certain covenants in the said act particularly mentioned.

18. Section 35 conferred powers to enter into contracts for leases. Section 36 contained a provision that such contracts should contain provisos for re-entry. Section 37 authorized the granting of new leases when possession had been recovered under the power of re-entry. Section 38 gave power to alter, vary, and rescind contracts; and section 39 gave powers to confirm leases containing technical errors.

19. By the 40th section of the said act, power is given to Earl John during his life, and, after his decease, for every person to whom the said hereditaments and premises limited by the indenture of the 4th of March, 1718, and the act of 1720, were by the said settlement and act respectively limited, as and when they should respectively, by virtue of the limitations aforesaid, be in the actual possession or entitled to the receipt of the rents and profits of the lands which for the time being should stand limited and settled to such of the uses limited by the said indenture of the 4th of March, 1718, and the said act of 1720, respectively, as should then be subsisting or capable of effect, to demise or lease all the mines in, under, or upon any part of the said lands situate in the townships of Little Neston, Oxtou, and [648] other places, in the counties of Chester, Salop, and Stafford in the manner in the said section mentioned.

20. By indenture of lease, dated the 2nd of February, 1841, and made between the said John Earl of Shrewsbury of the one part, and Edwin Lewis and George Hibbard of the other part (which for the purpose of this case is admitted to have been executed and perfected in conformity with the powers contained in the act of 1720 save in so far as herein appears to the contrary), the said earl demised a piece of land containing one acre and two roods, part of Heath Hey, in the said

township of Oxtou, to the said Lewis and Hibbard, for ninety nine years, at the yearly rent of 7l. 10s., if certain persons therein named should so long live.

21. The land comprised in this lease forms part of the land sought to be recovered in this action.

22. By indenture, dated the 12th of December, 1843, and made between the said John Earl of Shrewsbury of the one part, and Francis George Harbord of the other part (which for the purpose of this case is admitted to have been executed and perfected in conformity with the power contained in the act of 1843, save in so far as herein appears to the contrary), it was witnessed that, for and in consideration of the surrender of the said lease of the 2nd of February, 1841, and of the rents and covenants in the said lease of the 12th of December, 1843, contained, the said earl did demise to the said Francis George Harbord the said piece or parcel of land, for fifty-five years from the 2nd February, 1841, at the yearly rent of 7l. 10s.

23. By indenture of lease dated the 2nd of August, 1841, and made between the said John Earl of Shrewsbury of the one part, and the said Messrs. Lewis and Hibbard of the other part, and executed and perfected in like manner as the said first mentioned lease, the [649] said earl demised a piece of land containing three roods, other part of Heath Hey, in the said township of Oxtou, to the said Messrs. Lewis and Hibbard, for ninety-nine years, at the yearly rent of 3l., if certain persons therein named should so long live.

24. The land comprised in this lease forms the remaining part of the land sought to be recovered in this action.

25. By indenture of lease, dated the 12th of December, 1843, and made between the said John Earl of Shrewsbury of the one part, and the said Francis George Harbord of the other part, and executed and perfected in like manner as the said secondly-mentioned lease, it was witnessed that, for and in consideration of the surrender of the lease of the 2nd of August, 1841, and of the rents and covenants in the said lease of 12th of December, 1843, contained, the said earl did demise to the said Francis George Harbord the said last-mentioned piece or parcel of land, for fifty five years from the 2nd of August, 1841, at the yearly rent of 3l.

26. On the 9th of November, 1852, the said John Earl of Shrewsbury died without leaving any male issue, and thereupon Bertram Arthur, seventeenth and last Earl of Shrewsbury, succeeded to the title and estates annexed to it. He died a bachelor on the 10th of August, 1856, and thereupon the issue male of George Talbot, on whom the estates were by the settlement of the Duke of Shrewsbury and by the said act of 1720 settled in tail-male, became extinct; and thereupon (upon failure and in default of issue male of the said Gilbert Earl of Shrewsbury, of the said George Talbot, and of the said John Talbot, in the said act mentioned), the plaintiff, the present Earl of Shrewsbury, became and now is the person, being issue male of the body of the said John first Earl of Shrewsbury, [650] to whom the said title, honour, and dignity of Earl of Shrewsbury has, after the decease as aforesaid of the said Gilbert Earl of Shrewsbury, George Talbot, and John Talbot, without issue male of their respective bodies, by virtue of the said letters-patent of creation of the said earldom, descended and come.

27. Copies of the acts of parliament referred to, and of the leases thereinbefore mentioned, accompanied and were to be considered parts of the case.

The questions for the consideration of the court in this action were, —whether John Earl of Shrewsbury had power to demise by the indentures of lease of the 12th of December, 1843, respectively, or either of them, the lands therein respectively mentioned, so as to bind the plaintiffs.

If the answer to this question should be in the negative, then, whether the said earl had power to demise by the indentures of the 2nd of February, 1841, and 2nd of August, 1841, or either of them, the lands therein mentioned, or any of them, so as to bind the plaintiffs.

If the court should be of opinion that the said Earl John had not power to demise the lands mentioned in the said leases, so as to bind the plaintiffs by the said leases, or any of them, the plaintiffs, or such one of them as the court should direct, were to be entitled to judgment to recover the lands described in the writ in this action, with costs; otherwise, the defendants to be entitled to judgment, with costs.

It was agreed that the facts of this case were not substantially different from

those in *The Earl of Shrewsbury v. Keightley*, ante, p. 606, and that it must be governed by it.

Judgment for the plaintiffs.

[651] THE RIGHT HON. HENRY JOHN CHETWYND, EARL OF SHREWSBURY AND EARL TALBOT, AND THE RIGHT HON. GEORGE RICE, BARON DYNEVOR, v. BEAZLEY AND OTHERS. June 8th, 1865.

By a private act of 6 G. 1, c. 29, passed in 1720, for the purpose of confirming a prior settlement of the Shrewsbury estates, those estates were limited to the issue of the settlor as they should succeed to the earldom: and the act contained powers for each successive tenant for life or in tail to charge the lands for portions for younger children, to jointure, and (by s. 10) to lease all or any part of the lands for three lives or twenty-one years, or for any term of years determinable on three lives, so as there should be reserved and made payable by every such lease *the usual and accustomed rents*, boons, and services, with a proviso for re-entry for non-payment.—By an act of 1803, 43 G. 3, c. 40, “for vesting part of the *settled estates* of the Earl of Shrewsbury in trustees for sale,” &c., certain outlying portions of the property (set out in a schedule annexed to the act, and which included all the lands in the township of Oxtou) were conveyed to trustees,—“for ever, freed, released, and discharged, and absolutely acquitted, exempted, and exonerated of and from all and every the uses, trusts, estates, entails, remainders, charges, *powers*, provisoes, limitations, and agreements in and by the settlement and the act of 1720 respectively created, limited, provided, and declared of and concerning the same hereditaments and premises, or any of them, except only such leases as had been theretofore made or granted of the same in pursuance of the powers contained in the said settlement and act,”—in trust to sell, and, on payment of the purchase-money, to convey the same to the purchaser “freed and discharged, and acquitted, exempted, and exonerated as aforesaid,”—the proceeds of such sales to be laid out in the purchase of other lands, to be subject to the same uses, &c., as the lands so sold.—By the 7th section of the act of 1803, it was enacted and declared that, “in the meantime and until the said manors, lands, &c., thereby directed to be sold, should be sold in pursuance of the trusts aforesaid, the same premises respectively should be held, possessed, and enjoyed, and the rents, issues, and profits thereof should be had, received, and taken by and be applied to and for the benefit of such person and persons as would have been entitled thereto, and ought to have held, possessed, or enjoyed and received the same respectively in case that act had not been made.”—No sale took place under the last-mentioned act. But in 1843 another act passed (6 & 7 Vict. c. 28), for vesting *other parts* of the *settled estates* of the Earl of Shrewsbury in trustees for sale. The 1st section of this act, after reciting the act of 6 G. 1, c. 29, and the several settlements anterior thereto, vested in trustees the several estates mentioned in the second schedule annexed thereto in terms the same as those contained in the act of 1803, in trust for sale,—“subject and without prejudice to any lease or leases which may have been made under the power of leasing hereinafter contained.” By s. 3 the moneys arising from the sales were to be invested in the purchase of other lands, to be settled and limited to the same uses as the lands so sold were subject to. The 5th section enacted that, “in the meantime and until such sale or sales as aforesaid, the said manors and other hereditaments hereby vested in trust as aforesaid, or the unsold part or parts thereof for the time being, shall be held and enjoyed, and the rents, issues, and profits thereof be had, received, and taken by and for the benefit of such person or persons as would have been entitled thereto and ought to have held and enjoyed the same in case the same premises had not by this act been so vested in trust as aforesaid.” By s. 6 the power of jointuring in the act of 1720 was repealed, and new powers of jointuring and charging were given by s. 7. The power of leasing created by the 10th section of the act of 1720 was repealed by s. 11: and new powers of leasing were given,—by s. 12, for twenty-one years, by s. 13, for sixty years, by s. 33, for any number of years not exceeding ninety-nine years, in possession, and by s. 40, mining leases,—to “every persons and person to whom the said manors, hereditaments, and premises limited by the settlement and act of 6 G. 1 are by the same settlement and act respectively limited

successively as aforesaid, as and when they shall respectively by virtue of the limitations aforesaid be in the actual possession or entitled to the receipts of the rents and profits of the lands which for the time being shall stand limited and settled" by the said settlement and act of 6 G. 1, "to such of the uses limited by the said settlement and act of 6 G. 1 respectively as aforesaid, as shall then be subsisting or capable of effect."—Held, that a lease made by an Earl of Shrewsbury, after the passing of the act of 1843, of part of the lands which had been vested in trustees for sale by the act of 1803, was a valid lease under the power of leasing contained in the 33rd section of the act of 1843.

This was an action of ejectment brought by the plaintiffs against the defendants to recover possession of certain messuages, lands, and hereditaments, in the [652] township of Oxtou, in the parish of Woodchurch, and county of Chester, the possession whereof the plaintiffs, or one of them claimed to be entitled.

The cause came on for trial before Williams, J., at the Chester Spring Assizes, 1864, when a verdict was found for the plaintiffs, subject to the opinion of the court upon the following case:—

[The first twelve paragraphs of the special case were substantially the same as in *Keightley's case*, ante, p. 606. The case then proceeded as follows:—]

13. In the year 1827, the said Charles Earl of Shrewsbury died without issue male: and, upon his death, the title and the said last-mentioned lands descended to John Earl of Shrewsbury, the lessor named in the lease hereinafter mentioned.

14. By the Shrewsbury Estate Act, 1843 (6 & 7 Vict. c. 28), after reciting amongst other things (as the fact was) that the said John, the then Earl of Shrewsbury, had no issue male, and that he was the heir male of the body of the said George Talbot, and tenant in tail-male in possession of the said settled hereditaments and premises, and that it would be for the benefit of the said John Earl of Shrewsbury and those who might succeed to the settled estates, if certain hereditaments were vested in trustees in trust to sell the same, with a provision for investing the moneys to arise thereby in the purchase of other hereditaments to be settled to the uses and under the restrictions which should be subsisting or capable of taking effect in the settled estates not vested by the act of 1803, in trustees to be sold: and that it would be for the benefit of the said John Earl of Shrewsbury and those succeeding to the settled estates, if the said John Earl of Shrews-[653]-bury and the successive takers of the said settled estates were enabled to lease, and to enter into contracts for leasing, any part or parts of the said settled estates for such terms of years and under such provisions as would induce persons to build upon or improve the same, or to repair the messuages or tenements or other buildings standing thereon, or to build others in lieu thereof, it was enacted, that all and singular the manors or lordships, messuages or farms, lands, tenements, and other hereditaments particularly mentioned and described in the second schedule to the said act of 1843 (which schedule does not include any of the lands in the township of Oxtou), should from and after the passing of the said act be vested in certain persons in the said act mentioned, their heirs and assigns for ever, freed and absolutely acquitted, exempted, exonerated, and discharged from all and every the uses, trusts, estates, entails, remainders, charges, powers, provisoes, limitations, and agreements, in and by the said indenture of 31st October, 1700, the said will of the said Charles Duke of Shrewsbury, the said indenture of the 4th of March, 1718, and the Shrewsbury Estate Act, 1720, respectively created, limited, provided, and declared of and concerning the same manors, messuages, farms, lands, tenements, hereditaments, and premises, or any of them, upon trust with all convenient speed to sell and dispose of all and singular the said manors, &c., so by the said act vested as aforesaid, subject and without prejudice to any lease or leases which might have been made under the power of leasing in the said act thereafter contained.

15. By section 11 of the said act, the aforesaid power of leasing contained in the said act of 6 G. 1, was repealed, and by section 12 new powers of leasing were created.

16. By the 33rd section of the said act it was enacted [654] that it should be lawful for the said John Earl of Shrewsbury during his life, and, after his decease, for all and every other person and persons to whom the said hereditaments and premises limited by the said indenture of the 4th of March, 1718, and the said Shrewsbury Estate Act, 1720, are by the said settlement and act respectively limited successively as aforesaid, as and when they should respectively by virtue of the limita-

tions aforesaid be in the actual possession or entitled to the receipt of the rents and profits of the lands which should for the time being stand limited and settled to such of the uses limited by the said settlement of 1718 and the said act of 1720 respectively as aforesaid, as should then be subsisting or capable of effect, by indenture, to be sealed and delivered by him in the presence of two or more credible witnesses, to demise or lease all or any parts of the same lands, for any term or number of years not exceeding ninety-nine years in possession, to any person whomsoever, upon building leases, so as in such lease should be reserved the best yearly rent that could be reasonably had or gotten for the same, and that such leases should contain certain covenants in the said act particularly mentioned. Section 35 conferred powers to enter into contracts for leases. Section 36 contained a provision that such contracts should contain provisos for re-entry. Section 37 authorized the granting of new leases when possession had been recovered under the power of re-entry. Section 38 gave power to alter, vary, and rescind contracts; and section 39 gave power to confirm leases containing technical errors.

17. By the 40th section of the said act, power is given to Earl John during his life, and, after his decease, for every person to whom the said hereditaments and premises limited by the indenture of the 4th of March, 1718, and the act of 1720, were by the said [655] settlement and act respectively limited, as and when they should respectively, by virtue of the limitations aforesaid, be in the actual possession or entitled to the receipt of the rents and profits of the lands which for the time being should stand limited and settled to such of the uses limited by the said indenture of the 4th of March, 1718, and the said act of 1720 respectively as should then be subsisting or capable of effect, to demise or lease all the mines in, under, or upon any part of the same lands situate in the township of Little Neston, Oxtou, and other places, in the counties of Chester, Salop, and Stafford, in the manner in the said section mentioned.

18. By indenture of lease made the 2nd of February, 1851 (which for the purposes of this case was admitted to have been executed and perfected in conformity with the power contained in the act of 1843, save in so far as herein appears to the contrary), between the Right Hon. John Earl of Shrewsbury of the one part, and James Beazley of the other part, it was witnessed that, under and by virtue of the power and authority in that behalf given and reserved to the said earl by the Shrewsbury Estate Act, 1843, and of every or any other power or authority of enabling the said earl in that behalf, the said earl did demise to the said James Beazley a certain plot of land in the said township of Oxtou, for ninety-nine years from the 2nd of February, 1851.

19. The land comprised in this lease was the land sought to be recovered in this action.

20. On the 9th of November, 1852, the said John Earl of Shrewsbury died without leaving any male issue, and thereupon Bertram Arthur, 17th and last Earl of Shrewsbury, succeeded to the title and estates annexed to it. He died a bachelor on the 10th of August, 1856, and thereupon the issue male of George [656] Talbot, on whom the estates were by the settlement of the Duke of Shrewsbury and by the said act of 1720 settled in tail-male, became extinct; and thereupon (upon failure and in default of issue male of the said Gilbert Earl of Shrewsbury, of the said George Talbot, and of the said John Talbot, in the said act mentioned,) the plaintiff, the present Earl of Shrewsbury, became and now is the person, being issue male of the body of the said John, first Earl of Shrewsbury, to whom the said title, honour, and dignity of Earl of Shrewsbury has, after the decease as aforesaid of the said Gilbert Earl of Shrewsbury, George Talbot, and John Talbot, without issue male of their respective bodies, by virtue of the said letters-patent of creation of the said earldom, descended and come.

21. Copies of the acts of parliament referred to, and a copy of the lease hereinbefore mentioned, accompanied and were to be considered parts of this case.

The question for the consideration of the court in this action was,—whether John Earl of Shrewsbury had power to demise, by the said indenture of lease of the 2nd of February, 1851, the lands therein mentioned, so as to bind the plaintiffs.

If the court should be of opinion in the negative of the above question, the plaintiffs, or such one of them as the court should direct, were or was to have judgment to recover the lands described in the writ in this action, with costs. If the court should be of opinion in the affirmative of the above question, the defendants in the said action were to have judgment in the said action, with costs.

Manisty, Q. C. (with whom was Hannen), for the plaintiffs (*a*). The question in this case is whether [657] the lease granted by John Earl of Shrewsbury on the 2nd of February, 1851, of certain land in the township of Oxtou, in the county of Chester, is a valid lease. The act of parliament upon which the defendants rely in support of that lease is an act of 6 & 7 Viet. c. 28, passed in the year 1843, which had two main objects,—one, the taking out of settlement certain other of the Shrewsbury estates and vesting them in trustees for sale,—the other, to regulate all the settled estates properly so called. The power of leasing which is relied on is that contained in the 33rd section, which enacts that “it shall be lawful for the said John Earl of [658] Shrewsbury during his life, and, after his decease, for all and every other persons and person to whom the said manors, hereditaments, and premises limited by the said indenture of the 4th of March, 1718, and the said act of 6 G. 1, are by the same settlement and act respectively limited successively as aforesaid, as and when they shall respectively by virtue of the limitations aforesaid be in the actual possession or entitled to the receipt of the rents and profits of the lands which for the time being shall stand limited and settled by virtue of or under the said indenture of the 31st of October, 1700, the said will of the said Charles Duke of Shrewsbury, the said indenture of the 4th of March, 1718, and the said act of 6 G. 1, or any of them, or by virtue of or under or by means of any purchase, exchange, or partition, or any act or acts for inclosure, or otherwise howsoever, to such of the uses limited by the said indenture of the 4th of March, 1718, and the said act of 6 G. 1 respectively as aforesaid, as shall then be subsisting or capable of effect,”—“to demise or lease all or any part or parts of the same lands,” except, &c., “for any term or number of years not exceeding ninety-nine years, in possession, to any person or persons whomsoever who shall be willing substantially to improve or repair any of the present or any future houses or buildings upon any part of the same lands,” &c.—“so as in every such lease or demise there be reserved and made payable the best yearly rent that can be reasonably had or gotten for the same, to be made payable half-yearly or oftener; and so that every such lease or demise be made without taking any fine, premium, or foregift, or anything in the nature thereof, for or in respect of the making of the same,”—with the usual covenants and conditions. The 1st section, after reciting the several settlements and the act of 1720, and reciting (amongst other [659] things) the expediency of selling certain portions of the estates described in the second schedule annexed to the act,—that, in consequence of the great increase in the annual value of the settled estates since the passing of the 6 G. 1, it was reasonable that the jointuring power should be increased,—that it would be for the benefit of the said John Earl of Shrewsbury and those succeeding to the settled estates, if the power of leasing contained in the 6 G. 1 were repealed, and the said earl and

(*a*) The points marked for argument on the part of the plaintiffs were as follows:—

“1. That neither of the acts mentioned in the case conferred a power to make the lease in question:

“2. That, by the act of 1803, the lands thereby vested in trustees for sale were entirely taken out of settlement, and the previously existing power to lease them was put an end to:

“3. That the continuance of the previously existing power to lease the lands vested in trustees for sale would be inconsistent with the trust for sale:

“4. That the 1st section of the act of 1803 by implication declares that the only leases which were to be valid were such as had been made before the passing of that act, and therefore that any subsequently made should be void:

“5. That there was not after the passing of the act of 1803 any power to lease any of the lands which by it were vested in trustees for sale:

“6. That the leasing power conferred by the 33rd section of the act of 1843 is confined to the lands for the time being limited and settled to the subsisting uses of the settlement of 1718 and the act of 1720 respectively, and is not exercisable over lands which had been taken out of settlement, and were by the act of 1803 vested in trustees for sale:

“7. That the power conferred by the 33rd section of the act of 1843 was to be exercised only by parties for the time being in possession or receipt of the rents by virtue of the settlement of 1718, and the act of 1720; and that Earl John never was in possession or receipt of rent by virtue of the said settlement and act.”

the successive takers of the settled estates were enabled to grant leases for any term not exceeding twenty-one years, in possession, at rack-rent, or leases for such terms and under such provisions as would induce persons to build upon or improve the same, and also to grant mining leases. It then proceeds to vest all the lands in the second schedule described, in trustees, their heirs and assigns for ever, "freed and absolutely acquitted, exempted, exonerated, and discharged of and from all and every the uses, trusts, estates, entails, remainders, charges, powers, provisoes, limitations, and agreements in and by the said indenture of the 31st of October, 1700, the said will of the said Charles Duke of Shrewsbury, the said indenture of the 4th of March, 1718, and the said act of 6 G. 1 respectively created, limited, provided, and declared of and concerning the same manors," &c., upon trust, with the consent of the person who for the time being shall be in the possession of the settled estates by virtue of the limitations before mentioned, to sell and dispose of the same, "subject and without prejudice to any lease or leases which may have been made under the power of leasing hereinafter contained." Now, the powers of leasing and jointuring had already been repealed, as regarded Oxtou, by the act of 1803. By s. 3, the lands purchased with the proceeds of the sales were to be "conveyed, settled, and [660] assured to the uses, and with, under, and subject to the powers, provisoes, conditions, limitations, restrictions from alienation, declarations, and agreements to, with, under, and subject to which the said manors, &c., hereby vested in trust as aforesaid would have stood limited and settled if the same had not been so vested in trust as aforesaid, or as near thereto as the nature of the estates to be purchased and other circumstances will admit." By s. 5, which is similar to, though stronger in terms than, the 7th section of the act of 1803, it is enacted, "that, in the meantime and until such sale or sales as aforesaid, the said manors and other hereditaments hereby vested in trust as aforesaid, or the unsold part or parts thereof for the time being, shall be held and enjoyed, and the rents, issues, and profits thereof had, received, and taken by and for the benefit of such person or persons as would have been entitled thereto and ought to have held and enjoyed the same in case the same premises had not by this act been so vested in trust as aforesaid." The real question is, whether the 33rd section includes the lands in Oxtou. It is submitted that it does not,—the lands in Oxtou having by the act of 1803 ceased to be part of the "settled estates." The power of leasing created by the act of 1843 was to be exercised in respect only of lands which stood limited to the uses which were subsisting and capable of taking effect under the limitations contained in the settlement of 1718 and the act of 1720: and there is nothing to shew that it was intended to extend that power to Oxtou, which had ceased to be subject to those limitations.

Sir Hugh Cairns (with whom was Kay), for the defendants (*a*). The lease now in question is in all [661] respects a compliance with the provisions contained in the 33rd section of the 6 & 7 Vict. c. 28: it is a building-lease, and contains all the covenants and conditions which are required for the protection of those in remainder to the settled estates. The objects of the statute of 1843 were, to vest in certain trustees the lands described in the second schedule for the purpose of sale, the proceeds to be invested in the purchase of other lands to be settled to the same uses, and to repeal the then-existing power of leasing, and to substitute other powers of leasing in lieu thereof. The main contention on the part of the plaintiffs is, that this newly-created power of leasing applies only to the "settled estates," properly so called, and that Oxtou, having been taken out of settlement and vested in trustees for sale under the act of 1803, was no longer a part of the "settled estates," and so not affected by the leasing power contained in the act of 1843. The township of Oxtou, however, is specifically mentioned in s. 40 as one of the parishes or townships to which the power

(*a*) The points marked for argument on the part of the defendants were as follows:—

"The defendants will contend that John Earl of Shrewsbury had power to demise by the indenture of lease of the 2nd of February, 1851, the lands therein mentioned, so as to bind the plaintiffs, because the power of leasing which was conferred upon him by the Shrewsbury Estate Act, 1843, extended to and included the lands comprised in the said lease, and the exercise of such power vested the legal estate in such lands in the lessees for the term expressed in such lease, or at least until the said property should be sold and conveyed under the trust for sale in that behalf contained in the act of 1803, in the special case mentioned."

of granting "mining leases" is extended: and that in terms precisely the same as those contained in the 33rd section. The special case states that the whole of the township of Oxtou was dealt with by the act of 1803, and vested in trustees for the purpose of sale. There can be no doubt, therefore, as to the [662] intention. The language, in which the estates in question are dealt with in the 1st section of the act of 1843 is as follows:—"Be it enacted that all and singular the manors, messuages, &c., mentioned and described in the second schedule to this act," with all appurtenances, &c., "shall, from and after the passing of this act, be vested in and settled upon, and the same are hereby from henceforth vested in and settled upon, John Wright and E. W. Jerningham, and their heirs, to the use of them the said John Wright and E. W. Jerningham, their heirs and assigns for ever, freed and absolutely acquitted, exempted, exonerated, and discharged of and from all and every the uses, trusts, estates, entails, remainders, charges, powers, provisoes, limitations, and agreements in and by the said indenture of the 31st of October, 1700, the said will of the said Charles Duke of Shrewsbury, the said indenture of the 4th of March, 1718, and the said act of parliament of 6 G. 1, respectively created, limited, provided, and declared of and concerning the same manors or lordships, messuages, farms, lands, tenements, undivided parts or shares, hereditaments, and premises, or any of them: nevertheless, upon the trusts and for the intents and purposes hereinafter expressed and declared of and concerning the same, that is to say, upon trust that they the said John Wright and E. W. Jerningham and the survivor of them, and the heirs of such survivor, or their or his assigns, do and shall with all convenient speed, with the consent and approbation of the said John Earl of Shrewsbury, to be testified by some writing under his hand, and, after his decease, then with the consent of the person who for the time being shall be in the possession of the settled estates by virtue of the limitations before mentioned, &c., sell and dispose of all and every the said manors or lordships, messuages, farms, lands, tenements, undivided parts or [663] shares, hereditaments, and premises so by this act vested as aforesaid, with their rights, members, and appurtenances,—*subject and without prejudice to any lease or leases which may have been made under the power of leasing hereinafter contained.*" The argument on the part of the plaintiffs is, that when the lands were vested in trustees for the purpose of sale, they ceased to be settled estates. That which is said of Oxtou may be said of all the lands vested in the trustees by this act. But it is obvious from the above recital that the act contemplated the leasing of the lands therein mentioned between the time of its passing and their sale. The lands when sold are to be conveyed to the purchasers "freed and absolutely acquitted, exempted, exonerated, and discharged as aforesaid, but *subject and without prejudice as aforesaid*:" that is to say, freed from the old limitations, but subject and without prejudice to any leases which may have been made under the leasing-power thereafter contained. It is difficult to conceive words that could more clearly express that the power of leasing intended to be given is a power to be exercised with reference to the whole of the lands vested in the trustees by that act. The Earl of Shrewsbury for the time being is tenant in tail of the whole of the settled estates. The grasp of the settlement is never relaxed until something else is substituted for it. The 2nd section provides that the moneys to arise from any sales to be made in pursuance of the act shall be paid into the Bank of England, in the name and with the privity of the accountant-general of the high court of Chancery, to be placed to his account there, "Ex parte the purchasers of the *settled estates* of the Right Hon. John Earl of Shrewsbury." This is hardly consistent with the argument of the plaintiffs, that that which is to be sold has already ceased to [664] be part of the "settled estates" of the Shrewsbury family. Then, the 5th section provides that, until sale, the estates are to be enjoyed as before the passing of the act. The 11th section enacts that the power of leasing contained in the 6 G. 1 shall be and the same is thereby repealed. The 12th section gives to the person in possession of the settled estates a power of leasing all or any of the lands (except Alton Towers) for twenty-one years, in possession, at the best and most improved yearly rents that can be reasonably had or gotten for the same, without fine, premium, or foregift, or anything in the nature thereof. The 13th section in like manner gives power to accept surrenders of leases granted under the power of leasing in the 6 G. 1, c. 29, and to grant new leases for sixty years from the date of the surrendered lease, at the same rent, and without fine or premium, &c. Then comes the important section, viz. s. 33,—*"It shall be lawful for the said John Earl of Shrewsbury during his life, and, after his decease, for all and every other persons and*

person to whom the said manors, hereditaments, and premises limited by the said indenture of the 4th of March, 1718, and the said act of 6 G. 1, are by the same settlement and act respectively limited successively as aforesaid, as and when they shall respectively *by virtue of the limitations aforesaid* be in the actual possession or entitled to the receipt of the rents and profits of the lands which for the time being shall stand limited and settled by virtue of or under the said indenture of the 31st of October, 1700, the said will of the said Charles Duke of Shrewsbury, the said indenture of the 4th of March, 1718, and the said act of 6 G. 1, or any of them, or by virtue of or under or by means of any purchase, exchange, or partition, or any act or acts for inclosure, *or otherwise howsoever*, to such of the uses limited by the said indenture of [665] the 4th of March, 1718, and the said act of 6 G. 1, respectively as aforesaid, as shall then be subsisting or capable of taking effect,"—"to demise or lease *all or any part or parts of the same lands*, except such parts of the same lands in the county of Stafford as lie to the north of the river Churnett, together with the buildings thereon, if any, for any term or number of years not exceeding ninety-nine years, in possession, to any person or persons whomsoever who shall be willing substantially to improve or repair any of the present or any future houses or buildings upon any part of the same lands, or to erect or build any house or houses or other buildings in lieu or stead thereof," &c.; "so as in every such lease or demise there be reserved and made payable (except in the cases where pepper-corn rents may be reserved according to the provisions hereinafter,—s. 35,—contained) the best yearly rent that can be reasonably had or gotten for the same, to be made payable half-yearly or oftener; and so that every such lease or demise be made without taking any fine, premium, or foregift, or anything in the nature thereof, for or in respect of making the same." The clause then goes on to provide that the lease shall contain all the usual covenants and conditions, and a proviso for re-entry for breach. The contention on the part of the plaintiffs upon this section has been, that John Earl of Shrewsbury at the time he granted the lease in question was not in possession of Oxton "by virtue of the limitations aforesaid," and that Oxton did not at this time stand limited to the uses of the settlement of 1718 and the act of 6 G. 1. That, however, is a fallacy. John Earl of Shrewsbury *was* in actual possession of Oxton under and by virtue of the limitations aforesaid. Whether he had the legal estate or not is immaterial. He clearly was not a trespasser. The legal estate, no doubt, was in the [666] trustees: but they had no right to the possession or the profits of the land. The fee-simple was in them merely to enable them to make a title to a purchaser. It must always be borne in mind that this act of parliament, which is evidently drawn with much care and forethought, was drawn with the full knowledge that the power of sale contained in the act of 1803 had altogether failed to be carried into effect. Hence the necessity of a power of leasing as a convenient mode of enjoying the property in the meantime.

Manisty, Q. C., in reply. The state of things which existed in 1803 as to Oxton continues to exist at the present time, save inasmuch as it is affected by the act of 1843. Much, therefore, of the argument on the part of the defendants is wholly inapplicable. It is incontrovertible that the lands in Oxton still remain vested in the trustees for sale, freed and exempted from all limitations, charges, and powers, save and except the power of leasing which then existed. Although new powers of leasing are introduced by the act of 1843, these were not intended to affect the trusts created by the former act. These remain intact, and must be executed if the trustees are called upon to execute them. At the time of the passing of the act of 1843, Oxton was not one of the estates which were settled to uses still subsisting and capable of being carried into effect under the indentures of 1718 and the act of 1720: and it was obviously to those only that the act of 1843 was intended to apply. John Earl of Shrewsbury could not at the time of granting this lease be the person entitled to the lands by virtue of the limitations in the settlement. All he was entitled to was, the perception of the rents and profits until the trusts for sale should be carried into effect. This is plain from the 7th section of the act of 1803; [667] and even more so from the 5th section of the act of 1843. By s. 3 of the act of 1843, the premises to be purchased in substitution for those vested in the trustees for sale, were to be "conveyed, settled, and assured to the uses, and with, under, and subject to the powers, provisos, conditions, limitations, restrictions from alienation, declarations, and agreements, to, with, under, and subject to which the said manors or lordships and other hereditaments hereby vested in trust as aforesaid would have stood limited

and settled if the same had not been so vested in trust as aforesaid, or as near thereto as the nature of the estates to be purchased, and other circumstances, will admit." [Montague Smith, J. What effect do you give to the words in the 1st section of the act of 1843, "subject and without prejudice to any lease or leases which may have been made under the power of leasing *hereinafter contained*?"] This is explained by section 13, which I have already adverted to, and which provided for the surrender of leases made under the old leasing power, and the granting of new leases in lieu thereof, which might very well apply to Oxtou. The foundation upon which the argument on the part of the plaintiffs is based, is this, that the trusts created by the act of 1803 remain, and that the language of the leasing power in the act of 1843 is essentially different from that contained in the former act. The 7th section of the act of 1843 regards those persons only as being in possession, who would have been entitled to be in possession by virtue of the limitations before referred to, if that act had not passed. If the power of leasing had been intended to apply to the lands vested in the trustees for sale, it would have been so stated in plain terms: it would not have been left to inference or conjecture. The mention of Oxtou in reference to the power to grant mining leases in s. 40 was palpably an [668] oversight: and no substantial argument can be founded upon it.

ERLE, C. J. I am of opinion that the defendant is entitled to judgment. A lease was granted on the 2nd of February, 1851, by John Earl of Shrewsbury, to the defendant Beazley, pursuant to the power contained in the 33rd section of the Shrewsbury Estate Act, 1843 (6 & 7 Viet. c. 28), of lands in Oxtou, in the county of Chester; and the defendant is entitled to succeed if that is a valid lease.

The history of this property, so far as is material to the present question, is that large estates were settled in 1720 upon the persons who should take the Earldom of Shrewsbury: and Oxtou was included in the estate so settled. In the year 1803, the act of 43 G. 3, c. 40, passed, by which certain portions of that estate were, in the language of the act, exonerated from the uses imposed in 1720, and vested in trustees in trust for sale: and s. 7 of that act enacted, "that, in the meantime and until the said manors, messuages, farms, lands, tenements, hereditaments, and premises thereby directed to be sold, should be sold in pursuance of the trusts aforesaid, the same premises respectively should be held, possessed, and enjoyed, and the rents, issues, and profits thereof should be had, received, and taken by and be applied to and for the benefit of such person and persons as would have been entitled thereto, and ought to have held, possessed, or enjoyed and received the same respectively in case this act had not been made."

It is material to consider what is the right by which the Earl of Shrewsbury for the time being takes the lands in Oxtou which were so exonerated from the uses of the settlement of 1720, and vested in trustees for a given purpose, but, subject to those trusts, to be [669] possessed by him. In my opinion, he has possession of Oxtou by virtue of the uses in the settlement of 1720, in this sense, that he takes it under the statute of 1803; but that statute refers to the settlement of 1720, and requires the person claiming possession of the lands vested in trustees for the purpose of sale under the statute of 1803, to prove that he would have been entitled by virtue of the settlement of 1720 if that statute had not intervened, and that he is now entitled by virtue of the settlement of 1720, subject only to such rights as are interposed by virtue of that statute. If any person were claiming possession of Oxtou as against the Earl of Shrewsbury for the time being, the right of the claimant as against the earl would be determined by referring to the settlement of 1720, and ascertaining who by virtue of that settlement would have been entitled, if the statute of 1803 had not passed. He takes, therefore, in one sense, possession of Oxtou by virtue of the uses of the settlement of 1720. So matters stood until the year 1843, when it was found expedient to sell certain outlying portions of the property, and to invest the proceeds in other lands which should make a more compact estate around the grand mansion-house of the Earls of Shrewsbury: and therefore, as there was a schedule including Oxtou, and including land in various other parishes, in the statute of 1803, so again, for the same purpose, there is a schedule of lands to be sold by virtue of the statute of 1843. That was one purpose of the act of 1843. But it appears to me to be clear, from the perusal of that statute, that the proprietor of these estates obtained from parliament in 1843 several other powers applicable to the whole of the Shrewsbury property, and in particular the leasing power granted by s. 33; and that

leasing power, as I understand the section, extends not only to the lands which [670] are unaffected by the statute of 1803, but also to the lands that were taken out of settlement and vested in trustees for the purpose of sale in 1803, and also to the lands in the parishes mentioned in the schedule to the statute of 1843, which are again exonerated from the uses of the settlement of 1720, and vested in trust for the purpose of sale, and, subject to that trust, to be possessed by the Earls of Shrewsbury. Several parts of this statute relate to the whole of the estates settled in 1720, of which the Earls of Shrewsbury are in possession by virtue of the powers of that settlement, as modified and explained by what I have already said.

I now take s. 33, which enacts that "it shall be lawful for the said John Earl of Shrewsbury during his life, and, after his decease, for all and every other persons and person to whom the said manors, hereditaments, and premises limited by the said indenture of the 4th of March, 1718, and the said act of 6 G. 1, c. 29, are by the same settlement and act respectively limited successively as aforesaid, as and when they shall respectively by virtue of the limitations aforesaid be in the actual possession or entitled to the receipt of the rents and profits of the lands which for the time being shall stand limited and settled by virtue of or under the said indenture of the 31st of October, 1700, the said will of the said Charles Duke of Shrewsbury, the said indenture of the 4th of March, 1718, and the said act of 6 G. 1, c. 29, or any of them, or by virtue of or under or by means of any purchase, exchange, or partition, or any act or acts for inclosure, or otherwise howsoever, to such of the uses limited by the said indenture of the 4th of March, 1718, and the said act of 6 G. 1, c. 29, respectively, as aforesaid, as shall then be subsisting or capable of effect, &c., to demise or lease all or any part or parts of the same lands, except, [671] &c., together with the buildings thereon, if any, for any term or number of years not exceeding ninety-nine years, in possession, to any person or persons whomsoever who shall be willing substantially to improve or repair any of the present or any future houses or buildings upon any part of the same lands, or to erect and build any house or houses or other buildings in lieu or stead thereof or in addition thereto, or to erect and build any house or houses or other buildings on any part of the said lands whereon no buildings shall be then standing," &c. Now, in my opinion the Earl of Shrewsbury is a person in possession of the lands in question by virtue of the limitations in the settlement of 1720. Subject to the power of sale in the trustees, his possession is by virtue of the limitations in the settlement of 1720; and they are subsisting and capable of taking effect, inasmuch as they give him a right to the possession of the property. Then, there is an absolute power in him to demise any part of any land which he is entitled to. I would observe, in reference to the decision we came to yesterday in the case of *The Earl of Shrewsbury v. Knehtley*, ante, p. 606, that the power of leasing here is for the benefit of the remainder-man. It is clogged with a condition that the best rent that can be reasonably had shall be reserved, and without fine, premium, or foregift, &c. It is a totally different power from that of the statute of 1720,—a power to lease at the ancient rent. I think section 33 applies to the whole of the Shrewsbury estates of which the earl shall get possession by virtue of the settlement. The whole context of the statute is to my mind remarkably confirmatory of that construction, because exception is made at different times of the parts which were taken out of settlement in 1803 and in 1843. In the very first section, in the recital of the expediency of selling [672] the outlying portions of the estate in the counties of Oxford, Chester, Salop, and Worcester, and purchasing other estates more contiguous to the main property, it is said that it would be for the benefit of the earl and those who might succeed, if the last-mentioned manors or lordships, messuages, farms, lands, tenements, and other hereditaments were vested in trustees, in trust to sell the same, with a provision for investing the money to arise thereby, under the direction of the court of Chancery, in the purchase of other manors, lands, or hereditaments in the said counties of Oxford, Chester, Salop, Worcester, Stafford, Berks, and Derby, or some or one of them, to be settled to the uses and under the restrictions which should be subsisting or capable of taking effect in the settled estates not vested by the 43 G. 3, c. 40 (the act of 1803), or by that act, in trust for sale. It there contemplates the whole of the Shrewsbury property, excepting out of the term "the said settled estates," the estates vested by the 43 G. 3, or by that act, in trustees to be sold. The reason for that exception would be apparent.

Then we come to the jointuring power. Section 7 gives a larger power of jointuring

than that contained in the 6 G. 1, on all the Shrewsbury estates; but it is to be subject and without prejudice to any lease or leases then subsisting, and to any lease or leases which should have been granted under any of the powers of that act; and then comes an exception, "other than and except the said hereditaments set forth and described in the schedule annexed to the 43 G. 3, c. 40, and the said hereditaments set forth and described in the second schedule annexed to this act." The jointuring power, therefore, will apply to the estates which shall be purchased in lieu of those; and that jointuring power is not to extend to the lands in Oxtou, which are described in the schedule to the act of 1803, [673] nor to the lands described in the second schedule to the act of 1843. They are excepted. The same observation applies to s. 14, which gives a power to grant annuities for younger children, which are to be "charged and chargeable upon all or any part of the said manors and other hereditaments settled for the time being as aforesaid, other than and except the said hereditaments set forth and described in the schedule annexed to the 43 G. 3, c. 40, and the said hereditaments set forth and described in the second schedule to this act." In these two instances there is that express exception.

I now come to the other leasing clauses. Section 12 is the one which applies to leases for twenty-one years. It enacts that "it shall be lawful for the said John Earl of Shrewsbury during his life, and, after his decease, for all and every other persons and person to whom the said manors, hereditaments, and premises limited by the said indenture of the 4th of March, 1718, and the said act of 6 G. 1, c. 29, are by the same settlement and act respectively limited successively as aforesaid, as and when they shall respectively by virtue of the limitations aforesaid be in the actual possession or entitled to the receipt of the rents and profits of the manors and other hereditaments which for the time being shall stand or be limited and settled by virtue of or under the indenture of the 31st of October, 1700, the said will of the said Charles Duke of Shrewsbury, the indenture of the 4th of March, 1718, and the said act of 6 G. 1, or any of them, or by virtue of or under or by means of any purchase, exchange, or partition, or any act or acts for inclosure, or otherwise howsoever, to such of the uses limited by the said indenture of the 4th of March, 1718, and the said act of 6 G. 1, respectively, as aforesaid, as shall then be subsisting or capable of taking effect," &c., "to demise or [674] lease any part or parts of the same manors and other hereditaments (*except the mansion called Alton Towers, in the township of Farley, in the county of Stafford, and the outhouses, gardens, ponds, parks, woods, and premises usually enjoyed with the said mansion,*) to any person or persons, for any term or terms of years absolute not exceeding twenty-one years, to take effect in possession, and not in reversion or by way of future interest," reserving the best rent, and taking no premium, and with the usual covenants for the benefit of the remainder man. The person who drew this act of parliament took remarkable care when he used the words "the said settled estates" in the wide sense I before mentioned, to make exceptions whenever the need was. The exception in that section is not of the lands contained in the schedule to the act of 1803, nor of the lands described in the second schedule to the act of 1843, but it is of the mansion of Alton Towers and the property usually occupied and enjoyed with it.

The 13th section gives the same persons power to accept surrenders of leases granted under the power of leasing contained in the act of 1803 (6 G. 1, c. 29), other than and except the leases specified in the schedule to the act of 1843, and to demise the premises to the person or persons making the surrender for any term of years absolute, in possession, not exceeding the term of sixty years from the date of the surrendered lease, reserving the same rents, without taking any fine, and with a proviso for re-entry for non-payment of rent, &c. That is entirely a separate power, and need not turn upon the argument as to the construction of s. 33.

It appears to me that the whole tenor of this statute,—dealing with "settled estates" in the way I have explained,—is to give the earl for the time being power to demise the lands in Oxtou. The argument [675] that the lands in Oxtou are exonerated from the uses of the settlement of 1720, and not so within section 33, would say that lands described in the second schedule of the act of 1843 are exonerated from those uses. But it is clear to my mind that section 33 gives authority to demise the lands described in that schedule, because the 1st section, creating the power of sale, expressly excepted leases granted under this statute: and I should say, with respect to the argument as to the lands described in the schedule to the act of

1843, that they are just as much exonerated from the uses of the settlement of 1720, as the lands which were described in the schedule to the act of 1803. They stand alike; and it is clear to my mind that the leasing power conferred by section 33 extends to the lands to be sold under the statute of 1843: and I see no objection to its extending also to the lands exonerated from the uses of the settlement of 1720 by the statute of 1803.

Does the statute of Victoria (1843) under "the settled estates" include the lands in Oxton? Section 40 gives to the Earl of Shrewsbury for the time being a power just of the same description, to demise or lease all or any of the mines and minerals, whether opened or otherwise, in, under, or upon all or any part or parts of the same lands situate, amongst other places named, in the township of Oxton. It is said that that township is there mentioned by mistake. But I am very certain that the statute is drawn with intense care and skill, and that it was intended to give the power of granting mining leases in and under the lands in Oxton.

I give this judgment without any doubt or misgiving, seeing that the rights of the remainder man are fully protected. The words of the statute are to my mind perfectly clear and consistent to the effect I [676] have mentioned, when the whole of its provisions are read together.

WILLES, J. I am of the same opinion. I think the conclusion at which the court has arrived is entirely in accordance with what one might expect would have been the provisions made in the year 1843, considering what we know of the history of this property. Down to that period, the only leasing power which existed was that which is to be found in the statute of 6 G. 1, c. 29, which was an act passed under very peculiar circumstances. It was passed for the purpose of securing to a Roman Catholic family, notwithstanding the existence of the penal laws then in force against persons of that persuasion, the possession of their property: and they, as part of the price of the security they thus obtained, agreed that there should be no opening out of the entail created by the statute, except by an heir (an earl) who should be a protestant. So that, until the passing of the act of 1843, it was competent to any Earl of Shrewsbury who might inherit the property under the limitations contained in the statute of 6 G. 1, being a protestant, to cut off the entail, and so to defeat the subsequent remainders. Accordingly, it is not astonishing to find in that act a power of leasing which to a great extent enabled the successive earls to receive by way of fine or foregift upon the renewal of the leases the benefit that might accrue from the improved value of the property: and the power of leasing contained in the statute of 6 G. 1 is one which did allow the persons who successively came into the enjoyment of the property under the limitations contained in that act, upon the failure of the elder branch, to anticipate and enjoy from time to time so much of the corpus of the property as might be represented by the worth of a lease [677] for the period allowed by the 10th section, "at the antient and accustomed rent," which might be, —and in one instance, we have seen, was,—less than the actual value of the property. For that reason, and because of the omission of any reference to the power given by the act of 6 G. 1, or to any new power consistent with the sale of the corpus of the property so as to convert it as it stood in 1803 (at the time of the passing of the 6 G. 1) into money; so that the whole of that money should be laid out in lands to be settled to the same uses as affected the land under the act of 6 G. 1. For that reason it was that the court was compelled to hold in *Keightley's case*, ante, p. 606, that the lease was void; because, to imply a power to make a lease, under the 10th section of the 6 G. 1, of lands which had come under the operation of the act of 1803 (43 G. 3, c. 40), would be to hold that a portion of the corpus of the property which was to be sold by the trustees, and the proceeds of which were to be applied to the uses pointed out by that act, might also be anticipated and acquired by the tenants for life under the power.

So stood matters until the passing of the act of 1843, 7 & 8 Vict. c. 28. The speedy sale which was anticipated in 1803 of the land subject to the act of that year, did not take place. All the property appears to have very greatly improved in value within the ensuing forty years: and in 1843 was passed an act of parliament having considerable effect upon the family estates, and which led to consequences which could not be foreseen. That act appears to me, so far as language can express an intention, to have been intended to deal with the whole of the property, to have been intended, with regard to the powers given by the act, where those powers were not expressly

excepted, to apply to all the property which formed part of the [678] Shrewsbury estates, whether that property might remain strictly subject to the limitations of the act of 6 G. 1, or whether a portion of it might be sold, by reason of its being desirable with a view to consolidate the estates, and the purchase-money be applied to the acquisition of other lands lying more contiguous to the bulk of the property, that the whole estate should be subject to such powers. When one comes to consider the question, one naturally looks to see what these powers are,—whether they are powers which would interfere with the object which the act had in view, if exercised over the lands to be sold by the trustees, or whether they are not powers which would rather advance the object of the act; especially if the same delay took place in proceeding under the act of 1843 as had taken place in the contemplated sales under the act of 1803.

As my Lord has already fully pointed out the principal provisions of the act, I will content myself with referring to them very shortly. The powers of the act of 1843 are not powers which allow the persons in possession of the property from time to time to anticipate any portion of the income: but they are powers which enable them to make leases for the benefit of the persons who shall from time to time enjoy the property, whether they be persons taking under the conjoint effect of the statute of the 6 G. 1 and of the act of 1803, or of the act of 1843; and whether they are the persons who are entitled to the enjoyment of the estates being tenants in tail from time to time, or whether they are persons who had purchased from the trustees under the provisions of the two later acts. To purchasers, of course, it could make no difference, because the fact of the existence of the lease would be taken into account in ascertaining the purchase-money they would be willing [679] to give. To the person enjoying the estate, it might make every difference, because the property might get into a ruinous and dilapidated state by being out of lease, and the value to the person who would be entitled to the property obtained in exchange might thus be greatly deteriorated; whilst the remainder-man or heir-in-tail coming in from time to time would not, for the reason already mentioned, be prejudiced by a lease being made. All the arguments, therefore, founded upon convenience are in favour of the assumption that these powers, even if the language be ambiguous, are powers which apply to the whole of the property. But I am of opinion that the language is not ambiguous. On the contrary, I think it is clear and intelligible; and that, when we come to compare the language used in the section on which our judgment must mainly turn,—the 33rd section of the act of 1843,—with the language used in the other portions of the act, which were meant to apply to estates with the exception of those in question, the language which was sufficiently clear at first becomes still clearer. The 33rd section clearly does apply to all the lands which were within the settlement made by the act of 6 G. 1, whether they were subsequently, for the benefit of the estate temporarily severed from it or not. Now, the 33rd section amounts to this, that the power of leasing is to be exercised by the persons and person who from time to time should enjoy the property by virtue of the settlement of 1718 and the act of 6 G. 1. It then proceeds to deal with lands which may have been obtained by purchase or exchange, &c. But I am satisfied to take the construction which is most favorable to the plaintiffs, and that gives the power of leasing to the person who shall from time to time enjoy by virtue of the settlement made by the act of 6 G. 1. I am clearly of opinion that the person who made this [680] lease was in possession and enjoyment of the property by virtue of the settlement of the Duke and the act of 6 G. 1, and that without that settlement and that act he could not have enjoyed it at all. By reason of that settlement, and by reason of that act, he is the person designated thereby; and the resulting trusts expressed in the 7th section of the act of 1803 and the 5th section of the act of 1843 were resulting trusts in his favour. He was entitled to the temporary enjoyment of the estates until they were sold; and he was entitled to the benefits which could be derived from selling or exchanging them, or from the lands purchased with the proceeds, which came immediately under the settlement of the 6 G. 1. Who else took under that settlement? How otherwise any one could take under that settlement, has not been suggested. Now, as my Lord has pointed out, these words are the very words used in the power of jointuring,—s. 7, and in the power of charging the estate for the benefit of younger children,—s. 14. Those powers, by the express language of the act, are not to affect lands which are vested in trustees under the acts of 1803 and 1843; and those lands are taken out of

the language which is used in s. 33 in describing the person who is to lease and the lands which are to be leased, by words of exception,—“other than and except the hereditaments set forth and described in the schedule annexed to the act of 43 G. 3 (1803), and the hereditaments set forth and described in the second schedule annexed to that act,”—the act of 1843. Therefore you have not only language which in my judgment is sufficient to describe the person who enjoys for the time being, which describes no other person and no other lands, but you have two legislative expositions of those words as including such persons and such lands, but for an express exception, in the same act of parliament. You have [681] then that fortified by the fact that, in one of those powers other than that in which it is used, referring to the language of the 1st section, you have land expressly mentioned which was in the schedule to the act of 1803. So much for the body of the act, and so much for the character of the transaction itself as throwing light upon the language used.

But I apprehend we have another key to the intention of the legislature, because we have a recital very carefully framed, which shews distinctly, as it appears to me, what that intention was,—the recitals in an act of parliament being, as Lord Coke says, “the key to open the meaning of the act,” and which moreover, as he observes, may enlarge though it cannot restrain the enacting part. Passing over the general description of the settled estates, and of the uses, and of the act passed for settling them, 6 G. 1, c. 29, shewing that they were from the beginning spoken of as “the settled estates,” we come to the bottom of p. 725 of the printed copy of the act of 1843, where we find the whole property twice described as “the said settled manors, hereditaments, and premises,” and “the said settled estates.” Next, we find a recital that “it would be for the benefit of the said John Earl of Shrewsbury and those who may succeed to the *said settled estates*, “if the outlying portions of the estate were vested in trustees in trust to sell. Here you have the expression “settled estates,” with an exception, expressed in other words, it is true, but equally an exception with those which have been mentioned with reference to the powers of jointuring and of making charges for younger children; and you have the very language which was argued to have a limited effect in section 33,—“settled to the uses and under the restrictions which shall be subsisting or capable of taking effect in the settled estates not vested by the 43 G. 3, c. 40, or by this [682] act, in trustees, to be sold.” You have, therefore, in the recital an exception on that portion of the act which deals with the estate,—excepting the estates which it is insisted on the part of the plaintiff are excepted here. The recital then goes on to state that, in consequence of the great increase in the annual value of the “settled estates” since the 6 G. 1, it was reasonable that the power of jointuring should be extended. It then proceeds to state that it would be for the benefit of the then earl and those succeeding to the “settled estates,” if the existing power of leasing were repealed, and the earl and the successive takers were enabled to grant leases in possession, at rack-rent, for any term not exceeding twenty-one years, and also building leases and mining leases; and no such exception is introduced as is found in the previous part of the recital, when it was intended to exclude lands part of which was demised by the lease in question.

I must own that these considerations bring demonstration to my mind that the power contained in the 33rd section was well and lawfully exercised by the granting of the lease in question, and consequently that our judgment should be for the defendants.

BYLES, J. I am of the same opinion, but not without some apprehension that I may not have fully understood the case, because, in the view I take of it, I think it a perfectly clear case. The 18th paragraph of the special case states that the lease of the 2nd of February, 1851, was made in conformity with the power contained in the act of 1843, that is, the 6 & 7 Vict. c. 28. It may be observed that this lease is a lease which is perfectly consistent with the power in the trustees to sell the land for the best price that could be got for it, because it was a lease in respect of which [683] no premium or foregift was taken. Now, the argument of Mr. Manisty, if I rightly understood it, was this, that, in the 1st section of the 6 & 7 Vict. c. 28, is a provision analogous to that which was contained in the 43 G. 3, c. 40, that a portion of the lands which were settled by the 6 G. 1, c. 29, and made a part of the Earl of Shrewsbury's estates for ever, viz. the lands in the second schedule, should be vested in the trustees, “freed and absolutely acquitted, exempted, exonerated, and discharged of and from all and every the uses, trusts, estates, entails, remainders, charges, powers,

provisoes, limitations, and agreements in and by the indenture of the 31st of October, 1700, the will of the said Charles Duke of Shrewsbury, the indenture of the 4th of March, 1718, and the said act of 6 G. 1, respectively created, limited, provided, and declared of and concerning the same manors, messuages," &c. Now, it is plain that all that was necessary, in order to give effect to that provision, was this, that the trustees acting under that power of sale should be able to make a good title to a purchaser, and that, so far as the title of a purchaser is concerned, and so far as is not otherwise provided by the act, all the uses, trusts, estates, entails, remainders, charges, powers, provisos, limitations, and agreements before mentioned should be wiped out. But, what is to be done in the meantime? We were told in the last case that, under a somewhat similar power contained in the former act, the lands had remained unsold for forty years. This fact was known to the person who drew this act of parliament: and one would suppose that he must have contemplated that something would have been done in the meantime. I should have imagined, without any words to that effect, the beneficial interest in the meantime would remain in the person to whom the estate was limited. But that is not left to conjecture, [684] because s. 5 of this act, which nearly follows the words of the 7th section of the former act, in express terms provides that, "in the meantime and until such sale or sales as aforesaid, the said manors and other hereditaments thereby vested in trust as aforesaid, or the unsold part or parts thereof for the time being, shall be held and enjoyed, and the rents, issues, and profits thereof be had, received, and taken by and for the benefit of such person or persons as would have been entitled thereto and ought to have held and enjoyed the same in case the same premises had not by this act been so vested in trust as aforesaid." Now, how did John Earl of Shrewsbury and the other owners of this estate hold, except by virtue of this 5th section? That section gives them a beneficial interest: probably also it may give them a legal interest: but it is immaterial to consider that here. The estate is by the 1st section given to the trustees to sell "subject and without prejudice to any lease or leases which may have been made under the power of leasing hereinafter contained." I read those words "which may have been made," as if they had been, "which shall have been made,"—that is, any leases which should thereafter be made under the power of leasing thereinafter contained. Those persons, therefore, who are to enjoy in the meantime under the limitations in the statute of 6 G. 1 have a leasing power, which is contained in the 33rd section. Mr. Manisty says that the persons who are to exercise that power under s. 33 are not entitled "under and by virtue of the limitations aforesaid." It seems to me, though not without some doubt whether I fully understand the question,—for the short reason I have given, that they are persons who are so entitled.

MONTAGUE SMITH, J. I am of the same opinion. I [685] think the words of the 33rd section of the 6 & 7 Vict. c. 28, construed by the surrounding circumstances and by the language of other parts of the act, included the lands vested in the trustees for sale. The 1st section, in addition to the inference to be derived from the preamble, to which my Brother Willes has so fully referred, shews beyond all doubt an intention that the lands vested in the trustees for sale should be subject to some leasing powers. The trustees are to sell "subject and without prejudice to any lease or leases which may have been made under the power of leasing hereinafter contained." If the lands vested in trustees to be sold under this act are subject to the leasing power, what reason is there for supposing that the lands in Oxtou were not subject to the leasing power also? Mr. Manisty contends that those words would be satisfied by referring them to the power given by the 13th section of the 6 & 7 Vict. c. 28, which is a power to John Earl of Shrewsbury, or any other person to whom the lands limited by the indenture of the 4th of March, 1718, and the act of 6 G. 1, c. 29, are by the same settlement and act respectively limited as aforesaid, as and when they shall respectively "by virtue of the limitations aforesaid" be in the actual possession, &c., to accept surrenders of leases granted under the power of leasing in the 6 G. 1, c. 29, and to grant new leases for sixty years, reserving the antient rents. But, why should it be so limited? That, taken by itself, is not aptly described as a leasing power: it is a leasing power and something more. It is said that the language of the 13th section differs from that of the 12th section, which gives a power of leasing for twenty-one years. The words of that section are precisely the same as those of the 33rd section. Then, the 13th section, instead of repeating all the words of the 12th section, refers

to the settlement in this way, "by virtue of the limita-[686]-tions aforesaid," those limitations being described at length in the section immediately preceding. There are four leasing powers in this act,—a power to lease for twenty-one years (s. 12) at the best or most improved yearly rent, without taking any fine, premium, or foregift,—a power to accept surrenders of leases granted under the power of leasing in the 6 G. 1, c. 29, and to grant new leases for sixty years (s. 13), at the same rent as was reserved by the surrendered lease,—a power to grant building-leases for ninety-nine years (s. 33),—and a power in s. 40 to grant mining leases. Why should s. 13 be referred to alone as the clause to which the exception in s. 1 points? Referring to the surrounding circumstances, which we are at liberty to do in construing an act of parliament, there is every reason to suppose that it was the intention to give this power. It certainly was most expedient so to do; for, it might well be supposed that a considerable period would probably elapse before sales could be effected. Indeed, there had been an interval of 40 years since the previous act, and the Oxtou property still remained undisposed of. No doubt, the inconvenience of a want of power of leasing those estates while remaining unsold had been felt.

For these reasons, it appears to me that, subject to the exception already referred to, there is in this act a power of leasing all the lands, whether vested in trustees for sale or not. The framers of the act took care that, in the leases to be granted, there should be no provision to deteriorate the inheritance, as there was under the old power which we held not to apply to the estates vested in trustees for sale under the act of 1803. On the whole, I have come to the clear conclusion that the defendants are entitled to judgment.

WILLES, J. I would add that the 13th section does [687] not seem to me to present any difficulty. It appears to me that that section was intended to apply to an objection that might be made that the leases described in and authorized by s. 13 were leases in reversion. It was not to give a power, but to remove an objection.

Judgment for the defendants.

SHUTTLEWORTH v. LE FLEMING AND OTHERS. July 10th, 1865.

[S. C. 34 L. J. C. P. 309; 11 Jur. N. S. 841; 14 W. R. 13. See *Mercer v. Denne*, [1905] 2 Ch. 586.]

The statute 2 & 3 W. 4, c. 71, does not apply to easements or profits à prendre in gross, e.g. to a claim of "a free-fishery" in the waters of another.

The declaration stated that the defendants broke and entered a certain close of the plaintiff, being part of certain lands called the Low Bank Ground Estate, and landed and brought into and upon the said close certain fishing-nets, and thereby and therewith damaged the grass of the plaintiff there then growing: Claim, 20l.

Fifth plea,—that, at the said time when, &c., the said close adjoined and was, and the same now is, part of the shore of the said inland lake or water called Coniston or Thurston Water, and that the defendant Hughes Le Fleming and all his ancestors whose heir he is, for *sixty years* before this suit enjoyed as of right and without interruption a *free-fishery* in the said water, with the right of landing and bringing their fishing-nets into and upon any part of the shore of the said water, as to the said free-fishery appertaining: and that the defendant Hughes Le Fleming, and the other defendants as his servants and by his command, did what is complained of in the lawful and reasonable use and exercise of the said right, and not otherwise.

[688] The sixth plea was the same as the fifth, substituting "thirty years" for "sixty years."

Mellish, Q. C., for the plaintiff (a). The question is whether a right in gross can

(a) The points marked for argument on the part of the plaintiff were as follows:—

"1. That the statute 2 & 3 W. 4, c. 71, does not apply to easements or profits à prendre in gross: *Welcome v. Upton*, 6 M. & W. 536; *Bailey v. Stephens*, 12 C. B. (N. S.) 91:

"2. That a free-fishery is not a profit à prendre, not being an incorporeal hereditament:

"3. That the right of landing and bringing nets upon any part of other men's

be claimed under the Prescription Act, 2 & 3 W. 4, c. 71. How can actual user by A. prove a right in his ancestors? [Willes, J. In *Ackroyd v. Smith*, 10 C. B. 164, this court held that a right of way could not be claimed in gross.] If this had been a claim of a several fishery, it would have been clearly bad: for, it cannot be prescribed for. The statute applies only to cases where there is a servient and a dominant tenement. The 1st section recites that, "whereas the expression 'time immemorial, or time whereof the memory of man runneth not to the contrary,' is now by the law of England in many cases considered to include and denote the whole period of time from the reign of King Richard the First, whereby the title to matters that have been long enjoyed is sometimes defeated by shewing the commencement of such enjoyment, which is in many [689] cases productive of inconvenience and injustice:" it then proceeds to enact "that no claim which may be lawfully made at the common law, by custom, prescription, or grant, to any right of common or other profit or benefit to be taken and enjoyed from or upon any land of our sovereign lord the King, his heirs or successors, or of any ecclesiastical or lay person, or body corporate, except such matters and things as are herein specially provided for, and except tithes, rent, and services, shall, where such right, profit, or benefit shall have been actually taken and enjoyed by any person claiming right thereto, without interruption for the full period of thirty years, be defeated or destroyed by shewing only that such right, profit, or benefit was first taken or enjoyed at any time prior to such period of thirty years: but, nevertheless, such claim may be defeated in any other way by which the same is now liable to be defeated: and, when such right, profit, or benefit shall have been so taken and enjoyed as aforesaid for the full period of sixty years, the right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was taken and enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing." The 2nd section relates to claims of rights of way or other easement, or to any watercourse, or the use of any water: and the 3rd to claims to the use of light. The 4th section enacts "that each of the respective periods of years hereinbefore mentioned shall be deemed and taken to be the period next before some suit or action wherein the claim or matter to which such period may relate shall have been or shall be brought into question, and that no act or other matter shall be deemed to be an interruption within the meaning of this statute, unless the same shall have been or shall be submitted to or acquiesced in for one year after the party interrupted [690] shall have had or shall have notice thereof, and of the person making or authorizing the same to be made." The 5th section is material: it enacts "that, in all actions upon the case and other pleadings wherein the party claiming may now allege his right generally, without averring the existence of such right from time immemorial, such general allegation shall still be deemed sufficient: and, if the same shall be denied, all and every the matters in this act mentioned and provided, which shall be applicable to the case, shall be admissible in evidence to sustain or rebut such allegation: and that, in all pleadings to actions of trespass, and in all other pleadings wherein before the passing of this act it would have been necessary to allege the right to have existed from time immemorial, it shall be sufficient to allege the enjoyment thereof as of right by the occupiers of the tenement in respect whereof the same is claimed for and during such of the periods mentioned in this act as may be applicable to the case, and without claiming in the name or right of the owner of the fee, as is now usually done: and, if the other party shall intend to rely on any proviso, exception, incapacity, disability, contract, agreement, or other matter hereinbefore mentioned, or on any cause or matter of fact or of law not inconsistent with the simple fact of enjoyment, the same shall be specially alleged and set forth in answer to the allegation of the party claiming, and shall not be received in evidence on any general traverse or denial of such allegation." That throws considerable light upon what was intended by the 1st section. The claim is

lands adjoining the water, cannot be deemed an easement or incident annexed to a right of free-fishery: for that an easement, as such, can only be claimed as accessory to corporeal property:

"4. That the fifth and sixth pleas, although apparently pleaded with reference to the statute 2 & 3 W. 4, c. 71, are not such pleas as are warranted by that statute, as they allege enjoyment for the prescribed periods, not by occupiers, but by the defendant and his ancestors, and yet do not claim by prescription or grant."

to be made in the right of the occupier, instead of in that of the owner of the fee. [Byles, J. Section 1 applies to all rights which may be claimed either by custom, by prescription, or by grant.] This clearly is not a case in which the judge would be war-[691]-ranted in telling the jury that they might presume from the mere fact of user a grant to a man and his heirs. If this could be, a man's estate might be burthened with claims of which he could have no notice. [Byles, J. The real question is, whether the statute is applicable to such a claim.] In *Welcome v. Upton*, 6 M. & W. 536, where the question was, whether a right of pasturage in gross was within the 5th section of the Prescription Act, Parke, B., said: "If the only question in this case had been whether a right of common in gross be within the statute 2 & 3 W. 4, c. 71, s. 5, we should probably have granted a rule for the purpose of giving that question further consideration, although we might be disposed to think that the present case is within the equity of the statute. But, if the first plea be good, the determination of that question becomes immaterial. The first plea claims a prescriptive right in Thomas Brereton and his ancestors, and in his and their heirs and assigns, of sole and several pasturage in the close in question. That plea is good. It is laid down in Co. Litt. 122, that a party may prescribe to take the sole and several herbage; and, although this was doubted in *North v. Cox*, 1 Lev. 253, it was afterwards established as law by the cases of *Hoskins v. Robbins*, Pollexf. 13, and *Potter v. North*, 1 Ventr. 383. The word 'assigns' in the plea may be rejected as insensible." [Byles, J. In Com. Dig. *Piscary* (A.), it is said "A piscary is the liberty of fishing in the water of another: and this liberty may be claimed by grant or prescription." The real question is, whether the statute is applicable to such a claim.] The matter was a good deal considered by this court in *Bailey v. Stephens*, 12 C. B. (N. S.) 91, where it was held that a claim of a prescriptive right in the owners or occupiers of close A. to enter close B. (belonging to a third person), and to cut down and carry away and [692] convert to their own use all the trees and wood growing and being thereon, "as to the said close A. appertaining" was void, as being too large. Willes, J., there says: "There is no doubt an easement in gross could not be claimed by an occupier under the Prescription Act, because under the Prescription Act, as has been pointed out already, the claim is by custom, prescription, or grant; and there is no doubt that a right could not be acquired under that act, by twenty, thirty, or sixty years' enjoyment, according as it might be, whether an easement or a profit à prendre, except it was capable of being annexed to land within the rule I have mentioned. But the question has arisen whether it is not possible to plead a right in gross in the manner pointed out by the subsequent section, not a section giving the right, but a section giving the mode of pleading. It is perfectly clear to my mind that it cannot be so pleaded, without shewing something more than that the person is in possession as occupier; it must be shewn that he is heir or assignee of the person to whom the right in gross has been granted. The mere fact of his being in possession does not shew that. Therefore, notwithstanding the learned discussions that have taken place as to whether the right of an easement in gross may be pleaded in the form given under the Prescription Act, it is quite clear to my mind that nothing has passed affecting the right of prescription, and the fourth and fifth pleas are invalid." [Montague Smith, J. This plea is not in the form given by s. 5 of the Prescription Act. Willes, J. Nor is it within s. 2 "by some person claiming a right thereto."] Suppose the enjoyment had been by one man alone over the whole period of thirty years,—how could that prove that he and his ancestors had it? If a man has a right of this kind at all, it is a right for ever. A grant may be for life, or for years. If an-[693]-nexed to the land, it passes with the land. The Prescription Act intended that the right should be supported by simple user: if gained at all, it is gained for ever. When the statute in s. 1 provides, that, "where such right, profit, or benefit shall have been actually taken and enjoyed by any person claiming right thereto, without interruption," &c., coupling that with s. 5, it must mean, by any occupier of a dominant tenement who enjoys it as annexed to that tenement. In *Mounsey v. Ismay*, 34 Law J., Exch. 52, a claim, by custom, for all the freemen and citizens of a neighbouring city to run horse-races over certain land on Ascension Day in every year, was held not to be a claim to an easement within s. 2. The same court had previously (1 Hurlst. & Colt, 729) held such a plea, alleging it as a custom at common law, to be good: but, on the last occasion, the claim of twenty or forty years was held to be bad, because that was a case where there was no dominant tenement.

[Montague Smith, J. That is putting a great limitation on the word custom.] Martin, B., in delivering the considered judgment of the court, in 34 Law J., Exch. 54, says: "The occasion of the enactment of the Prescription Act is well known. It had been long established that the enjoyment of an easement as of right for twenty years was practically conclusive of a right from the reign of Richard the First, or, in other words, of a right by prescription, except proof was given of an impossibility of the existence of a right from that period: and a very common mode of defeating such a right was, proof of a unity of possession since the time of legal memory. To meet this, the grant by lost deed was invented: but, in progress of time, a difficulty arose in requiring a jury to find upon their oaths that a deed had been executed which every one knew never existed: hence the Prescription Act. The 1st section of the act relates to [694] profits à prendre, and the respective periods therein mentioned are thirty and sixty years. The present case is not alleged to be within it. The pleas are all grounded on the 2nd, which enacts that no claim which may be lawfully made at common law by custom, prescription, or grant, to any way or other easement, or to any watercourse, or to the use of any water, to be enjoyed upon any land, &c., when such way or other matter shall have been actually enjoyed by any person claiming right thereto without interruption for twenty years, shall be defeated or destroyed by shewing only that such way or other matter was first enjoyed at any time prior to such period of twenty years: and, when such way or other matter should have been so enjoyed for the period of forty years, the right thereto should be deemed absolute and indefeasible, unless it should appear that it was enjoyed by a consent or agreement by deed or writing. The question which has been argued before us, and which is the true one, is whether a custom for the freemen or citizens of Carlisle, upon Ascension Day, to enter upon another man's land for the purpose of holding horse-races there, is an easement within the 2nd section. To be so, it must be within the words custom, prescription, or grant, to a way or other easement, or to a watercourse, or to the use of any water, to be enjoyed upon land of another: and we think it is not. In the first place, we do not think that this custom is an easement at all. One of the earliest definitions of an easement with which we are acquainted, is in the *Termes de la Ley*, and it is 'a privilege that one neighbour hath of another by writing or prescription, without profit: as a way or sink through his land.' In this definition custom is not mentioned: prescription is: and it therefore seems to point to a privilege belonging to an individual, not a custom, which appertains to many as a class. Again, [695] in Mr. Gale's book, p. 5, an easement is defined: a very great number of authorities are collected, and it is stated in the most explicit terms, that, to constitute an easement, there must be two tenements, a dominant one to which the right belongs, and a servient one upon which the obligation is imposed." If that be the true construction of s. 2, under the 1st section you would confine the custom to the case of two tenements, because s. 5 equally applies to both sections. "We further think," continues the learned Baron, "that the 2nd section itself points to a right belonging to an individual in respect of his land, not to a class, such as freemen or citizens claiming a right in gross wholly irrespective of land; for, to obtain the benefit conferred by the 2nd section, it must be enjoyed by a person claiming right thereto for the full period of twenty years or forty years. We are not aware of any case or expression of opinion by any judge contrary to this: but the 5th section of the act has been relied on as establishing it. This section relates to pleadings, and enacts that, in all pleadings to actions of trespass, and other pleadings wherein before the passing of the act it would have been necessary to allege the right to have existed from time immemorial, it should be sufficient to allege the enjoyment thereof as of right by the occupier of a tenement in respect whereof the same is claimed, &c. It has been said that this shews that an easement within the protection of the statute must be an easement belonging to a dominant tenement: we think it affords an argument in illustration as to what the legislature contemplated: but, after what fell from this court in *Welcome v. Upton*, 5 M. & W. 398, and the same case 6 M. & W. 536, and a note of the late Mr. Henry Willes, in p. 152 of the edition of Gale on Easements edited by him, we are not prepared to say the statute may not extend to [696] easements in gross: although it is to be observed that all which Lord Wensleydale says in the last report of the case (6 M. & W. 542, 3) is, 'We might be disposed to think that the present case (an alleged easement in gross) is within the equity of the statute;' and he goes on to add that the question was then immaterial. But, however this may be,

we are of opinion that, to bring the right within the term 'easement' in the 2nd section, it must be one analogous to that of a right of way which precedes it, and a right of water-course which follows it, and must be a right of utility and benefit, and not one of mere recreation and amusement. In our opinion, therefore, the present alleged right is not within the language or meaning of the Prescription Act; and we are satisfied that it was never in the contemplation of Lord Tenterden, who framed it (see per Lord Wensleydale, 5 M. & W. 404), to include within the act such customary rights as entering land to enjoy rural sports, as in *Millechamp v. Johnson*, Willes, 205, n., or to dance upon a green, as in *Abbott v. Weekly*, 1 Lev. 176, by analogy to which we held this alleged customary right to run horse-races a lawful one at common law (a). What we think he contemplated were incorporeal rights incident to and annexed to property for its more beneficial and profitable enjoyment, and not customs for mere pleasure." [Erle, C. J. A parish may have a custom: but a parish cannot prescribe.] As far as it goes, that case puts some limitation on the 2nd section of the act. [Willes, J. Has the case of the pew been decided?] As that must be claimed as appurtenant to a house, the case would not decide this. Then, assuming that a right in gross may be claimed under s. 2, does it apply to a claim of a free fishery? [Willes, J. The question is whether such a right could be established by user.] What does the [697] plea mean by a free fishery? Does it mean an exclusive right to take fish in the water in question, or a right in common with others? In a very erudite opinion delivered by Willes, J., as the unanimous opinion of the judges in the case of *Malcolmson v. O'Dea*, 10 House of Lords Cases, 593, 618, that learned judge says: "Some discussion took place during the argument as to the proper name of such a fishery, whether it ought not to have been called in the pleadings (following Blackstone) a 'free' instead of a 'several' fishery. This is more of the confusion which the ambiguous use of the word 'free' has occasioned from a period as early as that of the Year Book of P. 7 H. 7, fo. 13, down to the case of *Holford v. Bailey*, 13 Q. B. 426, where it was clearly shewn that the only substantial distinction is between an exclusive right of fishery, usually called 'common of fishery,' sometimes 'free' (used as in free port). The fishery in this case is sufficiently described as a 'several' fishery, which means an exclusive right to fish in a given place, either with or without the property in the soil." In which sense is the word "free-fishery" used in this plea? If as in free-warren, the plea is clearly bad: it could not be intended to claim it by thirty years' user. Free-fishery and free-warren import an exclusive right, for the invasion of which a man may maintain trespass, even though he has no interest in the land itself. [Willes, J. "Free-fishery" *prima facie* means *several* fishery.] In Hargreave & Butler's note to Co. Litt. 122 a., it is said: "According to this passage, ownership of the soil is not necessarily included in a *several* fishery, and *common of fishery* and *free fishery* are the same thing. But one whose works will be admired as long as a good taste for literary compositions, or gratitude for the pleasure and instruction derived from them, shall have any influence, gives a very opposite [698] explanation: for, according to him, ownership of soil is *essential* to a *several* fishery; and a *free* fishery differs both from *several* fishery and *common of fishery*; from the former, by being confined to a *public* river, and not *necessarily* comprehending the soil: from the latter, by being *exclusive*: 2 Bl. Comm. 8th edit. 39. But we doubt whether this distinction may not be in a great degree questionable. 1. In respect to a *several* fishery, where is the inconsistency in granting the *sole* right of fishing, with a reservation of the soil and its other profits? Bracton expressly takes notice of such a grant; for, his words are, that one may *servitutem imponere fundo suo quod quis possit piscari cum eo, et ita in communi, vel quod alius per se ex toto*. Bract. fo. 208 b. There are also numerous authorities for it; the old books of entries agreeing that one may prescribe for a *several* fishery against the owner of the soil: to which should be added the three cases of Elizabeth cited by Lord Coke: see Lib. Intrat. 162 b., 163 a.; Rast. Ent. 597 b., &c. Nor do we understand why a *several* piscary should not exist without the soil, as well as a *several* pasture, as to which latter we have already (*suprà*, note 6) shewn the doctrine to be settled. The chief reasons which occur against Lord Coke seem to be these. Several writs never applicable except to the soil lie for piscary; such as a *præcipe quod reddat*, *monstraverunt de rationabilibus devisis*, and trespass, which latter writ is particularly insisted upon by

Lord Chief Justice Holt: Dav. 55 b.; Hugh. Comm. Orig. Wr. 11 W.; Jo. 440; 1 Ventr. 122; 2 Salk. 637; Skinn. 677. *Suum liberum tenementum* is a good plea to trespass for fishing in a *several piscary*: 17 E. 4, fo. 6.; 18 E. 4, fo. 4; 10 H. 7, fo. 24, 26, 28. The soil will pass, as it is said, by the grant of a piscary: Plowd. 144. But all these objections may be repelled. The writs re-[699] *lied* on will not always lie for a piscary. Thus, if a *præcipe quod reddat* is brought of a piscary in the water of another person, the writ is bad, and a *quod permittat* is the proper remedy: Fitz. Abr. *Brufe*, 861; Fitz. Nat. Brev. 23 l., and note (b) of the 4to edit. Besides, in the cases of actions for trespass in a *several piscary*, or at least in some of them, the writ seems in effect to state a *several piscary* in the plaintiff's own soil, which therefore proves nothing as to the sense of *several piscary*, without further explanation: Reg. Br. Orig. 95 b.; Carth. 285; Skinn. 677. The plea *liberum tenementum* may be replied to by prescribing for a *several piscary*: see the books before cited, as to such a prescription. Though the grant of a piscary *generally* may perhaps pass the soil, yet it will not if there are any words to denote a different intention: as, where one seised of a river grants a *several piscary* in it, which is the case put by Lord Coke in another place: and much less will the soil pass when there is an express reservation of it: ante, 4 b., and n. (2) there. Hence, as it should seem, the arguments are short of the purpose: for, at the utmost, they only prove that a *several piscary* is presumed to comprehend the soil, till the contrary appears, which is perfectly consistent with Lord Coke's position, that they may be in different persons, and indeed appears to us as the true doctrine on the subject. 2. Both parts of the description of a *free fishery* seem disputable. Though, for the sake of distinction, it might be more convenient to appropriate *free fishery* to the franchise of fishing in *public rivers* by derivation from the Crown, and, though in other countries it may be so considered, yet, from the language of our books, it seems as if our law practice had extended this kind of fishery to *all streams*, whether *private* or *public*: neither the register nor other books professing any discrimination: Rol. 95 b.; Fitz. N. B. [700] 88 (g); Fitz. Abr. *Assise*, 422; 4 E. 4, fo. 28; 17 E. 4, fo. 6 b., 7 a.; 7 H. 7, fo. 13 b.; Cro. Car. 554; 1 Ventr. 122; 3 Mod. 97; Carth. 285; Skinn. 677. Again, it is true that, in one case, the court held *free fishery* to import an *exclusive* right equally with *several piscary*, chiefly relying on the writs in the Reg. 95 b., and the 43 E. 3, fo. 24. But then this was only the opinion of two judges against one, who strenuously insisted that the word *libera* ex vi termini implied *common*, and that many judgments and precedents were founded on Lord Coke's so construing it: 2 Salk. 637; Carth. 285. That the dissenting judge was not wholly unwarranted in the latter part of his assertion, appears from two determinations a little before the case in question: see *Upton v. Dawkin*, 3 Mod. 97, and *Peake v. Tucker*, cited in Carth. 286, in marg. We may add to this the three cases cited by Lord Coke as of his own time: and that there are passages in other books which favour his distinction: see Cro. Car. 554; 17 E. 4, fo. 6 b., 7 a.; 7 H. 7, fo. 13 b." [Willes, J. A free-fishery, like free-warren, could only be granted by the Crown before Magna Charta. It has been held that a several fishery could be granted in a river not tidal; but that is called "separalis." When common of fishery is described, it is usually called *free*, by reason of everybody having a right to go there. I on this ground refused at Chambers to make the defendant state his claim with more precision.] Is a several fishery a profit à prendre within the meaning of the Prescription Act? It imports an ownership in the soil, and therefore cannot be claimed as a profit à prendre: it is an interest, and not a mere easement: Com. Dig. *Piscary* (A.). By profit à prendre in the Prescription Act, is meant a profit or benefit which is to be enjoyed in common with others. For this *Mounsey v. Ismay*, 34 Law J., Exch. 52, is a distinct authority.

[701] Manisty, Q. C. (with whom was J. A. Russell), *contra* (a). The right set up by the pleas is one which is necessarily incident to the right of fishing: the right to fish could hardly exist apart from the right to land nets on the banks of the water. *Primâ facie* the owner of the banks would be the owner of the soil of the lake adjoining. It may be that at some former time the owner granted to A. B., his heirs and assigns, a right of fishing in the lake, with the right of landing nets on the soil of the banks,

(a) The point marked for argument on the part of the defendant was as follows:—

"That the right claimed in the fifth and sixth pleas is one which may be well claimed and pleaded under the statute 2 & 3 W. 4, c. 71."

be it several or otherwise. It is a right which is recognized by the law, and which is assignable at law. Why should not such a right be gained by the Prescription Act? That it is a profit cannot be doubted. It is not like a mere personal licence to fish. Thirty years' enjoyment is enough to establish the right under s. 1. [Willes, J. Proof of thirty years' enjoyment of land is evidence that the party is owner of the fee: but would it prove that he is in possession of an inheritable estate?] The rule of law is well explained in *Bailey v. Stephens*, 12 C. B. (N. S.) 91, where the right claimed was very analogous to that claimed here. In *Wickham v. Hawker*, 7 M. & W. 63, it was held that the grant to a person, *his heirs and assigns*, of "free liberty, with servants or otherwise, to come into and upon lands, and there to hawk, hunt, fish, and fowl," is a grant of a *licence of profit*, and not of a mere *personal licence of pleasure*; and therefore a profit à prendre within the Prescription Act, 2 & 3 W. 4, c. 71, s. 2. Parke, B., in giving judgment, says: "The liberty of *fowling* has been decided, in one case, to be a profit à prendre, and may be prescribed for as such: *Davies's case*, 3 Mod. 246. [702] The liberty to hawk is one species of *ancupium* (Manwood, c. 18, s. 10, p. 117), the taking of birds by hawks, and seems to follow the same rule. The liberty of fishing appears to be of the same nature; it implies that the person who takes the fish takes for his own benefit: it is common of fishing." [Bytes, J. That is no authority for the position that such a right enjoyed in gross is within the statute. [Willes, J. A right of several fishery may be appurtenant to a manor.] In *Gray v. Boul*, 2 Brod. & B. 667, 5 J. B. Moore, 527, it was held that, where the lessees of a fishery had publicly landed their nets on the shore at A. for more than twenty years, and had, at various times, dressed and improved the landing-place (both the fishery and the landing-place having originally belonged to one person, but no evidence being offered to shew that he, or those who under him owned the shore at A., knew of the landing nets by the lessees of the fishery),—it was properly left to the jury to presume a grant of the right of landing to the lessees of the fishery by some former owner of the shore at A. *Welcome v. Upton*, 6 M. & W. 536, is a case of the same sort. [Willes, J. The same case in 5 M. & W. 398, is more to the purpose. There, a plea that, before and at, &c., the defendant and all his ancestors, whose heir he is, from time whereof the memory of man is not to the contrary have had, and been used and accustomed to have, and of right ought to have had, and the defendant still of right ought to have, for himself and themselves, the sole and several herbage and pasturage of and in divers, to wit, 217 acres, &c., of a certain open field, &c.,—was held to be disproved by shewing a grant to the defendant's ancestor eighty-one years before, for a valuable consideration: and it was further held that such a plea is not aided by the statute 2 & 3 W. 4, c. 71, s. 1. In delivering judgment, Parke, B., says: "The defendant ought [703] to have pleaded this right in a different mode. It has been urged in argument that this is not, strictly speaking, a claim of a profit à prendre, but an interest in the land itself: if that view is correct, the case would not fall within the 2 & 3 W. 4, c. 71. But, whether that be so or not, there is no question that the plea is not proved: it claims an immemorial right in Billingsley; but the evidence at the trial was of a conveyance in 1755 from Brereton to an ancestor of Billingsley. The only question upon which there seems to be any doubt is this: whether, supposing it to be a profit to be taken out of the land, the defendant can plead in the old form, claiming the right from time immemorial; because the 1st section of the 2 & 3 W. 4, c. 71, prevents such right, when enjoyed for thirty years, from being defeated by shewing that it first existed prior to that time. I think, however, that, under this section, the proper mode is to plead the enjoyment of the right for the periods therein mentioned. It is true that the 5th section does not appear to be worded so as to embrace the present case; and Lord Tenterden, who framed the statute, seems to have drawn that section under the idea that a profit à prendre could not be claimed except as appendant or appurtenant. I think, however, that, by the general rules of law, the claim ought to be pleaded according to the fact. I am not sure that by putting a liberal construction on the 5th section, it might not be made to include the present case: but, assuming that Lord Tenterden has by mistake omitted to consider this particular case, that is no reason why the established rules of pleading should be departed from."] The right exists at law, if it is within the equity of the statute. [Bytes, J. I suppose "within the equity," means the same thing as "within the mischief" of the statute. The difficulty which arises here was pointed out by Mr. Platt in *Welcome v. [704] Upton*, 6 M. & W. 540. He says,—

"The right claimed in the second plea, which is a right to take the whole pasturage *in gross*, is not within the statute 2 & 3 W. 4, c. 71, s. 5, which relates only to rights appendant and appurtenant. Its words are, 'It shall be sufficient to allege the enjoyment thereof as of right by the *occupiers* of the tenement *in respect whereof* the same is claimed, &c.'" In *Gale on Easements*, 3rd edit. 10, it is said: "It has been recently intimated, on high authority, that a plea to turn cattle on land generally, without stating for what purpose, is bad:" per Littledale, J., *Bailey v. Appleyard*, 3 Nev. & P. 257, 8 Ad. & E. 161. The learned editor adds in a note,—“But all the learned judge meant was that it must be shewn by proper averments in pleading in what respect the right to enter arises (see per Maule, J., in *Peter v. Daniel*, 5 C. B. 577): he could not have intended that a plea of a right of common in gross would be bad, for it is clear that such a right may exist, and that a man may claim to be entitled, by grant or by prescription, to a right of pasture in gross, giving to him and his heirs, independently of the possession of any land by them, the right of turning a definite number of cattle upon the land over which the right of common is claimed.” Again, at p. 13, n., it is said: “A right of common or other profit à prendre may be claimed as a right in gross; and there should seem to be no reason why an incorporeal right, not involving participation in the profits of the servient tenement, should not be capable of being conferred in like manner with an incorporeal right involving such participation. The case of *Ackroyd v. Smith*, 10 C. B. 164, is not inconsistent with this position. The point decided by that case is that a right of way cannot be so granted as to pass to the successive owners of the land, as such, in cases where the way is not con-[705]-nected in some manner with the enjoyment of the land to which it is attempted to make it appurtenant. In fact, the grant in that case is an instance of an attempt to create a new kind of estate, a right of way to the same time in gross and appurtenant: in gross, in that it was in fact unconnected with the enjoyment of the land to which it was attempted to make it appurtenant, and appurtenant, in that the grant purported to limit it so as to go to the successive owners of that land in succession. This attempt, of course, failed: but the case does not affect the position that, as profits à prendre may be claimed in gross, so also mere easements may be claimed in gross, and that such right may be accompanied with all the same remedies as easements appurtenant, and that the burden of them may run with the tenement over which they are claimed. Lord St. Leonards, in 1 Macq. 312 (*Dyce v. Lady James Hay*) expressly laid down that a dominant tenement is not necessary for the existence of an easement, according to the English law.” The subject is further discussed in note (b) p. 152. Although the claim set up in *Bailey v. Stephens*, 12 C. B. (N. S.) 91, was held to be too large, there are several passages in the judgment which shew that it was conceded that there may be such a right in gross: see particularly the passage in the judgment of Erle, C. J., at p. 109, beginning, “Mr. Pridaux has further cited,” &c., and the passages in the judgment of Willes, J., at p. 110, beginning, “I wish to guard myself,” and at p. 113, beginning, “This plea does not shew any conveyance,” &c.: and see also the judgment of Byles, J.

The 5th section of the act is directed to the pleadings. “In all pleadings to actions of trespass, and in all other pleadings wherein before the passing of this act it would have been necessary to allege the right to have existed from time immemorial, it shall be suffi-[706]-cient to allege the enjoyment thereof as of right by the occupiers of the tenement in respect whereof the same is claimed, for and during such of the periods mentioned in this act as may be applicable to the case, and without claiming in the name or right of the owner of the fee, as is now usually done.” The right claimed here is not one which needed ever to be prescribed for in the que estate: see *Mellor v. Spateman*, 1 Wms Saund. 346. In *Gale on Easements*, 17, treating of public rights which in their mode of enjoyment partake of the character of easements, the learned editor, in note (c), says: “Instances of such rights will be found in *Race v. Ward*, 4 Ellis & B. 702, of a custom for the inhabitants of a township to go on a close and take water from a spring; *Tyson v. Smith*, 6 Ad. & E. 745, 9 Ad. & E. 406, of a custom for liege subjects exercising the trade of victuallers to erect booths on the waste of a manor at the time of fairs; *Abbot v. Weekly*, 1 Lev. 176, of a custom for the inhabitants of a vill to dance upon a particular close. When, however, claims of this kind are unreasonable in their character, they are disallowed, even in cases where they might possibly have formed the subject of a valid grant (see the judgment of the Lord Chancellor in *Dyce v. Lady James Hay*, 1 Macq. 305): but no question of a

similar kind can arise in the case of a private easement, involving only *the rights of the owner of the dominant tenement on the one hand and the servient on the other*; for, in such a case, if the circumstances are such that the right claimed could have been the subject-matter of a valid grant as an easement, its existence may be established by proof of user, and no valid objection can be taken on the ground of the extent to which it may interfere with the enjoyment of the servient tenement." Every word of that has great importance. A dominant tenement is not necessary to [707] the existence of a right of this sort. [Willes, J. If you claim it as appurtenant to a tenement, you claim it for the owner of the tenement.] It is not at all material to inquire whether or not ownership of the sort is necessary for a free fishery. If they be of the same quality and nature, and the one is necessary to the user of the other, one incorporeal hereditament may be joined to another. The only question is, whether such a right can be gained by user under the act. Lord Coke, commenting on s. 184 of Littleton, says, 121 b.,—"Appendant is any inheritance belonging to another that is superior or more worthy. In law it is called pertinens, quasi invicem tenens, holding one another: a word indifferent both to things appendant and things appurtenant. The quality and nature of the things do make the difference. Appendants are ever by prescription; but appurtenants may be created in some cases at this day. As if a man at this day grant to a man and his heirs common in such a moore for his beasts levant or couchant upon his manor; or, if he grant to another common of estovers or turbary in fee-simple, to be burnt or spent within his manor: by these grants these commons are appurtenant to the manor, and shall passe by the grant thereof. Concerning things appendant and appurtenant, two things are implied,—first, that prescription (which regularly is the mother thereof) doth not make anything appendant or appurtenant, unless the thing appendant or appurtenant agree in quality and nature to the thing whereunto it is appendant or appurtenant: as a thing corporeal cannot properly be appendant to a thing corporeal, nor a thing incorporeal to a thing incorporeal." To this Mr. Hargrave adds a note,—"*The true test seems to be the propriety of relation between the principal and the adjunct; which may be found out by considering whether they so agree in nature and* [708] *quality as to be capable of union without any incongruity:*" see 1 Vent. 386. And see Gale, p. 9. Upon the whole, it is submitted that the right here claimed is one of the very rights contemplated by the Prescription Act; and that the 5th section, properly construed, admits of its being pleaded as it is here.

Mellish, Q. C., in reply. No case has decided that a right in gross like this can be proved by simple user. The mischief the statute was designed to obviate was, that the user was liable to be defeated by shewing unity of possession at any time since the time of Richard the First. *Wickham v. Hawker*, 7 M. & W. 63, has no application to the present case. And *Gray v. Bond*, 2 Brod. & B. 667, 5 J. B. Moore, 527, was a case where the right was claimed as appurtenant to land, not of a right claimed in gross, as this is. So also in *Daries's case*, 3 Mod. 246, the right was claimed as appurtenant.

Cur. adv. vult.

MONTAGUE SMITH, J., now delivered the judgment of the court:—

To a declaration in trespass for breaking and entering the plaintiff's close and landing fishing-nets there, the defendant pleaded that the land was part of the shore of an inland lake called Coniston Water, and that the defendant (Le Fleming) and all his ancestors whose heir he is for sixty years before the suit enjoyed as of right and without interruption a free-fishery in the said water, with the right of landing their nets on the shore, as to the free-fishery appertaining, and then justified the trespasses under these alleged rights. There was a similar plea alleging the enjoyment for thirty years.

To these pleas the plaintiff demurred; and the [709] demurrer raises the question whether the rights so pleaded to belong to the plaintiff in gross are within the Prescription Act, 2 & 3 W. 4, c. 71.

The construction of the statute on this point is not free from difficulty; and, although the question has arisen in the courts, it has not been decided. We are now called on to determine it; and, upon consideration of all the provisions of the act, we are led to the conclusion that rights claimed in gross are not within it.

The language of the 1st section may be sufficiently large to include some rights in gross. The subjects of claim are, "right of common or other profit or benefit to be

taken and enjoyed from or upon any land." The first and governing subject of claim referred to is "right of common." This general phrase, which defines no species of common, is no doubt wide enough to include a right of common in gross, as common of pasture; but it is not an apt or proper phrase to designate a several right to the exclusive pasturage of land, or any other several and exclusive right to take any particular profit of the land. A sole and several right of pasturage in gross claimed by prescription was held by the court of Exchequer in *Welcome v. Upton*, 6 M. & W. 536: see also Co. Litt. 122 a. So, right to take all the wood in a certain close may lawfully exist as a profit a prendre in gross: *Sir Francis Barrington's case*, 8 Co. Rep. 136. But such a right cannot be claimed as appurtenant to land, because it is in its nature wholly unconnected with the enjoyment of the supposed dominant tenement and its necessities: *Bailly v. Stephens*, 12 C. B. (N. S.) 91. So, a right to a several fishery, and a right to take minerals, may lawfully exist as rights of profit a prendre in gross. These rights in gross, however, would not be aptly or properly described by the expression "right of common" in the Prescription Act; and the succeeding words may reasonably be construed to relate to a profit or benefit of the same nature. If, then, there are some rights of profit a prendre in gross which do not fall within the fair meaning of the words of the act, it seems a reasonable ground for presuming that the legislature did not intend to deal with rights in gross at all, but contemplated only those more usual and ordinary rights of common and profits a prendre which are in some way appurtenant to lands, and are limited to the wants of a dominant tenement.

It may be observed that the instances in which rights in gross have come before the courts are very rare, and that the mischief referred to in the preamble of the Prescription Act arose in the litigation which was of constant occurrence between the owners of dominant and servient tenements. We think, however, the first section ought not to be read alone, but must be construed by reference to the other provisions of the act.

The 2nd section relates to easements and to water-courses. We think this section refers to easements properly so called, and to rights which are in some way appurtenant to a dominant tenement. The court of Exchequer, in the case of *Mounsey v. Ismay*, 34 Law J., Exch. 52, appears to have come to this conclusion. In the judgment of that court it is said, "We further think that the 2nd section itself points to a right belonging to an individual in respect of his land." Again,—“What we think Lord Tenterden contemplated were incorporeal rights incident to and annexed to property, for its more beneficial and profitable enjoyment.” The limited scope of the 2nd section affords some ground for arriving at what was the intention of the legislature in the 1st section, especially as the introductory words are the same in both, viz. "No claim which may be lawfully made at the common law by custom, prescription, or grant."

[711] But the 5th section, which relates to pleading, seems to us to give a key to the true construction of the act. That section professes to enact forms of pleading applicable to all the rights within the act theretofore claimed to have existed from time immemorial, and which forms, it declares, shall in such cases be sufficient. These forms have clear relation to rights which are appurtenant to land, and to such rights only.

The second branch of the section enacts, "that in *all* other pleadings to actions in trespass, and in *all* other pleadings wherein before the passing of this act it would have been necessary to allege the right to have existed from time immemorial,"—including, therefore, all rights claimable by prescription,—"it shall be sufficient to allege the enjoyment thereof as of right *by the occupiers of the tenement in respect whereof the same is claimed, for and during such of the periods mentioned in the act as may be applicable to the case, and without claiming in the name or right of the owner of the fee, as is now usually done.*"

The whole principle of this pleading assumes a dominant tenement, and an enjoyment of the right by the occupiers of it. The proof must of course follow and support the pleading. It is obvious that rights claimed in gross cannot be so pleaded or proved. If, therefore, they are held to be within the act, the enactment as to pleading cannot be satisfied: for then that mode of pleading which the statute enacts shall, in all cases of rights theretofore claimed from time immemorial, be sufficient, would not only be insufficient, but in certain cases manifestly inapplicable. Assuming the legis-

lature to have had in view in this clause (as its language imports) all the rights formerly claimable by prescription, to which the act was intended to apply, it is necessary implication to hold that prescriptive rights in gross are not within the scope of the statute at all.

[712] If the statute were in other respects free from doubt, possibly the effect of this clause might be got over: but we own that we think it indicates with tolerable clearness the subjects with which the legislature intended to deal.

It was suggested in the course of the argument that great difficulties would arise as to the evidence necessary to establish the nature and quality of rights in gross, if they were assumed to be within the statute, which do not occur in the case of rights proved and determined by user and enjoyment by the occupiers of a dominant tenement: as, for instance, whether sixty or thirty years' enjoyment by one man in the course of his own life, and no more would establish any right, either in that man for life or a descendible right in gross, although there might be nothing in the nature of his single enjoyment to indicate perpetuity. If rights in gross were intended, it might reasonably be expected that some guide to solve difficulties of this kind, either by the mode of pleading or otherwise, would have been found in the act. In the view we take, it is not necessary to decide whether the words "free-fishery" in these pleas mean a sole several fishery or a common of fishery. Whichever they mean, the right is claimed in gross.

Having come to the conclusion that the provisions of the Prescription Act are not applicable to rights so claimed, it follows that the pleas are bad, and that our judgment on the demurrers must be given for the plaintiff.

Judgment for the plaintiff (*a*).

[713] THOMPSON AND OTHERS *v.* HAKEWILL. July 10th, 1865.

[S. C. 35 L. J. C. P. 18; 13 L. T. 289; 11 Jur. N. S. 732; 14 W. R. 11.

Referred to, *Roberts v. Holland*, [1893] 1 Q. B. 668.]

Covenant on a joint lease of certain land by two tenants in common, whereby they demised the land *according to their several estates* to the lessees, who covenanted with them and their respective *heirs and assigns* to repair. It then deduced a title to the plaintiffs as the assignees of one only of the undivided shares, traced the lease to the defendant's testator, and assigned a breach by him of the covenant to repair in the time of the plaintiffs:—Held, on demurrer, that both the tenants in common of the reversion at the time of the breach ought to have joined as plaintiffs in the action.

Covenant upon an indenture of demise.

The declaration stated that Pearson Thompson, Edward Armitage and Sarah Anne his wife, John Leathley Armitage and Elizabeth his wife, Eldred Green, Henry Green, Richard Allan Green, Mary Green, Elizabeth Ann Green, and Esther Green, by H. S. L., their attorney, sued Edward Charles Hakewill, executor of the last will and testament of Richard Monkhouse, deceased, by virtue of a writ, &c. For that Henry Thompson and Judith his wife, being tenants in common in fee, in right of the said Judith Thompson, of one undivided moiety of a messuage and land at Edmonton, in the county of Middlesex, and Sarah Thomasin Teshmaker being tenant in common of the other undivided moiety of the said messuage and land, the said Henry Thomasin and Judith Thompson and the said Sarah Thomasin Teshmaker, by a deed bearing date the 17th of January, 1793, let the said messuage and land, according to their several estates, to John Cobley, to hold to him, his executors, administrators, and assigns, for seventy-two years from the 24th of June then last past: and the said John Cobley by the said deed covenanted with the said Henry Thompson and Judith Thompson and Sarah Thomasin Teshmaker, and their respective heirs and assigns, that he and they would from time to time and at all times during the continuance of the said demise, at the proper costs and charges of him and them, well and sufficiently repair, uphold,

(*a*) Upon the trial, the jury affirmed the defendants' right to fish in Coniston Water, but negatived their claim to land nets on the plaintiff's land: and a verdict was found for the plaintiff, with 40s. damages.

support, sustain, maintain, amend, and keep the said messuage and all and singular other the buildings and fences which then were, or which thereafter during the continuance of the term thereby granted might be erected, built, or set up upon the said demised premises, or upon any part thereof, in, by, and with all and all manner of needful and necessary reparations and amendments whatsoever, when, where, and as often as need or occasion should be or require, and the messuage, buildings, and fences, being so well and sufficiently repaired, upheld, supported, sustained, maintained, amended, and kept as aforesaid, should and would, at the end and expiration or other sooner determination of the said lease, peaceably and quietly leave, surrender, and yield up unto the said Henry Thompson, Judith Thompson, and Sarah Thomasin Teshmaker, their heirs or assigns, together with all locks, keys, bars, bolts, doors, shutters, chimney-pieces, dressers, shelves, pipes, gutters, wells, pumps, sinks, and other fixtures which during the said lease should be affixed or set up in or about the said thereby demised premises, or any part thereof, in good plight and condition, reasonable wear and use thereof only excepted: and likewise that it should and might be lawful to and for the said Henry Thompson, Judith Thompson, and Sarah T. Teshmaker, their heirs and assigns, and every of them, with workmen and others or without, twice or oftener in every year during the said term thereby granted, at seasonable times in the day-time, to enter and come into and upon the said demised premises and every or any part thereof, there to view, search, and see the state and condition of the reparations thereof, and of all such defects, decays, and wants of reparation as upon any such view should be then and there found to give or leave notice or warning in writing at the said demised premises to and for the said John Cobley, his executors, administrators, or assigns, to repair and amend the same within the space of three months then next following, within [715] which said time and space of three months next after such notice and warning he the said John Cobley did thereby, for himself, his executors, administrators, and assigns, covenant, promise, and agree to repair and amend the same accordingly: Averment, that afterwards, and during the continuance of the said term, divers other buildings and fences were erected, built, and set up upon the said demised premises by the said John Cobley: and afterwards and during the said term all the estate and interest of the said John Cobley in the said messuage vested in the said Richard Monkhouse by assignment: that, after the making of the said lease, the said Henry Thompson died, leaving the said Judith Thompson and Sarah T. Teshmaker him surviving; and afterwards, and during the said term, the said Sarah T. Teshmaker died, leaving the said Judith Thompson her surviving; and afterwards, and during the said term, the said Judith Thompson died seised of and in her said reversion in the said demised premises: and by divers deeds and conveyances all the estate and interest of the said Judith Thompson in the said demised premises, and her said reversion of and in the same, which was in her at the time of her death, became vested and is now vested in the plaintiffs, who are now seised of the same: that afterwards, and during the said term, and whilst the said Richard Monkhouse was assignee as aforesaid, and whilst the said reversion was vested in the plaintiffs as aforesaid, entry was made upon the said demised premises by and on behalf of the plaintiffs, to see the state and condition of the reparations thereof, according to the said lease, and notice and warning in writing of divers decays, defects, and wants of reparation then found upon the said view in and about the said demised premises and the buildings then erected and built upon the same, was then given at the said demised premises to and for the said Richard Monkhouse, to repair and amend the same within the space of three months then next following, according to the said lease: that three months next after the said notice and warning elapsed in the life-time of the said Richard Monkhouse before that suit, and all things had been done and had happened, and all periods of time had elapsed necessary to entitle the plaintiffs to sue the defendant on the said lease, and to bring that action, and before that suit, and whilst the said Richard Monkhouse was assignee as aforesaid, and whilst the reversion was vested in the plaintiffs as aforesaid, the said lease expired, ended, and determined: Breach, that the said Richard Monkhouse in his life-time, after he became, and whilst he was assignee as aforesaid, and after the said reversion came to and whilst it was vested in the plaintiffs as aforesaid, and during the continuance of the said demise, suffered the whole of the said messuage and all the other buildings and fences which were then erected, built, and set up upon the said demised premises, to be and remain greatly out of repair, for want of needful and necessary

reparations and amendments, contrary to the said covenant in the said lease : Further breach, that the said Richard Monkhouse in his life-time, whilst he was assignee as aforesaid, and after the said notice and warning in writing, and whilst the said reversion was vested in the plaintiffs as aforesaid, did not within the said space of three months next following the said notice and warning, repair or amend the defects, decays, and wants of reparation mentioned therein, or any of them, but wholly neglected so to do, contrary to the said covenant in the said lease : Further breach that, at the end, expiration, and determination of the said lease as aforesaid, the said Richard Monkhouse, in his life-time, did not surrender or yield [717] up the said messuage and demised premises with the buildings then erected upon the same, or any part thereof, well or sufficiently repaired or upheld or kept, according to the covenant in the said lease, nor did he surrender or yield up the same or any part thereof with the fixtures or any of them which during the said lease had been affixed or set up in or about the said demised premises, in good plight or condition, reasonable wear and use thereof excepted ; but that the said Richard Monkhouse surrendered and yielded up the whole of the said messuage, buildings, premises, and fixtures greatly out of repair, and in a very ruinous and bad condition, reasonable wear and use excepted, contrary to the said covenant in the said lease : Claim, 2000l.

To this declaration the defendant demurred, the grounds of demurrer stated in the margin being, "that the declaration shews no title in the plaintiffs to sue, and that the joint covenants set forth in the declaration, under the circumstances therein set forth, do not run with the reversion." Joinder.

F. M. White (with whom was Lush), Q. C., in support of the demurrer (*a*). The declaration shews no title in the plaintiffs to sue. *Woolton v. Steffenoni*, 12 M. & W. 129, is in point. There, a declaration in covenant stated that A. and B. his wife were seised in fee of an undivided moiety [718] of certain premises in right of the wife, and C. was seised of the other moiety ; that A. and B. and C. demised the premises for twenty-one years to D., who covenanted with A. and C. to repair ; that C. afterwards became seised in fee of the reversion of all the premises, and devised them to the plaintiffs and A. in fee ; that A. died, and the plaintiffs survived him ; and that before the death of A. all the estate of D. in the premises came to the defendant by assignment ; and assigned as a breach that the defendant would not, after the assignment, and during the demise, and while the plaintiffs and A. were seised of the reversion, and before the death of A., repair the demised premises. The court inclined to think that the covenant sued upon, being made with A. and C. only, was not a covenant running with the land, on which the assignee of the reversion could sue,—at all events without an averment that the breach was committed in the life-time of A.'s wife. Parke, B., in the course of the argument, observes,—“This is a demise of two undivided interests, of which the parties are tenants in common, and it is a joint covenant with both : will that run with the reversion ? It does not appear *on the face of the lease* that they have separate interests, otherwise the covenant might be construed to be a separate covenant with each in respect of his separate interest. Therefore this is a joint contract with two ; and, though their estates are separate, we cannot look out of the lease for that fact.” Here, no title to sue is traced from the representatives of Sarah Teshmaker. [Willes, J. There are two questions,—first, whether the covenant may not enure as one covenant,—secondly, whether the parties may not sue upon their several covenants. There is no estoppel. The husband leases his wife's estate for seventy-two years ; and she has survived him.] In *Foley v. Addenbroke*, 4 Q. B. 197, a declaration [719] in covenant at the suit of E. stated that F. and W. demised lands and iron-mines of one undivided moiety of which F. was seised in fee, to the defendant for a term of years, the defendant covenanting with F. and W. and their heirs, executors, &c., to erect and work furnaces, to repair the premises, and

(*a*) The points marked for argument on the part of the defendant were as follows :—

“1. That the declaration shews no title in the plaintiffs to sue :

“2. That the joint covenants set forth in the declaration, under the circumstances therein set forth, do not run with the reversion :

“3. That the declaration is bad, by reason of the non-joinder of the representatives of Sarah Thomasin Teshmaker, who is therein described as tenant in common of an undivided moiety of the messuage and land referred to in the said declaration.”

work the mines; and that F. died, and the plaintiff was F.'s heir: and breaches of covenant were assigned, committed since F.'s death. The defendant pleaded that W. survived F.: and it was held, on demurrer, that the action brought by L. without W. could not be maintained. [Byles, J. One of the parties in that case had no interest in the estate: the principle, therefore, is not applicable.] In delivering the judgment of the court in that case, Lord Denman says: "The result of the cases appears to be this that, where the legal interest *and cause of action* of the covenantees are *several*, they should sue separately, though the covenant be joint in terms; but the several interest and the several ground of action must distinctly appear, as in the case of covenants to pay *separate rents* to tenants in common upon demises by them; or as in the instance cited from *Slingsby's case* (5 Co. Rep. 18 b.), in the note (1) to the case of *Eccleston v. Clipsham*, 1 Wms. Saund. 155, where a man by indenture demised Blackacre to A., Whiteacre to B., and Greenacre to C., and covenanted with them and each of them that he had good title,—each might maintain an action for his particular damage by a breach of that covenant. On the other hand, it appears from several cases that, *if the cause of action be joint*, the action should be joint, though the *interest be several*: *Corryton v. Lytheburne*, 2 Saund. 115; *Martin v. Crompe*, 1 Ld. Raym. 340; *Wilkinson v. Hall*, 1 N. C. 713, 1 Scott, 675. In the present case, the covenants for breach of which the action is brought are such as to give the covenantees a *joint interest in the performance* [720] *of them*: and the terms of the indenture are such that it seems clear that the covenantees *might* have maintained a joint action for breach of any of them. Upon this point the case of *Kitchen v. Buckley*, 1 Lev. 109, is a clear authority: and the case of *Petrie v. Burg*, 3 B. & C. 353, 5 D. & R. 152, shews that, if the covenantees *could* sue jointly, they are bound to do so." [Willes, J. You have to make out that this covenant is not severable; and, next, that, assuming it to be a joint covenant, it does not go with the reversion.] The language of the covenant, as set out on the record, is joint. If tenants in common may join in an action of this kind, they must join: and it is plain from *Kitchen v. Buckley*, Sir T. Raym. 80, that they *may* join. Whether the covenant be joint or several, is always a question of intention. *Bradburne v. Botfield*, 14 M. & W. 559. A joint covenant with tenants in common does not run with the land: *Roach v. Wadham*, 6 East, 289.

Maude, contra (a). The argument on the part of the tenant assumes this to be a joint interest. That, however, is a fallacy. In Co. Litt. 45 a., it is laid down [721] that, "if two severall tenants of severall lands joyne in a lease for yeares by deed indented, these be severall leases, and severall confirmations of each of them from whom no interest passeth, and worke not by way of conclusion in any sort, because severall interests passe from them. B., tenant for life of C., and he in the remainder or reversion in fee, having severall estates in the one and the same land, joyne in a lease for yeares by deed indented, this demise shall worke in this sort: during the life of C. it is the lease of B. and confirmation of him in the reversion or remainder, and after the decease of C. it is the lease of him in the reversion or remainder, and the confirmation of B.; for, seeing the lessors have severall estates, the law shall construe the lease to move out of both their estates respectively, and every one to let that which he lawfully may let, and not to be the lease onely of tenant for life, and the confirmation of him in the remainder or reversion: neither is there any conclusion in this case, as shall be said hereafter. Tenant for life and he in the remainder in fee made a lease for years by deed indented: the lessee was ejected, and brought an ejectione firmæ, and declared upon a demise made by tenant for life and him in remainder, and, upon not guilty pleaded, this speciall matter was found, and that

(a) The points marked for argument on the part of the plaintiffs were as follows:—

"1. That the declaration shews that the plaintiffs are entitled to sue the defendant on the covenants to repair contained in the lease in question: the reversion in that lease having been at the time of the breach, as is admitted in the plaintiffs:

"2. That the reversion of the whole or of a moiety of the demised premises having been at the expiration of the lease vested in the plaintiffs; and, the whole of the demised premises having been then out of repair, as is admitted, the plaintiffs are entitled to recover damages for the non-repair of the whole or of a moiety of the premises:

"3. That the plaintiffs, being the representatives of the surviving covenantee, are entitled to sue on the covenants."

tenant for life was living, and it was adjudged against the plaintiff, for, during the life of the tenant (as hath been said), it is the lease of the tenant for life, and therefore during his life he ought to have declared of a lease made by him, and after his decease he ought to declare of a lease made by him in remainder. And the deed indented could be no estoppel in this case, because there passed an interest in them both. And whensoever any interest passeth from the party, there can be no estoppel against him : and so it was adjudged. And accordingly it was adjudged that, [722] where tenant in taile and he in the remainder in fee joined in a grant of a rent-charge by deed in fee, and after tenant in taile died without issue, the grantee distrained and avowed by force of a graunt from him in the remainder, and, upon non concessit, the jury found the special matter ; and it was adjudged for the avowant ; for every one granted according to his estate and interest." The same rule is laid down in Rol. Abr. *Grants* (G.), pl. 2, 3. [Byles, J. Does it appear by the lease here that the lessors were tenants in common ?] The declaration states that Henry Thompson and his wife were tenants in common in fee, in right of the wife, of one undivided moiety, and that Sarah T. Teshmaker was tenant in common of the other undivided moiety. Where there is nothing to compel the court to assume that the covenant is joint, they will not do so. The rule as laid down in Co. Litt. 45 a., is also laid down in the same terms in Sheppard's Touchstone, by Preston, p. 85, and in Bac. Abr. *Joint-Tenants* (K.). In *Eccleston v. Clipsham*, 1 Wms. Saund. 153, it was held that, though a covenant be *joint and several* in the terms of it, yet, if the interest and cause of action be *joint*, the action must be brought by all the covenantees : and, on the other hand, if the interest and cause of action be *several*, the action may be brought by one only. And see the authorities referred to in the note. See also the judgment of Williams, J., in *Beer v. Beer*, 12 C. B. 60, 80, to the same effect. In *Sorsbie v. Park*, 12 M. & W. 146, 158, Parke, B., says : "I think the correct rule is laid down by Gibbs, C. J., in the case of *James v. Emery*, 5 Price, 533, with the qualification stated by Mr. Preston in the note in Sheppard's Touchstone, 166. That rule is that a covenant will be construed to be joint or several according to the interest of the parties appearing upon the face of the deed, if the words are [723] capable of that construction ; not that it will be construed to be several by reason of several interests, if it be expressly joint. Suppose there were a covenant with A. and B. *jointly* that a certain thing should be done by the covenantor ; both of those persons must sue. But, where it appears upon the face of the deed that A. and B. have several interests, they must sue separately ; for, though the words be *primâ facie* joint, they will be construed to be several, if the interest of either party appearing upon the face of the deed shall require that construction." [Willes, J. The difficulty here, to my mind, is one of pleading. The lease is not set out in terms : it would have been much more satisfactory if it had been. It may be that the court may feel bound to assume that the covenant is joint, and so the point which you are now arguing (and upon which, as at present advised, the court is inclined to agree with you,) may not arise. As the declaration now stands, I do not think it raises the point.] The lease is in court, and is in the words in the declaration. [Willes, J., after looking at the lease, observed that it appeared to be a copyhold title, and that, assuming it to be set out in the declaration in terms (which White assented to), the question would be raised simpliciter. Byles, J. The lease shews that the lessors demised according to their several estates.] In *Servante v. James*, 10 B. & C. 410, 5 M. & R. 299, the covenant was with the several part-owners of the vessel and *their several and respective* executors, &c. Bayley, J., there says : "The covenants in question are made with the several part-owners of the vessel and *their several and respective* executors, administrators, and assigns ; which latter words would be quite inoperative if the right to sue were in all the parties jointly. In case of the death of one part-owner, by the words of the covenant his personal representative [724] might sue. If the covenant were joint, the executor of the survivor only could maintain an action ; but such a construction would be quite at variance with the words *their several and respective executors*, &c. Again, if the covenant were joint, a release by any one would defeat an action brought by all, an inconvenience that the several parties might wish to avoid. For these reasons, I think that the language of the covenant is several, and that the interests of the parties are several, and consequently that the action brought by all jointly cannot be maintained. The cases cited in the notes to *Eccleston v. Clipsham*, 1 Wms. Saund. 153, shew that the words will be distributed so as to give effect, if possible, to the intention of the parties to the covenant. This

covenant, it is submitted, may be read as a covenant with the lessors severally and their several and respective heirs and assigns; and, if so, the plaintiffs were at liberty to sue in respect of their several interests. *Badeley v. Figners*, 4 Ellis & B. 71, is an authority to the same effect. In *Fates (or Gates) v. Cole*, 2 Brod. & B. 660, 5 J. B. Moore, 554, it was held that tenants in common might sue in covenant, for neglect of repairs, the lessee of a house, who, subsequently to the demise but before the breach alleged, became a co-tenant of the plaintiffs in the same house.

White, in reply. The question is one of construction,—whether the covenants in this indenture are joint or several: for it is clear from the language of the court in *Foley v. Addenbrooke*, 4 Q. B. 197, that, where tenants in common may join, they must join. Wherever covenants can be construed to be joint, convenience requires that they should be so construed. In *Badeley v. Figners*, 4 Ellis & B. 71, the whole reversion had, by merger and otherwise, come to the persons who sued. No case is to be found where tenants in [725] common have severed in suing upon a covenant to repair. The difficulties which would result from such a course are patent: different juries might give different damages for the same breach. The rule as laid down in s. 315 of Littleton was acted upon in *Kitchin v. Buckley*, T. Raym. 80, and in *Beer v. Beer*, 12 C. B. 60, 81. [Willes, J. The course which the argument has taken seems to have reversed your position. If a joint covenant with tenants in common will run with the land, the defendant is probably entitled to judgment on this demurrer; otherwise not. The judgment in *Foley v. Addenbrooke* raises a difficulty. We will, therefore, take time to consider.

Cur. adv. vult.

BYLES, J., now delivered the judgment of the court (a):—

The declaration in this case was in covenant on a joint lease of certain land by two tenants in common, whereby they demised the land *according to their several estates* to the lessee, who covenanted with them and their respective heirs and assigns to repair. It then deduced a title to the plaintiffs as the assignees of one only of the undivided shares, traced the lease to the defendant's testator, and assigned a breach by him of the covenant to repair in the time of the plaintiffs.

To this declaration there was a demurrer; and the objection taken was that both the tenants in common of the reversion at the time of the breach ought to have joined as plaintiffs in the action.

The form of the covenant which we have to construe renders us little assistance. It was suggested that the words "heirs and assigns," being in the plural, assisted [726] the plaintiffs. But the word "heirs" is commonly used in the plural, and is satisfied either by heirs in succession, or by heirs in co-parcenary. The word "assigns" imports no more than that a benefit from the covenant was intended to the assignees of the undivided estates in the reversion: but, whether severally or jointly, it does not help us to discover. The word "respective" is equally appropriate, whether the respective heirs and assigns of the covenantees are to join or sever in an action. On the other hand, it may be observed that the covenant is with "the lessors," and not with "the lessors and each of them."

There is no doubt that a demise by tenants in common, though joint in its terms, operates as a separate demise by each tenant in common of his undivided share, and a confirmation by each of his companions: *Eccleston v. Chipsham*, 1 Wms. Saund. 153; 2 Rol. Abr. 64; *Sheppard's Touchstone*, by Preston, 85; *Heatherley v. Weston*, 2 Wils. 232. And there is also no doubt that the covenants in a lease by several lessors may be construed as joint or several in respect of the covenantees, according to their interest in the land apparent on the face of the deed: *Sorsbie v. Park*, 12 M. & W. 146.

The form of the covenant helping us little, we are at liberty to endeavour to gather the intentions of the parties by considering the consequences of construing this covenant as joint or several in respect of the covenantees.

The interest of the covenantees, tenants in common, in a covenant of this nature may be of four kinds. First, the covenantees may be simply joint-tenants of the covenant. This construction of the covenant is attended with the inconvenience, that the right to sue vesting in the survivor and his representative, real or personal, may be severed from the estate or some of [727] the estates, though the plaintiff, at law,

(a) The case was argued before Willes, J. and Byles, J., at the sittings in banco after Trinity Term.

would no doubt sue as trustee for the owners of the reversion at the time of the breach. Secondly, the covenant may be split, and treated as several covenants, and running respectively with each undivided share in the reversion of each tenant in common. The inconvenience of this construction is that a plurality of actions will always be necessary, which plurality might cause great hardship both to the landlords and to the tenant. There is this further inconvenience, that the damages which a jury might give in an action by one of several tenants in common would not be binding on a jury in another action at the suit of another tenant in common, who therefore in respect of another interest in the reversion exactly the same in degree, might for the same breach recover damages much more or much less. Lastly, there is this inconsistency that, if one of the original shares should be split up into two tenancies in common, those two tenants in common at all events *may* join in suing: *Kitchen v. Buckley*, 1 Lev. 109. Thirdly, the covenant may be treated as one entire covenant running not with undivided shares of the reversion, but with the whole reversion. The only inconvenience of this construction is that no action will lie unless the owners of the entire reversion at the time of the breach can be induced to join as plaintiffs. It is clear that a covenant to repair may run with the entire reversion of tenants in common: *Kitchen v. Buckley*. But it may be observed that, in that case, the covenants could not have been several, as the demise was before the severance of the reversion. Fourthly, such a covenant may be construed as a covenant in suing on which the tenants in common may join or sever at their election. And the language of the report in *Kitchen v. Buckley*, is in favour of such a [728] construction where the severance of the reversion is after the demise.

We, however, are now called on to decide that the benefit of such a covenant contained in a joint demise originally made by tenants in common, not only *may*, but *must*, run with the entire reversion; in other words, that tenants in common so situated, not only *may*, but *must*, join as plaintiffs in an action of covenant.

The balance of convenience, we think, inclines in favour of this construction, and is also sustained by the authority of the case of *Foley v. Addenbrooke*, 4 Q. B. 197, where the court of Queen's Bench held that tenants in common of the reversion *must* join in an action on such a covenant as this contained in a lease made by themselves jointly. It is true that one of the covenantees there did not on the face of the declaration appear to have had an interest in the reversion: but the court said that they must assume that she had, and on that assumption pronounced judgment. The judgment, therefore, of the Queen's Bench, being on the very point before us, must govern our decision.

This view is also in accordance with Littleton, § 314, that, even in the case of rent, where the thing to be rendered is indivisible, and due to all, tenants in common must join. The section of Littleton is as follows:—"Also, if there be two tenants in common of certaine land in fee, and they give this land to a man in taile, or let it to one for terme of life, rendring to them yearely a certaine rent, and a pound of pepper, and a hawke or a horse, and they be seised of this service, and afterwards the whole rent is behind, and they distraine for this, and the tenant maketh rescouse: In this case, as to the rent and pound of pepper they shall have two assises and as to the hawke or the horse but one assise. And the reason why they shall [729] have two assises as to the rent and pound of pepper is this, insomuch as they were tenants in common in severall titles, and when they made a gift in taile or lease for life, saving to them the reversion, and rendering to them a certaine rent, &c., such reservation is incident to their reversion; and for that their reversion is in common, and by severall titles, as their possession was before the rent and other things which may be severed, and were reserved unto them upon the gift, or upon the lease, which are incidents by the law to their reversion, such things so reserved were of the nature of the reversion. And in so much as the reversion is to them in common by severall titles, it behoveth that the rent and the pound of pepper, which may be severed, be to them in common, and by severall titles. And of this they shall have two assises, and each of them in his assise shall make his plaint of the moietie of the rent, and of the moietie of the pound of pepper. But of the hawke or of the horse, which cannot be severed, they shall have but one assise, for a man cannot make a plaint in an assise of the moietie of a hawke, nor of the moietie of a horse, &c. In the same manner it is of other rents and of other services which tenants in common have in grosse by divers titles, &c."

The analogy of this to the case of a covenant with two tenants in common to repair a house, in every brick whereof they are jointly interested, and more especially to such a covenant to repair after notice, is too striking to require further illustration.

We accordingly give our judgment for the defendant.

Judgment for the defendant (a).

(a) The declaration was afterwards amended as follows, the name of Harry William Busk being added as a plaintiff,—“For that Henry Thompson and Judith his wife, [730] at the time of the making of the demise hereinafter mentioned, were seised in fee as tenants in common in right of the said Judith Thompson, and at the will of the lords of the manor of Edmonton, Bowesford, Paul's House and Darnford, in the county of Middlesex, according to the custom of the said manor, of one undivided moiety of and in a messuage and land at Edmonton, in the said county, and Sarah Thomasin Teshmaker was at the time of the making of the said demise seised in fee as tenant in common, at the will of the said lords, according to the custom of the said manor, of the other undivided moiety of and in the said messuage and land, the said messuage and land being a customary tenement of the said manor demisable by copy of court roll by the lords of the said manor, at their will, to persons willing to take the same in fee-simple, to hold at the will of the said lords, according to the custom of the said manor: and thereupon the said Henry Thompson and Judith Thompson and Sarah T. Teshmaker, being so seised, demised the said messuage and land to John Cobley by a deed duly executed by them, and also duly executed by the said John Cobley, bearing date the 17th day of January, 1793, and which deed was in the words and figures following, that is to say [here the deed was set out]: Averment that, after the making of the said lease, and during the continuance of the said term, divers other buildings and fences were erected, built, and set up upon the said demised premises by the said John Cobley: and afterwards, and during the said term all the estate and interest of the said John Cobley in the said messuage vested in the said Richard Monkhouse by assignment: that, after the making of the said lease, the said Henry Thompson died, leaving the said Judith Thompson and Sarah T. Teshmaker him surviving: and afterwards, and during the said term, the said Judith Thompson died: and by divers deeds, covenants, admissions, and conveyances in the law, all the estate and interest of the said Henry Thompson and Judith Thompson and of the said Sarah T. Teshmaker of and in the said demised premises, and the whole of the reversion in the said lease, became during the said term vested in the plaintiffs, who became and were seised of the same in fee, and at the will of the lords of the said manor, according to the custom thereof: that all things had been done and had happened, and all periods of time had elapsed [731] necessary to entitle the plaintiffs to sue the defendants on the covenants in the said lease, and to bring this action, and before this suit and whilst the said Richard Monkhouse was assignee as aforesaid, and whilst the said reversion was vested in the plaintiffs as aforesaid, the said lease expired, ended, and determined: Breach, that the said Richard Monkhouse in his life-time, after he became, and whilst he was assignee as aforesaid, and after the said reversion came to and whilst it was vested in the plaintiffs as aforesaid, and during the continuance of the said demise, suffered the said messuage and the buildings and fences which were then erected and set up upon the said demised premises to be and remain greatly out of repair for want of needful and necessary reparations and amendments, contrary to the said covenants in the said lease: And that at the end, expiration, and determination of the said lease as aforesaid, the said Richard Monkhouse in his life-time did not surrender or yield up the said messuage and demised premises with the buildings then erected upon the same, or any part thereof, well or sufficiently repaired or upheld or kept according to the covenant in the said lease, nor did he surrender or yield up the same, or any part thereof, with the fixtures, or any of them, which during the said lease had been affixed or set up in or about the said demised premises, in good plight or condition, reasonable wear and use thereof excepted: but the said Richard Monkhouse surrendered and yielded up the said messuage, buildings, premises, and fixtures greatly out of repair, and in a very ruinous and bad condition, reasonable wear and use excepted, contrary to the said covenant in the said lease: Claim, 2000l.

[732] GAVED v. MARTYN. June 3rd, 1865.

[S. C. 34 L. J. C. P. 353; 13 L. T. 74; 11 Jur. N. S. 1017; 14 W. R. 62.
Distinguished, *Ivimey v. Stocker*, 1866, L. R. 1 Ch. 409.]

1. One who by lease or by licence from the owner of the soil has the right of digging and working clay (or minerals) thereunder, has such an interest in the soil as will entitle him to claim under the Prescription Act, 2 & 3 W. 4, c. 71, a right to the flow of water over the surface, by a twenty years' user.—2. A right to the flow of water along an artificial cut over the soil of another cannot be acquired under the Prescription Act, 2 & 3 W. 4, c. 71, unless the circumstances under which the cut was made shew that it was intended to be of a permanent character.—3. H. occupied clay-works, and, for the more convenient use of them, in 1830, under an agreement with one G. (with the consent of G.'s landlord), made a leat or artificial cut for the purpose of conducting water from a brook flowing over the land in G.'s occupation, to his works. The plaintiff in 1835 succeeded H. in the occupation of the clay-works, and continued for upwards of twenty years, without interruption, the enjoyment of the leat: Held that, notwithstanding the plaintiff had no notice of the agreement between H. and G., there was evidence from which the jury might find that the plaintiff had not enjoyed the stream for twenty years *as of right*.—4. The rights of tin-borders according to the customary law of Cornwall to the use of water within their tin-bounds, for the purpose of streaming their tin, will not prevent the acquisition by another of a prescriptive right under the 2 & 3 W. 4, c. 71, to the enjoyment of the water by a twenty years' user: nor will this right be affected by an agreement with the tin-borders for a money payment to abstain from fouling the water by streaming their tin therein.

This was an action for obstructing the plaintiff in the enjoyment of his alleged right to certain water-courses.

The first count of the declaration stated that, before and at the time of the grievances thereafter mentioned, the plaintiff was and is possessed and is the occupier of certain land and premises called Carrancarrow, in the parish of St. Austell, in the county of Cornwall, and was and is entitled to have the water of a certain stream or watercourse flow by the aid or means of a launder or water-carrier of the plaintiff, part of which launder or water-carrier was and of right ought to be and remain, and which the plaintiff was entitled to have and to have remain, upon certain premises of the defendant towards, to, through, over, and along the said land and premises of the plaintiff, without being diverted or obstructed by the defendant as thereafter mentioned: Yet the defendant, on divers occasions, took, removed, and carried away the said launder or water-carrier, and diverted and obstructed the water of the said stream or watercourse from, and prevented it from flowing through, to, over, and along [733] the said land and premises of the plaintiff; whereby the plaintiff was deprived of the use of the said water, and was prevented from using the same in divers lawful ways, and for the purpose of working certain clay-works of the plaintiff in and upon his said land in the way of his business as a clay-worker, and was greatly damaged in the way of his said business, and in the enjoyment of his said land, and the said launder or water-carrier of the plaintiff was also greatly injured.

The second count stated that the plaintiff was and is possessed and is the occupier of certain land and premises as in the first count particularly described, and was and is entitled to have the water of a certain stream or watercourse flow by the aid and means of another launder or water-carrier of the plaintiff towards, to, through, over, and along the said land and premises of the plaintiff, without being diverted or obstructed by the defendant as thereafter mentioned: Yet the defendant, on divers occasions, took, removed, and carried away the said launder or water-carrier, and diverted and obstructed the water of the said stream or watercourse from, and prevented it from flowing through, to, over, and along the said land and premises of the plaintiff; whereby the plaintiff was deprived of the use of the said water, and was prevented from using the same in divers lawful ways, and for the purpose of working certain clay-works of the plaintiff in and upon his said land, in the way of his business as a clay-worker, and was greatly damaged in the way of his said business, and in the

enjoyment of his said land: and the said launder or water-carrier of the plaintiff was also greatly injured.

The third count stated that the plaintiff was and is possessed and is the occupier of certain land and premises as in the first count particularly described, and [734] near to a certain brook called, to wit, Coxbarrow Brook, and that long before and until and at the time of the committing of the grievances thereafter mentioned a great part of the water of the said brook did of right run and flow, and of right ought to have run and flowed, and still of right ought to run and flow therefrom into and along a certain leat or channel, and thence unto, into, by, along, through, and over the said land and premises of the plaintiff: Yet the defendant, well knowing the premises, diverted and prevented the water of the said brook, which of right ought to have run and flowed, and might and otherwise would have run and flowed, into and along the said leat, unto, by, along, into, through, and over the said land and premises of the plaintiff: whereby the plaintiff was deprived of the use of the said water, and was prevented from using the same in divers lawful ways and for the purpose of working certain clay-works of the plaintiff in and upon the said land, in the way of his said business as a clay-worker, and was greatly damaged in the way of his said business, and in the enjoyment of his said land (*a*).

There were other two counts, for trespasses on Carranearrow, which became immaterial.

The defendant pleaded,—first, to the first, second, and third counts, not guilty,—secondly, to the first count, that the plaintiff was not nor is he entitled to have the water of the said stream or watercourse flow by the aid and means of the said launder or water-carrier part of which the plaintiff was entitled to have [735] and to have remain upon the said premises of the defendant, towards, to, through, over, and along the said land and premises of the plaintiff, as in the said first count alleged,—thirdly, to the second count, that the plaintiff was not nor is he entitled to have the water of the said stream or watercourse flow by the aid and means of the said launder or water-carrier of the plaintiff in the said second count mentioned, towards, through, over, and along the said land and premises of the plaintiff, as in the said second count alleged,—fourthly, to the third count, that a great part of the water of the said brook did not of right run and flow, nor ought of right to run and flow therefrom into and along the said leat or channel unto, into, by, along, through, and over the said land and premises of the plaintiff, as in the said third count alleged,—fifthly, to the fourth and fifth counts, payment of 5*l.* into court.

The plaintiff took issue on the first four pleas, and replied to the last damages *ultra*.

The cause was tried before Channell, B., at the Summer Assizes for Cornwall in 1864. The facts which appeared in evidence were as follows:—The plaintiff, John Gaved, was tenant and occupier under Lord Mount-Edgcumbe of certain clay-works in the parish of St. Austell, in the county of Cornwall, called the Carranearrow clay-works, which he had occupied since the year 1835. In 1855, the defendant became, by purchase, the owner of the adjoining land of Goonamarth, in the parish of St. Mewan, in which also there was a sett for working china-clay, of which one Higman was the grantee. Mr Trevanion was the former owner of Goonamarth, and the sett to Higman was granted by his trustees. In addition to the clay-setts above mentioned, there was an antient tin-stream work, called Cawn stream work, held and worked under antient customary tin-bounds, extending over [736] parts of each of the above-named estates of Carranearrow and Goonamarth. One Edward Hooper was until about twelve years ago in possession of the working of this tin-stream work, and also tenant of the farm of Carranearrow under the Earl of Mount-Edgcumbe, which farm extended as far as the plaintiff's clay-works.

Two leats or streams, one coloured *brown* on the plan, and called the "foul-water leat," the other of clear water, coloured *green* on the plan, supplied water to the plaintiff's works, and both were essential for their carrying on. There was also a stream called "the brook," coloured *blue* on the plan, from which the foul leat derived

(*a*) The following particular was delivered pursuant to a judge's order;—

"The third count of the declaration in this action relates to a leat called the foul-water leat flowing out of the Coxbarrow Brook, at a point between the two launders mentioned in the first and second counts."

all its supply. The clear-water leat derived its supply from several sources,—partly from “the old woman’s house,” and from an adit near thereto driven by the plaintiff in 1836, and partly from an artificial cut from the tin-tye near the old Cawn Clay-works made in 1832. From this tye the water had always flowed down to the Carranearrow Clay-works since 1837. The plaintiff continued to use this water till the defendant came, in 1855. The upper launder was put up in 1842, to prevent the clear water from mixing with the foul water of the brook. The water then flowed direct from the tye down the leat to the Carranearrow works. About the year 1852, an alteration was made in the leat, the uncoloured part of it being abandoned, and the coloured part adopted. The part abandoned was used by one Wheeler, who had other clay-works in the neighbourhood, and who obtained his supply of water from a point higher up than the plaintiff’s, taking it over the brook at the same point, but at a higher level than the plaintiff’s. The water continued to flow to the plaintiff’s works through this leat until 1863, when the acts complained of, viz. the removal of the launders [737] and the diversion of the stream by the defendant, took place.

When the defendant became possessed of his estate, in 1855, he claimed from the plaintiff 20l. a year for the use of the water: but the plaintiff refused to pay it.

The tin-bounds were worked by Edward Hooper in 1852, Hooper being at that time also the tenant of Carranearrow farm. They were customary tin-bounds. In that year Hooper told the plaintiff that, unless he paid him for stopping the streaming, he would foul the water, and stop the clay-works. The plaintiff agreed to give him 1l. per quarter not to stream, and paid that sum for three quarters, when he refused to pay any more. The plaintiff had a licence to dig clay under Hooper’s farm. The lower launder was put in by Edward Hooper shortly after the Carranearrow Clay-works were begun, in 1830. It also appeared that the course of the clear-water leat had been twice varied.—once in consequence of the banks of the brook being washed away in a storm, and once for the convenience of an adjoining occupier.

The accompanying plan shews the position of the several streams, and of the plaintiff’s and defendant’s works respectively. Its description by the surveyor who made it, so far as is material, was as follows:—The straight green line represents an old tin-tye (an open adit): it extends into the brook. The dotted green line represents an under-ground conduit, continuing the leat, which afterwards becomes open, and flows down to the Carranearrow works. Water flows into this leat from “the old woman’s house.” The brown line shews an open leat running down to Carranearrow works. The upper launder crosses the brook, and was placed for the purpose of carrying the water over the brook in a pure state, the brook being fouled by works. [738] The channel of the leat throughout is artificial. The dotted red line marks the tin-bounds, extending into both estates, viz. Lord Mount-Edgecumbe’s and Mr. Trevanion’s.

On the part of the defendant, it was submitted that there was no evidence of the plaintiff’s right to either of the watercourses claimed, both being artificial, and their origin shews: that his claim had been contested since 1855; that he was not such an occupier as could gain a right by user under the Prescription Act, 2 & 3 W. 4, c. 71: and that the alterations in the course of the clear-water leat and the payments to Hooper for the use of the water from the tin-tye, were fatal to the right.

Witnesses were called on the part of the defendant to prove that before the leat was cut to Hooper’s works (the Carranearrow works), it was agreed between him and the then occupier of Goonamarth (Geach) that he might make it, subject to the payment of a peppercorn or a furze-prickle by way of acknowledgment, and subject to the right of the occupiers of Goonamarth to divert the water for their own use when necessary.

The following are the questions which were put by the learned Baron to the jury, with their answers thereto:—

“First,—Was the foul-water leat cut from the brook with the consent of Geach, and under the terms and conditions spoken to by the two Geaches; or was it done by Hooper, of right, without any agreement?

“Answer. It was with the consent of Geach.

“Secondly,—Was there a cutting off of the water from the leat on one or more occasions when water in the brook was scarce; and, if so, was that done in virtue of the condition to that effect originally imposed, or done in assertion of the general right to have the water flow down the brook?

[739] *Answer.* There was, for both reasons.

"Thirdly,—Is the water in the part of the leat above the lower launder derived altogether from the sources of supply above the upper launder, or is it partially so derived and partially derived from springs and sources of supply between the upper and lower launders?

Answer. Partially from both sources.

"Fourthly,—Have the plaintiff and those through whom he claims had the uninterrupted enjoyment of the two leats, or of either of them, as of right, for more than twenty years, without interruption?

Answer. They have had uninterrupted possession of the leat coloured green, from the upper launder downwards; but have not had uninterrupted possession of the foul leat too

"Fifthly,—Was the payment of 4l. a year to Hooper a payment made for the right to have the water? or was it a payment only in consideration of Hooper not fouling by using it for streaming of tin?

Answer. Only for the purpose of preventing Hooper from fouling it."

The learned Baron thereupon directed a verdict to be entered for the plaintiff on the first and second counts, and for the defendant on the third count,—reserving leave to either side to move.

Montague Smith, Q. C., for the plaintiff, in Michaelmas Term last, obtained a rule calling upon the defendant to shew cause why the verdict found for him on the third count should not be set aside, and a verdict entered thereon for the plaintiff, on the ground that the agreement proved by the witnesses Geach, and the cutting off the water found by the jury, did not destroy or affect the enjoyment of the plaintiff since 1836; or why there should not be a new trial on the [740] ground of misdirection on the part of the learned judge, in erroneously directing the jury on the effect of the agreement, and in directing them that the agreement, if believed by them, would render the plaintiff's enjoyment an enjoyment not of right; and also on the ground that the verdict was against the evidence.

Karslake, Q. C., on the same day, on behalf of the defendant, obtained a rule calling upon the plaintiff to shew cause why the verdict found for him on the first and second counts should not be set aside, and a verdict entered for the defendant, on the grounds,—first, that the plaintiff was a mere licensee, and had no possession of the water to enable him to maintain this action,—secondly, that the user of the water by the plaintiff was contentious since the year 1855, and that no proof was given by him of any enjoyment of the water for twenty years as of right,—thirdly, that, the water-courses in question being altogether artificial, no right to continue to receive their flow could be acquired by the plaintiff,—fourthly, that the plaintiff, not being under the circumstances able to acquire a right to the water in the tin-tye as against the tin-bounder, was incapable of acquiring the right at all: or for a new trial, on the ground that the verdict was against the evidence.

Karslake, Q. C., and Pinder, shewed cause against the plaintiff's rule. There was no such enjoyment of the leat by the plaintiff and those under whom he claims as to give him a right to an easement under the 2nd section of the 2 & 3 W. 4, c. 71. That section enacts that "no claim which may be lawfully made at the common law, by custom, prescription, or grant, to any way or other easement, [741] or to any watercourse, or the use of any water, to be enjoyed or derived upon, over, or from any land or water of our said lord the king, &c., when such way or other matter as lastly hereinbefore mentioned shall have been actually enjoyed by any person claiming right thereto without interruption for the full period of twenty years, shall be defeated or destroyed by shewing only that such way or other matter was first enjoyed at any time prior to such period of twenty years; but nevertheless such claim may be defeated in any other way by which the same is now liable to be defeated; and, where such way or other matter as herein last before mentioned shall have been so enjoyed as aforesaid for the full period of forty years, the right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was enjoyed by some consent or agreement expressly given or made for that purpose by deed or writing." There has been no such enjoyment of the foul-water leat, which is the subject of the third count, as to give the right mentioned in the statute. It was a cut from a natural stream, the origin of which cut is shewn: it was made by Hooper, the then occupier of the Carrancarrow Clay-works, in the year 1830; and, though the plaintiff had the use of

it from the time he succeeded Hooper down to 1855, his enjoyment since that time has been subject to repeated interruptions. And the evidence shews that at no time had he an exclusive enjoyment. The enjoyment under the statute must be as of right, as well as without interruption. And here it was only by parol licence. In Gale on Easements, 3rd edit. 146, n. (c), it is said that "any occurrence during either the shorter or longer period, inconsistent with the *continuous* enjoyment of the easement claimed *as an easement* and *as of right*, is fatal to a claim under this section [s. 2], as, for instance, unity of possession [742] at any part of the period (*Orden v. Gardiner*, 4 M. & W. 499, or permission asked at any time during the period (*Momnouth Canal Company v. Hartford*, 1 C. M. & R. 614; *Beasley v. Clarke*, 2 N. C. 705, 3 Scott, 258; per cur. in *Tickle v. Brown*, 4 Ad. & E. 383, 6 N. & M. 230), or an agreement, whether written or verbal, made at any time within the period (*Tickle v. Brown*), or any other fact shewing that at any time during the period the enjoyment could not then have been as of right: *Warburton v. Poole*, 2 Hurlst. & N. 64. All such matters are admissible in evidence upon a simple traverse of the enjoyment as of right and without interruption."

Coleridge, Q. C., and Bullar, in support of the rule. Whatever may have been the position of other parties, the plaintiff clearly gained a right to the water mentioned in the third count by an uninterrupted enjoyment as of right from 1835, when he first obtained a sett of the Carranarrow Clay-works, down to the year 1855. [Byles, J. The plaintiff's user following an user which was permissive only, could he acquire a right? The plaintiff did not come in under Hooper. He succeeded Hooper in the occupation of the clay-works: but he came in under Lord Mount-Edgcumbe. There was no proof that the "furze-prickle" had ever been demanded of him: and he could not be in any way affected by Hooper's arrangement with Geach. [Byles, J. How do you shew an enjoyment for twenty years next before action brought?] There was no interruption acquiesced in. [Karslake, Q. C. The defendants rely on the user being permissive only, and not as of right. Byles, J. The jury have found that the enjoyment was not as of right.] That, it is submitted, was not a question for them: there was no evidence to go to the jury. In *Tickle v. Brown*, 4 Ad. [743] & E. 369, 6 N. & M. 230, it was held that the words "enjoyed by any person claiming right" applied to easements, in the 2 & 3 W. 4, c. 71, s. 2, and "enjoyment thereof *as of right*," in s. 5, mean an enjoyment had, not secretly or by stealth, or by tacit sufferance, or by permission asked from time to time, on each occasion, or on many: but an enjoyment had openly, notoriously, without particular leave at the time, by a person claiming to use without danger of being treated as a trespasser, as a matter of right, whether the right so claimed shall be strictly legal, as by prescription and adverse user, or by deed, or shall have been merely lawful so far as to excuse a trespass. Here, there was abundant evidence that the use of this water was claimed and enjoyed by Gaved openly and notoriously, as owner, and not by permission of anybody.

ERLE, C. J. I am of opinion that this rule should be discharged. This was an action to recover damages for an interference with the plaintiff's right to a stream or watercourse: and the question is whether the plaintiff had actually enjoyed the watercourse, claiming right thereto, for the full period of thirty years. I take the facts to be these:—Somewhere about the year 1830, Hooper, the then tenant of the Carranarrow Clay-works, got permission from Geach, the tenant of Goonamarth, to cut the leat now in question from the brook or natural stream. As between Hooper and the owner of Goonamarth, therefore, there could be, from 1830 to 1835, no enjoyment as of right within the meaning of the 2 & 3 W. 4, c. 71, which, as was decided in *Tickle v. Brown*, 4 Ad. & E. 369, 6 N. & M. 230, must be "an enjoyment had, not secretly or by stealth, or by tacit sufferance, or by permission asked from time to time, on each occasion, [744] or on many: but an enjoyment had openly, notoriously, without particular leave at the time, by a person claiming to use without danger of being treated as a trespasser." In the year 1835, Gaved, the plaintiff, took the Carranarrow Clay-works under Lord Mount-Edgcumbe, and with them had the enjoyment of the water of this stream or leat without interruption down to the year 1855, when the defendant Martyn for the first time interfered with that right, claiming to go back to the agreement between Geach and Hooper in 1830, and to stop the flow of water. The question is whether that enjoyment in fact for more than twenty years established an indefeasible right in the plaintiff, or left it as a question for the jury whether the plaintiff was not limited to the same right as Hooper had, viz. by virtue of his agree-

ment with Geach. The argument on the part of the plaintiff appears to be that the twenty years' enjoyment gave the right. The statute, however, does not say so. Before the statute, such a right could only be claimed by prescription, and might have been defeated by shewing the origin of the enjoyment: and the 2nd section provides that the claim shall not be defeated or destroyed by shewing only that the right was first enjoyed at any time prior to such period of twenty years (that is, by shewing its origin); provided the person claiming has enjoyed claiming a right thereto. Was there, then, evidence for the jury that Gaved continued to enjoy the stream as Hooper had done before him? The leat was made by Hooper through the farm in his occupation; and, on the face of it, it was an artificial course, and the owner of the soil from which it was brought at the end of twenty years claimed a right to stop it. I think there was evidence from which the jury were warranted in finding that there had not been an enjoyment for twenty years [745] previously to the commencement of the action, by the plaintiff or those through whom he claimed, as of right; but that the enjoyment was precarious, and procured by the permission of the owner of the soil. I do not lay it down as a matter of law that the plaintiff is affected by the licence which Hooper had; but only that the learned judge was bound to leave the question to the jury, and that they were warranted in acting upon it as they have done.

WILLES, J. I am of the same opinion. The court is asked by the first rule in this case to enter a verdict for the plaintiff on the third count, on the ground that the licence granted by Geach, assuming it to have been granted, was merely a personal licence to Hooper, and did not affect the plaintiff; or for a new trial, on the ground of misdirection as to the effect of that agreement. If the learned Baron had told the jury that the effect of the agreement between Hooper and Geach was to stamp the character of precariousness on the enjoyment by Gaved, Hooper's successor, his direction might have been objectionable. The first question which he put to the jury seems rather to indicate that that is what was in his mind; but, when we turn to the fourth question, we find that that was not his intention. The fourth question depends upon this consideration whether, upon the evidence before them, the jury should come to the conclusion that the enjoyment by the plaintiff was or was not precarious. The two questions presented by the rule, therefore, are in reality the same: and they amount to this, whether there was any evidence from which the jury might properly find that the enjoyment of the leat in question was precarious. A plaintiff who is seeking to establish an enjoyment for the statutable period of twenty years, must,—with this [746] exception, that he need not satisfy the jury of the fact of there having been a lost grant, or that the enjoyment commenced before the time of legal memory,—make out that his enjoyment has been under a claim of right. And I apprehend it would clearly be competent, in answer to such a claim, to shew that the enjoyment originated under an agreement with the tenant or owner of the servient tenement, and therefore was precarious and not as of right: and, upon proof of that fact, it would be for the jury to say whether the tenant of the dominant tenement had not continued the enjoyment in pursuance of a similar agreement, and whether it was not precarious. Here, there was abundant evidence from which the jury might, if they had thought proper, come to the conclusion that the enjoyment by the plaintiff was precarious. There is the agreement between Geach and Hooper, and the fact that the water was to be diverted by artificial means. Considering the jealousy which exists as to water rights, it is difficult to say that the plaintiff's claim could ever have been a claim as of right. The circumstances which were obvious would naturally put him on inquiry whether the permission which Hooper had was by deed, or whether it originated only in a licence. There was evidence from which the jury might well conclude that the plaintiff was content to go on as before, and that there was a tacit permission on the part of the owner of Goonamarth that things should continue as they were, subject, of course, to the conditions applying as between the plaintiff and Hooper. Upon these grounds, it appears to me that there was evidence upon which the jury might find the enjoyment of the foul leat to have been throughout an enjoyment by the permission of the owner of Goonamarth. In the case of *Toymbee v. Brown*, 3 Exch. 117, 125, counsel in argument put a question something like [747] this, as to lights,—“Suppose,” he said, “an agreement by a tenant for life that he and his successors, owners of certain property, should allow the use of a light, could that agreement be set up to defeat the title of a party who had subsequently acquired a right to the use of the light by twenty years' enjoyment?”—which is the difficulty

suggested by Mr. Coleridge here. To this Alderson, B., replies,—“If the parties had gone on acting upon the agreement, that would be evidence from which the jury might negative an adverse enjoyment, which is the foundation of the right.” So, here, the agreement between Geach and Hooper, with the other circumstances of the case, were evidence for the jury, and on which their verdict may well stand.

BYLES, J. I am of the same opinion. Here the origin of the enjoyment of the stream was clearly shewn by the admissions of the parties to have been a user by the permission of the tenant or the owner of the stream, or of both. Hooper confessedly had no right. The plaintiff succeeds Hooper generally: he does as Hooper did: he enjoys as his predecessor did. Now, mere enjoyment is not enough to give a right under the statute: it must be an enjoyment by a person claiming as of right. Until Martyn came in, in 1855, there is nothing to shew that the plaintiff ever claimed or did anything more than his predecessor Hooper did. The question left, as far as the foul leat is concerned, was, “Has the plaintiff or those through whom he claims had an uninterrupted enjoyment of the leat as of right for more than twenty years?” The answer is in the negative. It seems to me that the question was rightly put to the jury, and that there was abundant evidence to warrant their answer. The rule was also moved on the ground that the verdict was against the evidence. I think that, if the plaintiff [748] had notice of the circumstances under which Hooper's enjoyment of the leat began, his subsequent enjoyment was not under a claim of right. For these reasons, I am of opinion that the direction of the learned Baron was right, and that the finding of the jury on that direction was also right.

MONTAGUE SMITH, J., had been counsel in the cause, and therefore took no part in the judgment.

Rule discharged.

Coleridge, Q. C., and Bullar, then proceeded to shew cause against the defendant's rule. The second rule relates to the clear water brought down to the plaintiff's works by the two launders. As to these, the facts were, that the lower launder was placed by Hooper to carry the water from the spot marked on the plan as “the old woman's house” over the foul-water leat, and the upper launder by the plaintiff himself in the year 1842: and, as to both, the plaintiff has had uninterrupted user for more than twenty years, subject only since 1855 to the claim of Martyn. That, however, the jury have disposed of. The only questions which remain, therefore, are whether the plaintiff, coming in after Hooper, enjoyed the water as of right or as a mere licensee, and whether the plaintiff could acquire any right in respect of the water brought down by the upper launder, inasmuch as it was taken from a tye or stream which was subject to the rights of the tin-bonders. There was abundant evidence of actual enjoyment. It will be said that, as the tin-bonders had the water as incident to their rights as such, the plaintiff could derive no right as against the owner of the soil. If the plaintiff has had the requisite length of enjoyment to give him an easement, [749] his rights under the statute cannot be affected by the local and peculiar rights of the tin-bonders (a). The rights of a person in the position of the plaintiff are well defined in *Bright v. Walker*, 1 C. M. & R. 211. The tin-bonder had a right to use the water of the tye for streaming his ore: the payment to him by the plaintiff was merely for the purpose of inducing him to abstain from exercising his rights, it being important to the plaintiff to have the water brought down to his works in a clear state.

Karslake, Q. C., and Pinder, in support of the rule. The plaintiff had no such interest in the water in question as to entitle him to maintain this action. The material facts are these:—Hooper was tenant of the whole of Carrancarrow farm. The plaintiff, as the tenant of the Carrancarrow Clay-works, claims the right to dig and work for clay under Hooper's farm,—an incorporeal hereditament. The legal incidents of such a licence as the plaintiff had are clearly defined in *Harker v. Birkbeck*, 3 Burr. 1556, *Doe d. Hanley v. Wood*, 2 B. & Ald. 724, *Muskett v. Hill*, 5 N. C. 694, 7 Scott, 855, and *Lane v. Whaley*, 3 Hurlst. & N. 675. In *The Stockport Waterworks Company v. Potter*, 3 Hurlst. & Colt. 300, it was held that the abstraction of water from a natural stream, openly and under a claim of right for a period of twenty years,

(a) For a careful exposition of the rights of tin-bonders, see Rogers on Mines, 347.

to a tenement not abutting on the stream, will create no easement to have pure water flow down the stream to the point of abstraction. The plaintiff's right to the water could not be claimed as appurtenant to his right to dig the clay. As to the upper launder, which was put up by the plaintiff in 1842 for the purpose of conducting the water from the tin-tye,—an open cut or drain made [750] by the tin-bonders for the purpose of streaming their tin,—down to the Carrancarrow Clay-works, twenty years' enjoyment could confer no right. It was a mere artificial stream, which the tin-bonders might have diverted whenever they pleased. There was, therefore, no evidence of a user as of right which could properly be left to the jury. In *Arkwright v. Gell*, 5 M. & W. 203, 231, Lord Abinger says,—“The stream upon which the mills were constructed was not a natural watercourse, to the advantage of which, flowing in its natural course, the possessor of the land adjoining would be entitled, according to the doctrine laid down in *Mason v. Hill*, 5 B. & Ad. 1, and in other cases. This was an artificial watercourse, and the sole object for which it was made was to get rid of a nuisance to the mines, and to enable their proprietors to get the ores which lay within the mineral field drained by it: and the flow of water through that channel was, from the very nature of the case, of a temporary character, having its continuance only whilst the convenience of the mine-owners required it; and, in the ordinary course, it would most probably cease when the mineral ore above its level should have been exhausted.” In *Wood v. Waud*, 3 Exch. 748, it was held that no action will lie for an injury by the diversion of an artificial watercourse, where, from the nature of the case, it is obvious that the enjoyment of it depends upon temporary circumstances, and is not of a permanent character, and where the interruption is by a person who stands in the nature of a grantor. So, in *Greatrex v. Hayward*, 8 Exch. 291, it was held that the flow of water from a drain made for the purposes of agricultural improvements, for twenty years, does not give a right to the neighbour, so as to preclude the proprietor from altering the level of his drain for the improvement of his [751] land. Lord Campbell, referring to those cases in *Beeston v. Wate*, 5 Ellis. & B. 986, 996, says: “In those cases, regard was had to the water being obtained artificially by the owner of the servient tenement, rather than to the water running through an artificial cut. Here the water in question is part of the water of a stream which has flowed on the surface of the country from the time that our globe took its present conformation.” The cases are all collected in the 3rd edit. of Gale on Easements, 263 et seq. The result is that one who has made an artificial cut for a temporary purpose cannot claim a prescriptive right under the statute.

ERLE, C. J. As to the claim in respect of the water carried over the lower launder, it seems to me that the verdict ought to stand. Water has been brought to the clay-works of the plaintiff, and he, being the occupier of those works, and having a right to the easement of digging clay on Hooper's farm, may maintain a valid claim to the water in respect of such occupation. Then, does the evidence shew that, though he has enjoyed the easement for more than twenty years without interruption, and as of right, he could not acquire an indefeasible right to it, because the water was collected in land which was subject to the claims of tin-bonders. If he had himself dug the channel and conducted the water along it for more than twenty years without interruption, he would have acquired a right to it. But it is said that he could not acquire a right here, because the water had its source in land which was subject to the contingent rights of the tin-bonders, provided they chose to exercise them: and it is said that the right to the water could not vest absolutely in any person where [752] such a claim existed. I do not, however, think that argument tenable. If the rights of the tin-bonders are in operation, the custom of Cornwall, which may be called the common law of Cornwall, may operate in the way suggested. But, if they are not in operation, the general law of the land applies to Cornwall as to any other county. The man who has dug a channel, and has conducted water along it for twenty years without interruption, acquires a right to it, though its source may be in lands which are subject to tin-bonders' rights. This will entitle the plaintiff to a verdict in respect of the lower launder. As to the upper launder, the court will take time to consider.

WILLES, J. I am of the same opinion. As to the first question, whether the plaintiff could maintain the action in respect of his possession of the Carrancarrow Clay-works, I am clearly of opinion that he can. He was the occupier of the land

through which the water flowed; and, as a general rule, the occupier of land through which water flows may maintain an action for the diversion of it. The plaintiff's right to the uninterrupted flow of the water is not diminished by the circumstance of his having an additional right, viz. the right of searching for clay under other lands not in his occupation. If we were to hold that such an occupation, ancillary to the enjoyment of mineral rights, was not sufficient to maintain this action, we should in effect be saying that there never could be a right of this kind acquired by occupiers, under Lord Tenterden's Act. As to the second question, whether or not the enjoyment of the water was contentious, and therefore not an enjoyment as of right, since the year 1855, it is obvious that that must always be a question for the jury; and the jury have determined that, by finding that the enjoyment was of [753] right. As to the third question, viz. whether the artificial character of the watercourse in its origin prevented the acquisition of a right to it by prescription, a different question arises with respect to the upper launder, the water flowing over which was supplied from an artificial cut called a tin-tye, which had been made by the tin-borders for the purpose of streaming tin, from that which presents itself as to the lower launder, the flow over which was procured by an adit driven by the person claiming the right to the water into land not subject to tin-borders' rights. As to the last-mentioned launder, the flow of water was no doubt intended to be of a permanent character, and therefore subject to the law of prescription. That is the distinction pointed out in *Wood v. Waul*, 3 Exch. 748. In *Mayor v. Chadwick*, 11 Ad. & E. 571, it was held that, in the absence of a special custom, artificial watercourses are not distinguished in law from natural ones, and that a title may be gained by twenty years' user as well to the former as to the latter. This was supposed to be at variance with what had been laid down by the court of Exchequer in *Aikwright v. Gell*, 5 M. & W. 231. But the two cases are reconciled by the judgment of Parke, B., in *Wood v. Waul*, 3 Exch. 777, where that learned judge says: "We entirely concur with Lord Denman, C. J., that 'the proposition that a watercourse, of whatever antiquity, and in whatever degree enjoyed by numerous persons, cannot be enjoyed so as to confer a right to the use of the water, if proved to have been originally artificial, is quite indefensible:' but, on the other hand, the general proposition that, *under all circumstances*, the right to watercourses, arising from enjoyment, is the same whether they be natural or artificial, cannot be sustained. The right to artificial watercourses, as against the party creating them, surely [754] must depend upon the character of the watercourse, whether it be of a permanent or temporary character, and upon the circumstances under which it is created. The enjoyment for twenty years of a stream diverted or penned up by permanent embankments, clearly stands upon a different footing from the enjoyment of a flow of water originating in a mode of occupation or alteration of a person's property, and presumably of a temporary character, and liable to variation." The stream running over the lower launder, though artificial in its origin, was subject to the law of prescription, and the plaintiff has acquired a right to it, subject to the operation of the fourth question, whether the circumstance of its having its origin in the tin bounds prevents the application of the Prescription Act to the claim. I am of opinion that it does not. The right of the tin-borders by custom is one apart from the ownership of the soil, or the enjoyment of any right connected with the soil, with the exception of the single right to search for tin and to take all reasonable means for producing it, subject to the payment of a toll to the owner of the land. I apprehend that the rights of the owner of the land, and any incorporeal rights or hereditaments arising out of it, may be determined by the ordinary law under the Prescription Act, irrespective of the rights of the tin-border, which may not be inaptly described as rights paramount under the custom. I do not see why the inhabitants of Cornwall should be in a worse position with reference to the acquisition of prescriptive rights to water than the inhabitants of other parts of the kingdom. With respect, therefore, to the lower launder, I concur with my Lord in thinking that the rule should be discharged; and, as to the upper launder, the court will take time to consider. As to the payments made to Hooper, but little reliance was placed in [755] the argument on them. Indeed this point was disposed of by the finding of the jury that the payment was not for the use of the water, but in order to prevent its being fouled, which might exist as a distinct right, according to *Carlyon v. Lovering*, 26 Law J., Exch. 251.

BYLES, J. I agree with all that has fallen from my Lord and my Brother Willes

as to the lower launder. The question raised as to the upper launder requires more consideration.

Cur. adv. vult.

ERLE, C. J., now delivered the judgment of the court upon the point reserved:—

The point remaining for decision is, the right of the plaintiff to maintain his action on the count for removing the upper launder. The facts for the plaintiff are, that this launder was placed in 1842 to convey water in the leat to the plaintiff's works, and, notwithstanding the evidence of contention between the parties, we take the jury to have decided the question of fact rightly, that the enjoyment of this water by the plaintiff was as of right, without interruption: but their verdict was taken subject to the leave reserved to the defendant's counsel to move to reverse that verdict, if the facts relied on for the defendant negatived in point of law the existence of the right claimed by the plaintiff.

The result of those facts is, that the water in the stream in question was brought to the surface artificially by the operations of miners, and conveyed in the tye or open adit to the part of the brook where the upper launder was afterwards placed so as to receive it, and that the use of the stream, which might include a change of its direction, had not been abandoned by the miners.

[756] It appeared that the land where the facts relevant to the right to the stream in the upper launder took place, was within the tin-bounds, which at the earliest period mentioned in the evidence belonged to William Hooper, and had passed from him, through mesne assignments to the defendant. The mouth of the adit from which the stream of the tye flowed, the course of that stream from thence over the surface in the tye either to tin stream works or to the Carrancarrow Clay-works, or to the brook, or to and beyond the upper launder towards the Carrancarrow Clay-works of the plaintiff, were all within the limits of the tin-bounds above mentioned, and so was subject to the rights of the owner thereof. It appeared also that the owner of the tin-bounds had worked for tin, and had de facto exercised his rights over the water from time to time during all the time to which the evidence related. In 1826 and 1827, one Vivian had paid the bound-owner 4l. a year for taking the water to and from the tye to the Cawn Clay-works. One Higman had paid annually 10l., first to Hooper the father, and afterwards to Hooper the son, for taking the water of the tye, down to 1851; and the plaintiff himself in 1852 agreed to pay to the bounder 4l. annually, and did pay for three quarters.

It is true that these payments were made to the bounder to induce him to omit the exercise of his right to use the stream for tin, whereby the water would have been fouled; and that the water itself was not the subject of the agreement. But the point to be ascertained is, whether the miners had abandoned their right and interest in the stream brought to the surface by mining operations; and, if the tin-bounder claimed and exercised the right of using the stream within the bounds when, where, and how he chose, he had not abandoned his right thereto.

[757] It is not necessary here to consider further the rights of owners of tin-bounds; but it is not superfluous to add that the right to tin-bounds is most clearly "the law and privilege of the stannary, and as such part of the law of England,"—Co. Litt. 11 b.; and that a judge administering the law of England is as much bound within the stannaries to protect rights derived from the stannary laws, and to learn from those laws what those rights are, as in Kent he is bound to know what is the tenure of land there, and what are the rights incidental to that tenure.

The antiquity and the operation of the stannary laws, both generally and also in relation to tin-bounds, are considered, and the authorities are collected in the report of *Vice v. Thomas*, published by Mr. Smirke, vice-warden of the stannaries, in 1843.

These being the facts in relation to the stream, the question remains, whether the plaintiffs, by turning that stream from the brook over the upper launder into the leat leading to his works, and enjoying the use thereof without interruption for more than twenty years, acquired a right thereto under the Prescription Act. Although the jury have found that he did this as of right, that must be taken to be a finding of the fact of the enjoyment, subject to the point reserved for the defendant, whether such enjoyment of a stream of this character could be by law as of right, within the meaning of the Prescription Act. And we are of opinion that the plaintiff acquired no right to this stream by the user thereof for twenty years, because the stream was an artificial stream made to flow over the defendant's land by the operations

of miners, and the miners had not permanently abandoned their right of control over the water in the stream when the plaintiff diverted it by the upper launder to his works.

Rights and liabilities in respect of artificial streams [758] when first flowing on the surface are entirely distinct from rights and liabilities in respect of natural streams so flowing. The water in an artificial stream flowing in the land of the party by whom it is caused to flow, is the property of that party, and is not subject to any rights or liabilities in respect of other persons. If the stream so brought to the surface is made to flow upon the land of a neighbour without his consent, it is a wrong for which the party causing it so to flow is liable. If there is a grant by the neighbour, the terms of the grant regulate the rights and liabilities of the parties thereto. If there is uninterrupted user of the land of the neighbour for receiving the flow as of right for twenty years, such user is evidence that the land from which the water is sent into the neighbour's land has become the dominant tenement, having a right to the easement of so sending the water, and that the neighbour's land has become subject to the easement of receiving that water. But such user of the easement of sending on the water of an artificial stream is of itself alone no evidence that the land from which the water is sent has become subject to the servitude of being bound to send on the water to the land of the neighbour below. The enjoyment of the easement is of itself no evidence that the party enjoying it has become subject to the servitude of being bound to exercise the easement for the benefit of the neighbour. A right of way is no evidence that the party entitled thereto is under a duty to walk; nor a right to eaves-dropping on the neighbour's land, that the party is bound to send on his rain-water to that land. In like manner, we consider that a party by the mere exercise of a right to make an artificial drain into his neighbour's land either from mine or surface, does not raise any presumption that he is subject to any duty to continue his artificial drain, by twenty years' user, al-[759]-though there may be additional circumstances by which that presumption would be raised or the right proved. Also, if it be proved that the stream was originally intended to have a permanent flow, or if the party by whom or on whose behalf the artificial stream was caused to flow is shewn to have abandoned permanently without intention to resume the works by which the flow was caused, and given up all right to and control over the stream, such stream may become subject to the laws relating to natural streams. But the facts here do not raise either of these points.

The law relating to natural streams is entirely different. The flow of a natural stream creates natural rights and liabilities between all the riparian proprietors along the whole of its course. Subject to reasonable use by himself, each proprietor is bound to allow the water to flow on without altering the quantity or quality. These natural rights and liabilities may be altered by grant or by user of an easement to alter the stream, as by diverting, or fouling, or penning back, or the like. If the stream flows at its source by the operation of nature, that is, if it is a natural stream, the rights and liabilities of the party owning the land at its source are the same as those of the proprietors in the course below. If the stream flows at its source by the operation of man, that is, if it is an artificial stream, the owner of the land at its source or the commencement of the flow, is not subject to any rights or liabilities towards any other person in respect of the water of that stream. The owner of such land may make himself liable to duties in respect of such water, by grant or contract: but the party claiming a right to compel performance of those duties must give evidence of such rights, beyond the mere suffering by him of the servitude of receiving such water.

The rights of the plaintiff in respect of the two [760] launders exemplify this distinction. For the lower launder the plaintiff had made a watercourse on the defendant's land, and collected the water of natural springs therein, and brought it to the launder. For the upper launder, the plaintiff had gone to the edge of the defendant's land, and received thence into the launder the water of the tye, where it would have flowed into the natural stream and become part thereof. In respect of the lower launder, there was dominant actio and servient patientia for twenty years, and so there was good evidence of an easement for the plaintiff, the dominant tenant. In respect of the upper launder, there was no dominant actio by the plaintiff nor servient patientia by the defendant on the defendant's land in respect of the stream while on that land, and so there was no presumption of a grant by the defendant, no evidence of a right in the plaintiff.

For the law relating to natural streams on the surface, we refer to *Mason v. Hill*, 5 B. & Ad. 1, 2 N. & M. 347, 3 B. & Ad. 304. For the law relating to subterranean water, to *Chasenore v. Richards*, 7 House of Lords Cases, 349 (Exchequer Chamber, 2 Hurlst. & N. 168). For the law relating to artificial streams, we refer to *Arkwright v. Gell*, 5 M. & W. 203, *Magor v. Chadwick*, 11 Ad. & E. 571, 3 P. & D. 367, and *Wood v. Waud*, 3 Exch. 748. And, for a clear exposition of the whole law on this class of easements and servitudes, we refer to Gale on Easements, 3rd edit. p. 263.

In *Arkwright v. Gell* the law relating to artificial streams is expounded with clearness and vigour. The important and extensive rights and interests connected with mining are protected in due relation to the rights of surface owners. In this case, the question arose between the surface owner and the mining owner: and it was held that the mining owner who had brought the water to the surface on the plaintiff's land for [761] draining a mine, might divert it where deeper draining was required; and all the mines of the district that might be unwatered by the drain were properly treated as one interest.

In *Magor v. Chadwick* no law is expounded, but doubts upon the law are created by dissent from some governing propositions laid down in *Arkwright v. Gell*. The judge at the trial had not recognized any distinction between natural and artificial streams; and the court refused a new trial for misdirection, on the ground that the blame of any miscarriage, if miscarriage there was, ought to be laid on the counsel who argued at the trial. The result of that case would have been pernicious to all miners and all proprietors improving land by draining. But it was followed by *Wood v. Waud*, in which the propositions laid down in *Arkwright v. Gell*, relating to the difference between artificial and natural streams, are re-affirmed. In this case the question arose between two proprietors of the surface, over whose land an artificial stream flowed on its way to the natural stream; and it was held that, as between them, the law relating to natural streams did not govern.

This case was followed by *Greatrex v. Hayward*, 8 Exch. 291, in which it was decided that a drain on the surface made for the purpose of draining the land of the maker thereof, is an artificial stream, and is not subject to the law relating to natural streams, and might be diverted after twenty years' flow into the plaintiff's land, for the purpose of improving the drainage of the defendant's land.

These cases have been followed by others collected in the treatise above mentioned: and we consider that the distinction between natural and artificial streams is established in our law, and that the flow from the upper launder was not such an artificial stream that [762] an easement could be acquired therein by twenty years' user.

For these reasons we consider that the plaintiff's case as to the upper launder failed; and that the rule for entering the verdict on the count relating thereto for the defendant must be made absolute.

Rule absolute accordingly (a).

[763] IN THE EXCHEQUER CHAMBER.

BEVAN v. WHITMORE. 1865.

An official assignee of a district court of bankruptcy having given his assent to the bringing of an action in his name jointly with that of the trade assignee for the recovery of part of the bankrupt's estate, and, the action proving unsuccessful, the trade-assignee having paid the costs:—Held,—affirming the judgment of the court below,—that he was entitled to sue the official assignee for contribution.

This was an action brought by the plaintiff, who was the trade-assignee under a fiat against one Foster, a merchant at Birmingham, to recover from the defendant, the official-assignee, the sum of 127l., being a moiety of the costs incurred in an action brought by both as assignees of one Dowling, under the circumstances stated in the report in the court below, ante, vol. xv., p. 433.

The plaintiff had paid the whole of the costs, and the court of Common Pleas held

(a) See *Rawstron v. Taylor*, 11 Exch. 369.

that he was entitled to maintain an action against the official-assignee for a moiety of the sum so paid by him.

The defendant appealed against this decision, and the case was argued in the Exchequer Chamber at the sittings in error after Trinity Term, 1864, before Pollock, C. B., Crompton, J., Bramwell, B., Channell, B., Blackburn, J., and Shee, J., by Lush, Q. C., for the appellant (the defendant below), and by Quain, for the respondent (the plaintiff below), when the judgment of the court below was unanimously affirmed.

Judgment affirmed.

[764] IN THE EXCHEQUER CHAMBER.

CAMERON v. THE CHARING-CROSS RAILWAY COMPANY. BOURHILL v. THE SAME.
Feb. 6th, 1865.

[S. C. 12 L. T. 121; 11 Jur. N. S. 282; 13 W. R. 390. Overruled, *Ricket v. Metropolitan Railway*, 1867, L. R. 2 H. L. 186.]

Held by the Exchequer Chamber,—reversing the judgment of the court of Common Pleas,—that an injury to the goodwill or a loss of profit in the business of a shop, caused by an obstruction, whether permanent or temporary, of a highway, in the lawful execution of the works of a railway company, where no part of the land on which the business is carried on is taken or otherwise injuriously affected, is not the subject of compensation under the 68th section of the Lands Clauses Consolidation Act, 1845.

In this case the court of Common Pleas held, upon the authority of *Chamberlain v. The West End of London and Crystal Palace Railway Company*, 2 Best & Smith, 605, 617, and *Senior v. The Metropolitan Railway Company*, 2 Hurlst. & Colt. 258,—that loss of trade occasioned by the obstruction of a passage leading to a thoroughfare in which the plaintiff's shop was situate, whereby the access of customers was interfered with, was a particular damage in respect of which the parties were entitled to compensation under the 68th section of the Lands Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 18: see 16 C. B. (N. S.) 430.

The defendants appealed against this decision, and the case now came on for argument in the Exchequer Chamber, before Pollock, C. B., Crompton, J., Channell, B., Blackburn, J., Mellor, J., and Pigott, B., when

H. Shield, for the appellants, relied upon the decision of the Exchequer Chamber in *Ricket v. The Metropolitan Railway Company*, where it was decided at the same sittings (since reported, 12 L. T. (N. S.) 79), by the majority of the court, that an injury to the goodwill or a loss of profit in the business of a house, caused by an obstruction of a highway, in the lawful execution of the works of a railway company, where no part of the land whereon the business is carried on is taken or otherwise injuriously affected, is not the subject of compensation under the Lands Clauses Consolidation Act, 1845.

[765] H. Giffard, Q. C. (with whom was Maclachlan) contra, sought to distinguish *Ricket v. The Metropolitan Railway Company* from the present case, by the fact that there was not, as here, a permanent obstruction of the way.

But the whole court thought that it was impossible to distinguish the two cases, and that the judgment of the court below must be reversed.

Judgment reversed.

IN THE EXCHEQUER CHAMBER.

DOGGETT v. CATTERNS. Feb. 6th, 1865.

[S. C. 34 L. J. C. P. 159; 12 L. T. 355; 11 Jur. N. S. 243; 13 W. R. 390. Distinguished, *Shaw v. Morley*, 1868, L. R. 3 Ex. 141. Applied, *Bows v. Fenwick*, 1874, L. R. 9 C. P. 344. Distinguished, *Eastwood v. Miller*, 1874, L. R. 9 Q. B. 443: *Haigh v. Sheffield Corporation*, 1874, L. R. 10 Q. B. 107. Discussed, *Galloway*

v. *Maries*, 1881, 8 Q. B. D. 279; *Liddell v. Lofthouse*, [1896] 1 Q. B. 297. Referred to, *Thwaites v. Coulthwaite*, [1896] 1 Ch. 499. Discussed, *Hawke v. Dunn*, [1897] 1 Q. B. 587. Distinguished, *McInaney v. Hildreth*, [1897] 1 Q. B. 604. Commented on, *Powell v. Kempton Park Racecourse Company*, [1897] 2 Q. B. 262; [1899] A. C. 165.]

Held by the Exchequer Chamber,—reversing the judgment of the Common Pleas,—that the habitual use of a spot in a public park for the receiving of deposits, to return a larger sum on the contingency of a particular horse winning a race, is *not* the using of a “place” for such purpose, within the 16 & 17 Vict. c. 119, s. 1.

The question in this case was, whether the habitual use of a spot under a tree in Hyde Park for the receiving of deposits, to return a larger sum on the contingency of a particular horse winning a race, was the using of a “place” for such purpose, within the prohibition of the 16 & 17 Vict. c. 119, s. 1, which, after reciting that “a kind of gaming has of late sprung up, tending to the injury and demoralization of improvident persons, by the opening of *places called betting-houses or offices*, and the receiving of money in advance by the *owners or occupiers of such houses or offices*, or by other persons acting on their behalf, on their promises to pay money on events of horse-races and like contingencies,”—“for the suppression thereof,” enacts that “no *house, office, room, or other place* shall be opened, kept, or used for the purpose of the owner, occupier, or keeper thereof, or any person using the same, or any person procured or employed by or acting for or on behalf of such owner, occupier, or keeper, or [766] person using the same, or of any person having the care or management or in any manner conducting the business thereof, betting with persons resorting thereto, or for the purpose of any money or valuable thing being received by or on behalf of such owner, occupier, keeper, or person as aforesaid, as or for the consideration for any assurance, undertaking, promise, or agreement, express or implied, to pay or give thereafter any money or valuable thing on any event or contingency of or relating to any horse-race or other race, fight, game, sport, or exercise, or as or for the consideration for securing the paying or giving by some other person of any money or valuable thing on any such event or contingency as aforesaid; and every house, office, room, or other place opened, kept, or used for the purposes aforesaid, or any of them, is hereby declared to be a common nuisance, and contrary to law.”

The court of Common Pleas having held that the spot in question was a “place” within the meaning of the statute (ante, vol. 17, p. 669), the defendant appealed; and the case was argued in the Exchequer Chamber at the sittings after Hilary Term, 1865, before Pollock, C. B., Crompton, J., Bramwell, B., Channell, B., Blackburn, J., Mellor, J., and Pigott, B.

Hayes, Serjt. (with whom was B. Greene), for the appellant, submitted that the word “place” in the statute must be restricted to places ejusdem generis with “house,” “office,” and “room”; and that an open space in a public park could not have an owner or occupier. [Bramwell, B. Or be a “common gaming-house” within s. 2.]

Yeatman, contrà, insisted that the word “place” was to be understood in its ordinary and accustomed sense, and need not be confined to house, office, room, [767] or other place of which there might be an owner or occupier.

POLLOCK, C. B. I am of opinion that the judgment of the court of Common Pleas must be reversed. The opinions of the learned judges of the court below proceed on the ground that the spot on which the defendant exercised his calling was a “place” within the meaning of s. 1 of the statute. I concur in that view so far that I think the place being an open one, and not being a “house,” “office” or “room,” would not alone prevent it from being a place within that section. I think, however, to satisfy the words, it must be a place which is capable of having an owner or occupier, which this place clearly was not.

CROMPTON, J. I am of the same opinion. The preamble to the statute refers to the owners and occupiers of betting-houses or offices and persons acting on their behalf. The words “such person,” in s. 5, refer to “any person being the owner or occupier of any house, office, room, or other place,” in s. 4. The defendant here clearly does not come within that description.

BRAMWELL, B. I agree that the judgment should be reversed, but not on the ground that a person, to come within ss. 4 and 5 of the statute, must be an owner

or occupier of the place, or a person acting on behalf of the owner or occupier. The object of the statute was to put down ascertained places of resort for gambling. I think the place in question was not a place of that sort within the contemplation of the act.

The rest of the court concurring,—CHANNELL, B., and BLACKBURN, J., for the reasons given by POLLOCK, C. B., and MELLOR, J., and PIGOTT, B., for that given by BRAMWELL, B.,—

Judgment reversed.

[768] ANDREWS AND OTHERS v. LAWRENCE AND ANOTHER. 1865.

A. agreed to do for B. & Co. all the woodwork on an iron ship which B. & Co. were building for M. & Co., according to a certain tender, the whole to be completed for 300l. The contract or tender contained the following clause,—“Any *important* work not mentioned in this tender that may be required to be done by the *owners*, to be paid for by them, in addition to the amount herein specified.” The work was undertaken by A. for B. & Co. upon the faith of a guarantie by C., as follows,—“In consideration of your contracting with Messrs. B. & Co. for the woodwork of an iron ship now building by them for Messrs. M. & Co., we hereby guarantee the payment to you *according to the contract*.” The word “important” in the contract was inserted by A., with the consent of B. & Co., after the guarantie was signed by C.—Held, that the contract bound B. & Co. for extra work done, they being the persons referred to therein as “the owners”; and that the insertion of the word “important” had no material effect upon the liability of C. under the guarantie.—Affirmed in the Exchequer Chamber.

This was an action upon a guarantie. The declaration stated that the defendants, in consideration of the plaintiffs’ contracting with Messrs. H. M. Lawrence & Co. for the woodwork of an iron ship then building by them for Messrs. Moor & Co., guaranteed the payment to the plaintiffs by the said H. M. Lawrence & Co. according to a certain contract: Averment, that they, the plaintiffs, did contract with the said H. M. Lawrence & Co. for the said wood-work of the said ship, and there remained unpaid to the plaintiffs by the said H. M. Lawrence & Co. 205l. 18s. 5d., which sum was due and payable according to the said contract from the said H. M. Lawrence & Co. to the plaintiffs: Breach that, although the plaintiffs had done all things, and all things had happened, and all times had elapsed necessary to entitle the plaintiffs to sue the defendants on the breach of promise in that count complained of, yet the defendants had not indemnified the plaintiffs according to the said promise, and had not paid to the plaintiffs the sum of 205l. 18s. 5d., or any part thereof. Money counts, and accounts stated.

The defendants pleaded,—first, that they did not promise as alleged,—secondly, to the first count, that the plaintiffs did not contract with the said H. M. Lawrence & Co. for the said wood-work of the said ship, as alleged,—thirdly, to the first count, that before action the said H. M. Lawrence & Co. satisfied and discharged by payment all the moneys due and pay-[769]able according to the contract from the said H. M. Lawrence & Co. to the plaintiffs,—fourthly, never indebted. Issue thereon.

The cause was tried before Shee, J., at the Spring Assizes at Liverpool in 1864, when the following facts appeared in evidence: The plaintiffs are ship-chandlers and ship-smiths, carrying on business in Liverpool, and the defendants are merchants also at Liverpool. The action was brought to recover the sum of 201l. 16s. 5d. for extra work done by the plaintiffs to an iron ship called the “Bianca,” and which they claimed from the defendants under the guarantie hereinafter mentioned.

James Andrews, one of the plaintiffs, who was called as a witness, stated that, in August, 18 2, Mr. H. M. Lawrence, a brother of the defendants, carrying on by himself the business of an iron-ship builder at Liverpool, under the style of H. M. Lawrence & Co., informed him that he had entered into a contract to build, and was building, for Messrs. Moor & Co., an iron ship called the “Bianca,” and applied to him to send in a tender for the wood work; that he knew that H. M. Lawrence had been in difficulties, and said that he should require a guarantie, and he afterwards, viz. on 25th of August, sent to the said H. M. Lawrence the following tender:—

"Messrs. H. M. Lawrence & Co.

"Liverpool, 25th August, 1862.

"We will engage to do the following wood-work at an iron ship now building by you, viz. :

"*Decks.* To be of yellow pine. Main deck 6×4 , one plank of teak 8×4 each side of hatches, right fore and aft, for ring bolts, and one 8×4 next the water-ways. Quarter deck $6 \times 3\frac{1}{2}$; topgallant forecastle $6 \times 3\frac{1}{2}$, about 30 feet long, also a laid between decks 6×3 , to be well seasoned. Store rooms in each end. [770] Deck 6×3 , free from objectionable knots, and well fastened with screw-bolts and nuts; and upper and forecastle deck and quarter-deck to be planed and caulked. Upper deck to be caulked twice, and plugged, set in white lead; 'tween decks once caulked; upper decks to have two coats of oil.

"*Ceiling.* To be of pitch pine 3 inches thick to upper part of bilge, to be made in square hatches in flat of bottom, with small ring bolts let in flush for lifting them off. The remainder to be alternately ceiled 6in. wide and 6in. space, with 2in. yellow pine. The whole to be well fastened with screw-bolts and nuts, and to be planed.

"*Main-rail.* Of green heart 18×4 , or wide enough to take pins in way of rigging, secured to an iron on bulwarks by bolts and nuts.

"*Topgallant bulwarks.* Fifteen inches high, the rail and stanchions of teak, the rail 7×3 boarded with yellow pine 2in. thick, and to be neatly panelled.

"*Windlass and bitts.* Main piece of green heart. A spindle of $4\frac{3}{4}$ in. iron running through, to be cased with 4in. elm; to find plates and bushes, and two Normans (*the owners finding patent purchase-lever*). Cast whelps and chain stoppers. The bitts of green heart 22×8 , with facing pieces same thickness, well secured with knee before.

"*Catheads.* Of African oak 13×14 , with hoop on the end of each: two cast catfaces, and two patent stoppers, sheathing and fixing up.

"*Bitts.* A pair of forestay-bitts of green heart 14in. square, going thro' to 'tween-deck beams, with cross-pieces 16in. thick, as per margin.

"*Bitts and taffrail.* At the mainmast, two of green heart 14×11 with rail 5in. thick, of green heart, set in casting, with sheaves.

"*Bitts aft.* Two of green heart 14in. square, to go down to 'tween-decks.

[771] "*Topgallant forecastle.* Sill 10×6 of green heart fitted for the crew, about 30ft. long on load line under the main deck, and decks laid under for stores and coals; the forecastle to be lined and fitted with 20 berths; to find and put up the front of forecastle.

"*Houses on Deck.* To be made as per plan complete. The sills of green heart 10×8 , beams 7×6 , and stanchions of 6×6 pitch-pine. Decks of yellow pine 6×3 , the sides and ends 2in. pitch-pine. Bulk-head in the fire-house fitted with 4 berths, and 4 side-lights divided for galley, and the galley lined with sheet iron inside, and the floor tiled.

"*Steering-gear.* Capstans, 3; winches, 2; improved patent pumps, fixing only, *the owners finding the articles.*

"*Chain-locker.* Of sufficient size to hold the chains, and fitted with pipes, manhole, &c., complete; to be planked with 2in. elm.

"*Hawse-pipes, bitts, &c.* Two on each side of cold-blast iron, forward, fitted through a green heart chock above the deck, well secured; a cast-iron pipe rivetted to the bulwarks on each side between the windlass and foremast, for breast-ropes, with iron butts to correspond. Also a pipe on each side, with bitts before the front of poop, for breast-ropes. Also a pipe with green heart bitts, or iron if preferred *by owners* on each side through the stern, above poop deck. The whole of the bitts to be well secured with screw-bolts and nuts.

"*Warping-chocks.* Two cast-iron warping-chocks, one on each side, forward, fitted and completed.

"*Boats.* Two; one 26 feet long-boat, and one 23 feet pinnace-boat, carver built, one 22 feet gig, and one 20 feet jolly-boat: all to be copper-fastened, and to have set of oars, boat-hooks, and rowlocks, and spars to long-boat complete, and chocks and cover for the long-boat.

[772] "*Sundries.* To find bucket-rack, flag locker all ladders required, say, two side-ladders, two poop-ladders, two forecastle-ladders, and accommodation-ladder the two poop and two side-ladders to be of teak-wood, and the remainder to be made of pitch-pine.

"To find teak-wood carved gangway boards, brass mounted. To find skid and

shoe to go on the main rail, of elm. To find and put in as many deck lights as may be required. To find all hatch-fastenings, boat-gripes, beams for boats to rest on, with iron pillars or stanchions to the same. All brass locks and hinges to hatchways and doors on deck. To find two pair of iron davits made of 4in. iron, with blocks and wrought-iron hangings complete. To find two patent cathead stoppers, and shank painters. To find and fix six scuppers in the lower deck, with pipes to carry off the water, and two scuppers in the fore-castle. To find and put a scuttle in the fore-castle. To galvanize iron-work to the amount of 15l. To find green heart pump-check and elm casing for the two main pumps. To find yellow-pine timber for the figure head, taffrail, trail boards, and flights, with English oak head-knees or cheeks, and head timbers, including materials and labour, but not carving. To find a teak-wood wheel, cover, and grating complete.

"Any *important* (a) work not mentioned in this tender that may be required to be done by the owners, to be paid for by them, in addition to the amount hereinafter specified.

"The materials and workmanship to be of the best description, and the whole to be completed to the satisfaction of the surveyors.

"We will complete the whole of the aforesaid work, finding materials as per margin, and paying all wages, [773] for the sum of 3800l.: to be paid in two equal payments, one half in cash, and one half in good bills not exceeding three months' date,—the first payment to be made when the ship is launched, and the second payment when our work is finished.

"JAMES ANDREWS & Co."

The said H. M. Hugh Lawrence accordingly applied to the defendants for a guarantee, and on the 8th of September, 1862, obtained from them the following guarantee:—

"Messrs. J. W. Andrews & Co.

"London Works, Sefton Street, Liverpool,

"8th September, 1862.

"Gentlemen,—In consideration of your contracting with H. M. Lawrence & Co. for the wood-work of an iron ship now building by them for Messrs. Moor & Co., we hereby guarantee the payment to you according to the contract.—Yours faithfully,
E. LAWRENCE & Co."

The contract referred to in such guarantee was the tender above set out: and the tender, with the guarantee signed by the defendants, was afterwards, on the same day, brought by H. M. Lawrence to the witness; and, on his handing him the guarantee, the tender was signed by him, and the word "*important*" added in the place where that word appears in *italic*, at the suggestion of H. M. Lawrence.

The sum of 380l. mentioned in the tender was duly paid: and this action was brought to recover the further sum of 201l. 16s. 5d. for extra work done by the plaintiffs to and in respect of the "*Bianca*."

The witness was cross-examined as to whether the items in the particulars were wood-work, but it was finally agreed at the suggestion of the learned judge that the items should be referred to arbitration, in the [774] event of its being decided that the plaintiffs were entitled to recover for extra-work from the defendants.

H. M. Lawrence was then called by the defendants: and he deposed that he contracted with Moore & Co to build the "*Bianca*," and applied to the plaintiffs to tender for the wood-work of the "*Bianca*"; that the word "*important*" was inserted in the contract entirely without the knowledge of the defendants, and without their being communicated with: and that the plaintiffs were ship-smiths as well as ship-carpenters.

The learned judge directed the jury to find for the plaintiffs for the sum claimed, subject to the agreement for arbitration, and reserved the defendants leave to move to enter a verdict for them, if the court should be of opinion that on the true construction of the guarantee and the contract or tender, the defendants were not liable for extras, or that the addition of the word "*important*" was an alteration of the contract which discharged the defendants from liability.

E. James, Q. C., in Easter Term, 1864, accordingly obtained a rule nisi to enter a

(a) This word the witness Andrews swore was not in the tender when sent by him; nor was it at that time signed.

verdict for the defendants or a nonsuit on the grounds,—“first, that the defendants were not liable for any extras,—secondly, that the defendants were not liable, by reason of the contract being vitiated by the alteration in a material particular, viz. by the insertion of the word ‘important.’”

Crumpton Hutton, in the following Easter Term, shewed cause. The first question is, whether there was any contract binding the surety, the defendant, to pay for anything beyond the 38 *Ol.* mentioned in the tender. That extras were contemplated by the contract, is clear from the clause which provided that [775] “any important work not mentioned in the tender, that might be required to be done *by the owners*, should be paid for by them in addition to the amount thereafter specified.” Although there was no evidence that the tender was shewn to the defendant before he agreed to become surety, the language of the guarantie shews that it must have been. The words “by the owners” in that clause, do not refer to Messrs. Moore & Co., for whom the ship was being built, but to H. M. Lawrence, the builder. The plaintiff could not have recourse to Moore & Co. for the price of the extras. [Byles, J. Supposing you are right in that, does not the altered contract impose upon the surety a different degree of liability ?] It was altered before it was delivered out as a perfect contract. And, besides, the insertion of the word “important,” so far from increasing, materially decreased the liability both of principal and surety. That the *delivery* of the contract is the important thing, is clear from the authorities collected in *Xenos v. Wickham*, 13 C. B. (N. S.) 381, in error, 14 C. B. (N. S.) 435. An alteration, to avoid a contract, must be in a material part of it. In *Crookewit v. Fletcher*, 1 Hurlst. & N. 893, where a charterparty had been entered into with a warranty that the ship, then at Amsterdam, should sail from thence for Liverpool on or before the 15th of March next, and, after the signing of it, the broker (Hearn) who had acted for the plaintiff, the ship-owner, wrote in the margin, to come in after the words “March next,” the words “wind and weather permitting,”—the alteration was held to avoid the charterparty, because a material one. In delivering the judgment of the court, Martin, B., there says: “It is, no doubt, apparently a hardship that, where what was the original charterparty is perfectly clear and indisputable, and where the alteration or addition was made without any fraudulent [776] intention, and by a person not a party to the contract, that a perfectly innocent man should thereby be deprived of a beneficial contract: but, on the other hand, it must be borne in mind that, to permit any tampering with written documents, would strike at the root of all property, and that it is of the most essential importance to the public interest that no alteration whatever should be made in written contracts; but that they should continue to be and remain in exactly the same state and condition as when signed and executed, without addition, alteration, rasure, or obliteration: but, upon this point, the case of *Davidson v. Cooper*, 11 M. & W. 778, is conclusive. No case can possibly be entitled to more weight than this. Lord Abinger, in giving judgment, stated that the court had arrived at their judgment after much reflection; and Lord Denman, in delivering the judgment of the court of error,—13 M. & W. 343,—stated that the court had arrived at their conclusion after much doubt; and the judgment is, that a party having the custody of an instrument for his own benefit, is bound to preserve it in its original state. It was said that Mr. Hearn was a stranger to the plaintiff: he certainly was not, for he was the agent of the plaintiff to deliver the charterparty to the defendant: but, even if he were, the rule in *Pigott's case*, 11 Co. Rep. 27 a., is ‘that, when any deed is altered *in a part material* by the plaintiff himself, or by any stranger without the privity of the obligee, be it by interlineation, addition, erasing, or by drawing of a pen through a line or through the midst of *a material word*, the deed thereby becomes void:’ and Lord Denman in his judgment stated that *Pigott's case* had never been overruled, but, on the contrary, extended to unsealed documents; and, as we think that the stipulation as to sailing on the 15th of March [777] was a condition precedent, the addition to it of ‘wind and weather permitting’ was *a material alteration*, and, we think, avoids the instrument.” [Byles, J. Here, the alteration was assented to both by the plaintiff and the principal debtor.] Yes.

E. James, Q. C., and Baylis, in support of the rule. The defendants never guaranteed the payment of any extras at all, but only that of the sum originally agreed upon. The plaintiffs contracted to do the whole of the work specified for 3800*l.*: and it was stipulated that any work not mentioned in that tender that might be required to be done *by the owners* should be paid for *by them* in addition to the

amount specified. The substitution of the words "the owners" in the subsequent parts of the contract or tender, for "your" at the commencement, shews plainly who the plaintiffs meant to look to for the extras. Then, the insertion of the word "important" after the contract was signed, was a material alteration made by a party interested, and therefore rendered the contract void, at all events as against the sureties.

ERLE, C. J. I am of opinion that this rule should be discharged. The action is brought upon a guarantie signed by the defendants, whereby they guaranteed the payment by H. M. Lawrence according to the contract, for the wood-work of an iron ship which H. M. Lawrence was building for Messrs. Moore & Co. The contract between H. M. Lawrence and the plaintiffs was made under these circumstances:—H. M. Lawrence was building an iron ship for Messrs. Moore & Co., and applied to the plaintiffs to do the wood work. The plaintiffs refused to undertake the work without having security. H. M. Lawrence thereupon went to the defendants with the tender, and asked [778] them to consent to give a guarantie. They did so: and the plaintiffs thereupon did the work, the contract-price for which, 3800l. has been duly paid. Beyond the things specified in the tender, the plaintiffs did other work upon the ship: and the question is, whether that extra work so done by the plaintiffs beyond what was specified in the contract is within the guarantie, which is in these words,—"In consideration of your contracting with Messrs. H. M. Lawrence & Co. for the wood-work of an iron ship now building by them for Messrs. Moore & Co., we hereby guarantee the payment to you according to the contract." In H. M. Lawrence's contract with the plaintiffs, there is a clause which provides that "any important work not mentioned therein that may be required to be done *by the owners*, shall be paid for by *them*, in addition to the amount (3800l.) thereafter specified." As I read that contract, H. M. Lawrence is called throughout 'the owners,' and not improperly so, for, until completed, the ship would be the property of the builder. In the course of the performance of their contract, the plaintiffs did some extra work at the request of H. M. Lawrence: and the question is whether the guarantie extends to that. I am of opinion that the additional work clearly is guaranteed by the defendant's letter of the 8th of September, 1862, and therefore that the plaintiffs are entitled to recover.

The rest of the court concurring,

Rule discharged.

The defendants appealed against this decision, and the case was argued in the Exchequer Chamber on the 16th of May, 1865, before Pollock, C. B., Channell, [779] B., Blackburn, J., Mellor, J., Pigott, B., and Shee, J., and on the 19th of June, before Pollock, C. B., Crompton, J., Bramwell, B., Channell, B., Blackburn, J., Pigott, B., and Shee, J.

E. James, Q. C. (with whom was Baylis), for the plaintiffs in error, contended that the defendants' liability under the guarantie only extended to the wood-work mentioned therein, and did not extend beyond the tender or contract price of 3800l. which had been paid, and this claim for extra work formed no part of the amount guaranteed by the defendants: and that the object of the clause as to extra work not mentioned in the tender or contract was not to expand the guarantie of the defendants, but to make it clear that it was to be the subject of an extra charge, which was to be paid for by the owners, or those who should order or require it to be done.

Brett, Q. C. (with whom was C. Hutton), insisted that the contract referred to in the guarantie clearly contemplated the possibility of extra work being required, and that, if such extra work was done, and was not paid for by the defendants' brother (the party guaranteed), the defendants were to be liable upon their guarantie for the price of such extra work, as well as for the main sum of 3800l.: and that the insertion of the word "important" in the contract was not an alteration which discharged the defendants from liability, the insertion of that word having been made by the brother of the defendants, on their behalf, at the same time at which the contract was signed and finally agreed to by the plaintiffs and the guarantie delivered, and the insertion of that word having no material effect upon the liability of the defendants under the guarantie: and, consequently, [780] that the judgment of the court of Common Pleas was right, and ought to be affirmed.

The Court unanimously concurred in the view taken by the court below, and the judgment was accordingly affirmed.

Judgment affirmed.

IN THE EXCHEQUER CHAMBER.

HENRY KEMP RICHARDSON, Clerk, AND THE HON. ANNE RICHARDSON, his Wife,
v. EDWARD POWER AND CATHERINE GOODALL POWER, his Wife, MARY MANTLE,
Widow, THOMAS WATSON, WILLIAM WARTNABY AND HARRIETT, his Wife,
JOHN HENRY HOLDITCH, AND WILLIAM LUCK. July 10th, 1865.

[S. C. 35 L. J. C. P. 44 ; 11 Jur. N. S. 739 ; 13 W. R. 1104.]

A testator by his will devised certain real estates to his daughter Harriett for life, and after her death to her sons successively in tail, and, in default of such issue, to his son John Arthur in fee. By a codicil, the testator, after reciting that "he had by his will devised the reversion in fee in several estates, expectant on the decease of his several daughters (including Harriett), to his son John Arthur," and that "he had devised other estates to trustees to the use of his said son until he should attain the age of twenty-five years, and thereupon to him and his assigns for ever," declared his will to be, "that, in case his said son should happen to depart this life without leaving lawful issue of his body living at his decease, and before the said several estates should become vested in him by virtue of the said several limitations aforesaid," the said estates should go to such of his daughters as should then be living, and to the issue of such of them as should then be dead, in the manner therein mentioned.—The testator died in 1804: John Arthur attained twenty-five, and died in 1844, without having had issue: and the testator's daughter Harriett died unmarried in 1864:—Held that "vested," in the codicil, meant "vested in interest," and consequently that, on the death of the testator, the estates vested immediately in the son John Arthur, subject to the estates limited to the daughter Harriett and her issue, and that the devisees of John Arthur took.

This was an action of ejectment brought by the plaintiffs against the defendants to recover possession of one undivided moiety or half part, the whole into equal moieties to be divided, of and in certain closes or grounds inclosed, meadows, lands, and premises, with their appurtenances, situate, lying, and being in the lordship or liberties of Lilbourne, in the county of [781] Northampton, called by the several names of Perkin's Meadow, Upper Turner's Close, Lower Turner's Close, and Mead Lands, otherwise Bottom Close, and Meadow, the whole containing 155a. 3r. 22p., more or less.

By consent and by a judge's order the following case was stated for the opinion of the court of Common Pleas:—

1. Richard Arnold, of Lutterworth, in the county of Leicester, Esq., deceased, duly made and published his last will and testament in writing, bearing date the 28th of January, 1801, and executed and attested as by law was then required for passing freehold estates by devise; and thereby,—after devising certain hereditaments (subject to an annuity therein mentioned) in trust for his daughter Mary Arnold during her life, with remainder to the use of her first and other sons successively in tail, with remainder to the use of her daughters as tenants in common, with remainder to his son John Arthur Arnold, his heirs and assigns for ever; and devising certain other hereditaments (subject to a like annuity) in trust for his daughter Elizabeth Watson during her life, with remainder to the use of her first and other sons successively in tail, with remainder to the use of her daughters as tenants in common, with remainder to his said son John Arthur Arnold, his heirs and assigns for ever; and devising certain other hereditaments (subject to a like annuity), in trust to receive the rents, issues, and profits thereof until his daughter Dorothy Arnold should attain the age of twenty-one years or marry, upon the trusts therein mentioned, and, after she should attain that age or marry, in trust for his daughter Dorothy Arnold during her life, with remainder to the use of her first and other sons successively in tail, with remainder to the use of her daughters as tenants in common, with remainder to his said son John Arthur [782] Arnold, his heirs and assigns for ever,—gave and devised as follows, that is to say, "I give and devise all those my several closes or grounds inclosed,

meadow lands, hereditaments, and premises, with their appurtenances, situate, lying, and being in the lordship or liberties of Lillbourne aforesaid, called by the several names and containing the several quantities of land hereinafter mentioned, that is to say, Perkin's Meadow 11a. 2r. 1sp., Upper Turner's Close 54a. 1r. 11p., Lower Turner's Close 47a. 0r. 8p., and Mead Lands 42a. 3r. 15p., or thereabouts, be the same respectively more or less, now in the tenure or occupation of Richard Reeve, his assignee or assigns (subject, nevertheless, to the payment of the sum of 20l. per annum already charged upon the said premises and payable to Miss Alice Lovett, daughter of Mr. William Lovett, deceased, for her life), unto my said wife and the said Richard Arnold and John Adcock, and their heirs. Upon trust that they my said wife and the said Richard Arnold and John Adcock, and the survivors and survivor of them, and the executors or administrators of such survivor, do and shall receive and take the rents, issues, and profits thereof, and the sum of 20l. per annum, part thereof, pay to or retain in the hands of her my said wife half-yearly, by equal portions, for and during the term of her natural life, and the residue of the said rents, issues, and profits do and shall receive and take during and until my daughters Anna Maria and Harriett shall severally and respectively attain the age of twenty-one years or be married, upon the trusts hereinafter mentioned: and, from and immediately after my said two last-mentioned daughters shall have severally attained the said age of twenty-one years, or be married, then upon trust that they my said wife and the said Richard Arnold and John Adcock, or the survivors or survivor of them, or [783] the executors or administrators of such survivor, do and shall receive and take one moiety or full half part of the rents, issues, and profits of the said last-mentioned hereditaments and real estate, and every part thereof, for and during the then remainder of the term of the natural life of my said daughter Anna Maria, and during that time pay, apply, and dispose of the same to and for her sole and peculiar use and benefit: and, from and after the decease of my said daughter Anna Maria, I give and devise one undivided moiety or full half part of my said last-mentioned closes or grounds inclosed, meadows, lands, hereditaments, and premises, with their appurtenances, to the use of the first son of the body of my said daughter Anna Maria lawfully to be begotten, and to the heirs of the body of such first son lawfully issuing: and, in default of such issue, to the use of the second, third, fourth, and all and every other the son and sons of the body of my said daughter Anna Maria lawfully to be begotten, severally, successively, and in remainder, one after another, as they and every of them shall be in seniority of age and priority of birth, and to the several and respective heirs of the body and respective bodies of all and every such son and sons lawfully issuing, the elder of such sons and the heirs of his body issuing to be always preferred and to take before a younger of such sons and the heirs of his body issuing: and, in default of such issue, to the use of all and every the daughter and daughters of the body of my said daughter Anna Maria, lawfully to be begotten, as tenants in common, and not as joint-tenants: and, in default of such issue, I give and devise my said last-mentioned moiety of the said closes or grounds inclosed, meadows, lands, hereditaments, and premises, with their appurtenances, unto my said son John Arthur Arnold, his heirs and assigns for ever. And, as to the other un-[784]-divided moiety or full half part of the said last-mentioned closes or grounds inclosed, meadows, lands, hereditaments, and premises, with their appurtenances, from and after my said daughter Harriett shall attain the said age of twenty-one years or be married, upon trust that they my said wife and the said Richard Arnold and John Adcock, or the survivors or survivor of them, or the executors or administrators of such survivor, do and shall receive and take the rents, issues, and profits of the said last-mentioned moiety for and during the then remainder of the term of the natural life of my said daughter Harriett, and during that time pay, apply, and dispose of the same to and for her sole and peculiar use and benefit: and, from and after the decease of my said daughter Harriett, I give and devise the said undivided moiety or full half part of my said last-mentioned closes or grounds inclosed, meadows, lands, hereditaments, and premises, with their appurtenances, to the use of the first son of the body of my said daughter Harriett lawfully to be begotten, and to the heirs of the body of such first son lawfully issuing: and, in default of such issue, to the use of the second, third, fourth, and all and every other the son and sons of the body of my said daughter Harriett lawfully to be begotten, severally, successively, and in remainder, one after another, as they and every of them shall be in seniority of age and priority of birth, and of the several and respective heirs of the body and respective bodies of all and

every such son and sons lawfully issuing, the elder of such sons and the heirs of his body issuing to be always preferred and to take before a younger of such sons and the heirs of his body issuing; and, in default of such issue, to the use of all and every the daughter and daughters of the body of my said daughter Harriett lawfully to be begotten, as tenants in common, and not as joint-[785] tenants: and, in default of such issue, I give and devise my said last-mentioned moiety of the said closes or grounds inclosed, meadows, lands, and premises, with their appurtenances, unto my said son John Arthur Arnold, his heirs and assigns, for ever."

The testator then directed that the rents of the estates thereinbefore devised for the benefit of his daughters Mary, Dorothy, Anna Maria, and Harriett respectively, should be paid to them for their sole and separate use, as therein more particularly mentioned: and he directed his trustees, during the respective minorities of his daughters Dorothy, Anna Maria, and Harriett, to maintain and educate them out of the rents of the estates devised to them respectively, and, upon their respectively attaining the age of twenty-one years, or marrying with such consent as therein mentioned, to stand possessed of the unapplied surplus of such rents and profits to and for the use and benefit of his said son John Arthur Arnold in such and the same manner as the net proceeds of the testator's personal estate were thereafter directed to be applied and disposed of for his benefit.

And the said testator then devised certain other hereditaments unto his wife until his said son John Arthur Arnold should attain the age of twenty-five years; and, from and immediately after his said son should have attained the said age, he gave and devised the same unto his said son John Arthur Arnold, his heirs and assigns, for ever: but, in case the testator's said son should happen to depart this life under the said age of twenty-five years and without issue, then the testator gave and devised the same hereditaments to his the testator's said wife and her assigns for her life, and, from and after her decease, to his the testator's five daughters, Mary, Elizabeth, Dorothy, Anna Maria, and Harriett, their heirs and assigns for ever, as tenants in common.

[786] And the testator then gave and devised the residue of his real estate (except two closes therein mentioned) unto trustees for the term of 500 years, upon certain trusts therein mentioned for securing the payment of three life-annuities to the persons therein mentioned: and, from and after the expiration or sooner determination of the said term, and in the meantime subject thereto, upon trust that they his said trustees or the survivors or survivor of them, or the executors or administrators of such survivor, should receive the rents, issues, and profits thereof until the said John Arthur Arnold should attain the age of twenty-five years, and the same pay, apply, and dispose of in his maintenance, education, and bringing-up, in such manner as they should think proper, during his minority; and, from and immediately upon his attaining the said age of twenty-five years, upon trust to account with and pay the said rents and profits to the said John Arthur Arnold, to and for his own use and benefit: And also, immediately upon the said John Arthur Arnold's attaining the age of twenty-five years, the said testator gave and devised the last-mentioned hereditaments to him the said John Arthur Arnold, his heirs and assigns for ever. And the testator devised the two closes which he had excepted from the residuary devise of his real estate, to trustees during the minority of his said son John Arthur Arnold, upon trust to apply the rents for his benefit as therein mentioned; and, from his attaining the age of twenty-one years, the testator devised the same closes to the said John Arthur Arnold for his life, with a limitation to trustees to preserve contingent remainders; and, after his death, to the use of the first and other sons of the said John Arthur Arnold, successively, in tail, with remainder to the use of his daughters as tenants in common, with remainder to the testator's said five daughters as tenants in com-[787]-mon in fee. And the testator, after giving certain legacies and annuities, bequeathed the residue of his personal estate to his said trustees, upon trust to invest the same in manner therein mentioned, and to apply the income thereof for the benefit of the said John Arthur Arnold until he should attain the age of twenty-one years; and, from and immediately after he should attain that age, to pay the same to him for his own use and benefit, to whom the testator thereby gave the same.

2. That moiety which was given in trust for the testator's daughter Harriett for her life of and in the said closes, inclosed meadows, lands, and premises called respectively Perkin's Meadow, Upper Turner's Close, Lower Turner's Close, and Mead Lands, with their appurtenances, is the said moiety to which the present action relates.

3. The said Richard Arnold duly made and published a codicil, dated the 11th of June, 1803, to his said will, which codicil was duly executed and attested in manner then required for passing freehold estates by devise : and he thereby recited and revoked the devise in his said will contained for the benefit and in favour of his said daughter Elizabeth Watson, for her life, with remainder to her children, as hereinbefore mentioned : and he devised part of the hereditaments comprised in the said revoked devise to certain uses and upon certain trusts for the benefit of the said Elizabeth Watson and her children as therein mentioned, subject to such annuity as therein mentioned : and he devised the residue of the same hereditaments to trustees, upon trust to receive the rents and profits thereof until his said son John Arthur Arnold should attain his age of twenty-five years, and pay thereout an annuity of 20l. to the testator's wife during her life, and apply the residue thereof for the benefit of the said John Arthur Arnold as therein [788] mentioned : and, when and so soon as the said John Arthur Arnold should have attained that age, then upon trust to account with and pay the said rents and profits to him : and, from and immediately after the said John Arthur Arnold should have attained that age, the testator devised the same hereditaments unto the said John Arthur Arnold, his heirs and assigns for ever, subject to the payment of the said annuity of 20l. to the testator's wife during her life : And the testator bequeathed to trustees a sum of 1500l. upon the trusts therein mentioned for the said Elizabeth Watson and her children : but, in case there should be no children of the said Elizabeth Watson living at her decease, or, being such, all of them should happen to depart this life under the age of twenty-one years without leaving lawful issue, then in trust to pay the same trust premises to the said John Arthur Arnold : and, in case the said John Arthur Arnold should be then dead, leaving lawful issue then living, then the testator gave the same trust moneys to be equally divided amongst his said other four daughters, Mary, Dorothy, Anna Maria, and Harriett, share and share alike. And the said Richard Arnold then by the now-stating codicil recited and devised in the words following, that is to say,—

“Whereas, I have in and by my said will given and devised the reversion in fee of and in divers lands, tenements, and hereditaments, expectant on the several deceases of my said daughters Mary, Dorothy, Anna Maria, and Harriett, without issue of their respective bodies, unto my said son John Arthur Arnold, his heirs and assigns for ever : And whereas I have also in and by my said will, as well as by this my codicil, limited divers other lands, tenements, and hereditaments (subject to certain annuities or rent-charges therein specified) for the use and benefit of my said son John Arthur Arnold, his heir and assigns, until [789] he attains his age of twenty-five years : and, upon his attaining the said age of twenty-five years, then I have given and devised the same to him my said son, his heirs and assigns, for ever : Now, I do hereby declare my will to be that, in case my said son shall happen to depart this life without leaving lawful issue of his body living at his decease, and before the said several estates shall become vested in him by virtue of the several limitations aforesaid, then and in such case I give and devise the said estates, chargeable as by my said will and this my codicil is before mentioned, unto such of my several daughters Mary, Elizabeth, Dorothy, Anna Maria, and Harriett, as shall be then living, and the issue of such of them as shall be then dead, in manner following, that is to say, I give and devise an equal undivided share thereof to every one of them my said daughters Mary, Dorothy, Anna Maria, and Harriett, as shall be then living, and to their respective heirs and assigns, as tenants in common, and not as joint tenants : and, in case of the death of either of them my said daughters Mary, Dorothy, Anna Maria, and Harriett, before my said son, leaving issue then living, then I give the share and shares of her and them so dying unto the heirs of the body of such daughter and daughters respectively : And, as to the share of my said daughter Elizabeth Watson, I give and devise the same unto my said wife Elizabeth Arnold and the said Richard Arnold and John Adcock, and their heirs, during the life of the said Richard Watson, in trust to apply and dispose of the rents and rent and profits thereof from time to time as the same shall become due, in the purchase of stock in the Government funds, in order thereby and by the produce from time to time of such purchased stock to form an accumulated fund during the said Richard Watson's life, and from and after his decease, upon trust to pay all such original and accumulated stock and moneys unto my daughter [790] Elizabeth for her own use ; but, in the case of the decease of my said daughter Elizabeth in the meantime, leaving issue then living then in trust to pay all such stock and moneys to such issue in equal

shares and proportions; and, in case my said daughter Elizabeth shall happen to die in the life-time of the said Richard Watson, without leaving any issue then living, then in trust to pay all such stock and moneys to my said four other before-named daughters, in equal shares and proportions: and, from and after the decease of the said Richard Watson, I give and devise the said undivided part or share of my said daughter Elizabeth of and in the said estates, unto her my said daughter Elizabeth for her life; and from and after her decease, I give and devise the same unto and amongst all her children that shall be then living, and their respective heirs, share and share alike, as tenants in common, and not as joint-tenants: And, in case my said daughter Elizabeth shall depart this life in the life time of my said son, leaving issue of her body then living, then I give and devise the share of my said daughter Elizabeth in the said estates to the heirs of her body."

And,—after reciting that he had by his will given to his daughters Mary, Dorothy, Anna Maria, and Harriett, the several sums of 2000*l.* a piece upon their attaining their respective ages of twenty-one years or days of marriage, and in case they should any of them die under that age and unmarried he had given the shares of such of them so dying unto his said son, and that he had also given the residue of his personal estate, together with the produce of the accumulated trust rents of his several real estates, unto his said son John Arthur Arnold, to his own use, upon his attaining the age of twenty-one years,—the testator by the now-stating codicil declared that, in case his said son John Arthur Arnold should happen to depart this life before he attained that age, and without leaving [791] lawful issue of his body then living, then the testator gave one equal part or share of all the said accumulated trust rents, moneys arising by the death of any of his said daughters, and personal estate, unto such of his said daughters Mary, Elizabeth, Dorothy, Anna Maria, and Harriett, as should happen to survive his said son; but, as to the share of the said Elizabeth Watson, subject to such provisions as in the now stating codicil contained.

4. The said testator was at the time of making his said will, and thenceforth until and at the time of his death, seised and well entitled, to him and his heirs, of and to the said closes or grounds inclosed, meadows, lands, hereditaments, and premises so devised by him as aforesaid.

5. The said testator died in the year 1804, without having revoked or varied his said will, save so far as the same was varied by the said codicil, and without having revoked or varied the said codicil.

6. The testator left him surviving his widow, Elizabeth Arnold, and six children, viz. the said John Arthur Arnold, his only son and heir at law, and Mary Arnold, Elizabeth, then the wife of Richard Watson, Dorothy Arnold, Anna Maria Arnold, and Harriett Arnold, in his said will respectively named. The said John Arthur Arnold was the testator's youngest child.

7. The said John Arthur Arnold duly made and published his last will and testament in writing, dated the 19th of February, 1842, and thereby devised as follows:—
 "I give and devise all the messuages, lands, tenements, tithes, and other hereditaments, and part or share, parts or shares of messuages, lands, tenements, tithes, and other hereditaments at or within the parish of Lilbourne, in the county of Northampton, of or to which I am or may become seised or entitled [792] under the will and codicil of my late father Richard Arnold, deceased, or one of them, or otherwise, upon the respective deceases of my sisters Dorothy and Harriett Arnold respectively, and such failure of issue of their respective bodies as in the same will and codicil or one of them is mentioned, unto and to the use of the said Thomas Watson, his heirs and assigns for ever." And, on the 26th of October, 1843, the said John Arthur Arnold duly made and published a codicil to his said will, and thereby, after fully reciting the hereinbefore-stated devise contained in his said will, and after reciting that the said Dorothy Arnold was then dead without having been married, but that the said Harriett Arnold was still living, the said testator proceeded as follows, that is to say,—"I do hereby revoke so much of my said will as relates to the devise hereinbefore mentioned of the hereditaments at Lilbourne aforesaid to which I might become entitled upon the respective deceases of my sisters Dorothy Arnold and Harriett Arnold and such failure of their issue respectively as above referred to:" and, after devising as therein mentioned the hereditaments to which he had become entitled in possession upon the death of his said sister Dorothy Arnold, the said testator devised in the words following, that is to say,—
 "And, as to so much of the same heredita-

ments at Lilbourne aforesaid as I am so entitled to as aforesaid in expectancy upon the death of my said sister Harriett Arnold without such issue as above referred to, I give and devise the same, with the appurtenances, unto and to the use of my said wife" (meaning thereby the plaintiff Anne Richardson), "her heirs and assigns for ever."

8. On the 12th of May, 1844, the said John Arthur Arnold died, without having revoked or altered his said will, except so far as it was altered by the said [793] codicil, and without having revoked or altered his said codicil.

9. The said John Arthur Arnold left Anne Arnold, his wife, him surviving, who has since married the Rev. Henry Kemp Richardson; she and her present husband being the plaintiffs in this action.

10. The said John Arthur Arnold never had any issue. There were living at his decease three of his said sisters, viz. Mary, Anna Maria, and Harriett: his sister Elizabeth Watson had died previously, leaving the defendant Thomas Watson and several other children her surviving.

11. The said Anna Maria Arnold attained the age of twenty-one years, and afterwards married George Wartnaby, who died in her life-time; and the said Anna Maria Wartnaby died in August, 1863, leaving one child only her surviving, viz. the defendant Harriett Wartnaby. The said Harriett Arnold attained her age of twenty-one years; and on the 22nd of January, 1864, she died, a spinster, having made a will and thereby devised all her real estate to the defendant John Henry Holditch, his heirs and assigns, in trust to sell the same.

12. The wills and codicils of the said Richard and John Arthur Arnold were to be read and taken as part of the case.

The question for the opinion of the court was, whether or not, under the circumstances hereinbefore stated, the plaintiffs are now entitled to the possession of that moiety of and in the said lands at Lilbourne of which the said Harriett Arnold was tenant for life under the said will of the said Richard Arnold.

If the court should be of opinion that the plaintiffs were so entitled as aforesaid, then judgment was to be entered up for the plaintiffs, to recover possession of the said moiety of the said lands, with costs. If the [794] court should be of opinion that the plaintiffs were not so entitled as aforesaid, then judgment was to be entered up for the defendants, with costs.

No argument took place in the Court of Common Pleas, it being agreed that judgment should pass for the plaintiff, upon the authority of the decision of the Master of the Rolls upon the same will in the case of *Re Richard Arnold's Estate*, 33 Beavan, 163, where it was held that the daughters took for life only; that the devise for life contained in the will could not be enlarged by a recital in the codicil that the devise was in tail: and that the word "vested," in the gift over, meant vested in *interest*, and not vested in possession.

A writ of error was thereupon brought, and the case was argued in the Exchequer Chamber at the sittings after Easter Term last, before Pollock, C. B., Channell, B., Blackburn, J., Mellor, J., Pigott, B., and Shee, J.

Cadman Jones, for the plaintiffs in error (the defendants below), contended that the expression in the will of Richard Arnold, "in case my son shall die before the estates become vested in him," whatever be the *prima facie* legal interpretation of the word "vested," evidently meant here a vesting in *possession*, as contra-distinguished from a mere vesting in *estate*: and he referred to the following authorities, — *Berkeley v. Swinbourne*, 16 Simons, 275, 17 Law J., Chan. 416; *Taylor v. Prohisher*, 5 De Gex & Sm. 191, 21 Law J., Chan. 608; *Poole v. Bott*, 11 Hare, 33, 22 Law J., Chan. 1042; *Boraston's case*, 3 Co. Rep. 19; *Young v. Robertson*, 4 Macqueen, 314; *Re Gregson's Trusts*, 34 [795] Law J., Chan. 41; *Wordsworth v. Wood*, 1 House of Lords Cases, 129.

Sir Roundell Palmer, A. G. (with whom was Pearson), for the defendants in error (the plaintiffs below), submitted that, according to all the legitimate rules of construction, the decision of the Master of the Rolls in the case of *Re Arnold*, 33 Beavan, 163, upon this will, was correct; that, in construing a will, the natural and ordinary meaning must be given to the language of the testator, unless such a construction would be manifestly repugnant or inconsistent or incongruous; that technical words in a will must always be interpreted in their known technical sense, unless it be manifest from the whole scope of the instrument that the testator's intention was otherwise; that the gift in the will to John Arthur could only be defeated by clear

and unambiguous language in the codicil; that the reversion *vested* in John Arthur immediately on the death of his father; and that that estate was not defeated or destroyed by anything contained in the codicil. The following cases were cited,—*Grey v. Pearson*, 6 House of Lords Cases, 61; *Roddy v. Fitzgerald*, 6 House of Lords Cases, 823; *Egerton v. Brownlow*, 4 House of Lords Cases, 208, 23 Law J., Chan. 348; *Doe d. Hearle v. Hicks*, 8 Bingh. 475, 1 M. & Scott, 759, 1 Clark & Fin. 20; *Comport v. Austen*, 12 Simons, 218; *Russel v. Buchanan*, 7 Simons, 628; *Re Thruston's Trusts*, 17 Simons, 21; *Griffith v. Blunt*, 4 Beavan, 248; *Blakemore's case*, 20 Beavan, 214; *Re Morse's Settlement*, 21 Beavan, 174, 25 Law J., Chan. 192; *Re Thatcher's Trusts*, 26 Beavan, 365; *Rowland v. Tawney*, 26 Beavan, 67; *Sheffield v. Kennett*, 27 Beavan, 207; *In re Cant's Estate*, 4 De Gex & J. 503, 28 Law J., Chan. 641; *King v. Cullen*, 2 De Gex & Sm. 252; *Parkin v. Hodgkinson*, 15 Simons, 293; *The Commissioners of Charitable Donations v. Cotto*, 2 Drury & W. 615; *Henderson v. Kennicot*, 2 De Gex & Sm. 492, 18 Law J., Chan. 40.

Cadman Jones was heard in reply.

Cur adv. vult.

CHANNELL, B., now delivered the judgment of the court (a):—

This was an action of ejectment brought to recover the possession of a moiety of certain lands at Lilbourne, in the county of Northampton, of which one Harriett Arnold was tenant-for-life under the will of Richard Arnold.

The question in the cause arises on the will and codicil of Richard Arnold. This will and codicil were in the year 1863 the subject of proceedings before the Master of the Rolls, with reference to another devise in similar terms to that now to be considered.

In the present action of ejectment a case was stated for the opinion of the court of Common Pleas, pursuant to the Common Law Procedure Act: and the question submitted to that court was assumed to be in principle the same as the one which had been before the Master of the Rolls *In re Arnold's Estate*. The court of Common Pleas ordered judgment in the ejectment to be entered for the plaintiffs below, in accordance with the judgment pronounced by the Master of the Rolls, to enable the defendants below to proceed in error upon the judgment so ordered to be entered.

Proceedings in error having been taken, and brought before us, we are now called upon to consider the formal decision of the court of Common Pleas.

In 1801, Richard Arnold made a will, by which he devised the property which is the subject of this eject-[797]-ment, to trustees from and after his daughter Harriett should attain twenty-one, or marry, upon trust to pay her the rents and profits for her separate use during her life; and, after her death, he devised it to the use of the first and other sons of Harriett in tail, and, in default of such issue, to the use of the daughters of Harriett, as tenants in common; and, in default of such issue, the testator gave and devised the estate in question to his son, John Arthur Arnold, in fee. Then, by the codicil, the testator recites that he had by his will devised the reversion in fee in several estates expectant on the decease of his several daughters, including Harriett, to his son John Arthur Arnold, and also that he had devised other estates to trustees, to the use of his said son John Arthur Arnold, his heirs and assigns, until he attained twenty-five, and thereupon, to him, his heirs and assigns, for ever: and then the testator proceeds to declare his will to be that, in case his said son should die without leaving lawful issue of his body living at his decease, and before the said several estates should become vested in him by virtue of the said several limitations aforesaid, then the testator gave and devised them to such of his daughters as should be then living, and the issue of such of them as should be then dead, in the manner therein mentioned.

The testator died in 1804. The son John Arthur Arnold attained twenty-five after the testator's death, and died without issue, in 1844. Harriett attained twenty-one after the testator's death, and died unmarried, in 1864.

The question for our consideration is, whether the estates in question devised to Harriett had at the death of John Arthur Arnold become vested in him or not: and it may be taken generally, without more particularly referring to the will of John Arthur Arnold, or [798] to the state of the family, as set out in the special case that,

(a) The learned Baron intimated that Pigott, B., who had only heard a part of the argument, declined on that account to take any part in the judgment.

if the estates had so vested, the judgment of the court of Common Pleas must be affirmed: but, if they had not vested, then the judgment must be reversed.

Now, by the devise in the will, particular estates, viz. life-estates and estates-tail, are given to Harriett Arnold and her issue, with an ultimate remainder in fee to John Arthur Arnold, a living person. This remainder in fee devised by the will is, we think, an estate which vested at the death of the testator.

We have then to see whether there is anything in the codicil which shews an intention that it shall not so vest.

In the course of the argument before us, very many authorities were cited; some of which we do not think it necessary particularly to advert to.

It was scarcely disputed, if at all, that, if the words in the codicil "in case his said son should die before the said several estates should become vested in him by virtue of the said several limitations aforesaid," were to be construed in their strict technical sense, that then the contest on the part of the plaintiffs below was correct. But it was argued on the part of the plaintiffs in error that the words in the codicil we have referred to were to be understood, not in their strict technical, but in their ordinary and popular sense, and, so construed, would maintain the view of the plaintiffs in error. In support of this view, we were pressed with the case of *Young v. Robertson*, 4 Macq. 314, as an authority directly in point. That case was decided early in the year 1862, was probably not reported at the time of the decision by the Master of the Rolls *In re Arnold's Estate*, certainly was not cited in the last-mentioned case.

In *Young v. Robertson*, words somewhat similar to those in the present codicil were held to shew an intention that the property should vest, not à morte tes-[799]-tatoris, but at the death of the tenant for life. Now, in the first place, it is to be observed that, in that case, the words upon which the decision proceeded were all in the same instrument, viz. a Scotch trust-disposition; for the principle of the decision was not at all affected by the codicil, which only introduced another grand-nephew of the testator or truster to share in the trust-disposition first made.

In the present case, the devise in the will, under the circumstances which have arisen, is, we think, clear; and the question is, whether the words of the codicil alter the ordinary period of the vesting of the interest under that devise. It has been decided that a gift in a will can only be destroyed by something equally clear in a codicil: see *Doe d. Harte v. Hicks*, 1 Clark & Fin. 20, acted on recently by the court of Exchequer in *Robertson v. Powell*, 2 Hurlst. & Colt. 762. So that we cannot say that the period of vesting here is deferred, unless we see from the words of this codicil an intention that the property shall not vest until the death of Harriett, as clearly as we do see from the words of the will an intention to give an estate in remainder, to vest at once.

It will be well to examine the reasons upon which *Young v. Robertson* was decided, with a view of seeing how far any of them are applicable to the present case. The decision proceeds mainly upon two grounds, —first, that, where words of survivorship occur in an instrument in which a period for payment or distribution is named, that period is the time to which the surviving is to be referred, —and, secondly, that, where a testator, in a will, which is considered to speak from the time of his death, uses the words "before the share or estate becomes vested," he must *prima facie* be taken to mean something more than "before my death." Now, the first of these reasons cannot in our opinion apply in this case; for, there is no period [800] of payment or distribution named distinctly in the clause here in question. The gift over is to such of the daughters *then* living. If, on looking back into the sentence, we found that the word "then" referred grammatically to the period of payment or of obtaining possession of the estate, the reasoning of *Young v. Robertson* would apply: but we find, on looking back for a period of time to which to refer the word "then," that it appears to be the death of John Arthur Arnold before the estates have vested in him: so that we are still left in uncertainty as to when that vesting is to take place, and cannot determine it by the rule suggested. Then, as to the second reason, that also does not so clearly apply here, because the gift over in the codicil comprises not only the estates now in question devised to Harriett, as to which it may be conceded that the period of vesting is either the death of the testator or the death of Harriett, but also other estates which are so devised that it might be a question whether they would vest in John Arthur Arnold until he attained the age of twenty-one.

Probably, if we were called on to decide that question, we should say that they

vested at the testator's death: see *Boraston's case*, 3 Co. Rep. 19 b., and subsequent decisions. Still it might be doubted, especially as to those estates devised by the codicil, though there could be no doubt if the devise were in the exact terms recited by the codicil. Therefore, although, for the purpose of making a gift over of the estates now in question, it would have been simpler to have said "before my death," instead of "before the estate vests," it would not be so at all, if the testator had intended the gift over to take effect as to some of the estates comprised in it on John Arthur Arnold's dying before himself, but, as to others, on his dying before twenty-five.

Probably the form of words used was the shortest [801] which could be used for that purpose: and, if so, the argument deduced from the supposed simplicity of the other expression loses its force, although, doubtless, if the testator had the meaning we have suggested, it would have been well that he should have expressed it more clearly. Besides, the intention of the testator in making the gift over at all, is no doubt to prevent the property being undisposed of by the will. That will take place only if the devisee dies before his interest vests. Then, if so, it is not at all unnatural that he should in terms make the gift over to take effect on the happening of the event he wishes to guard against, that is, the death of the devisee before the vesting of his interest, instead of in terms making it depend upon the death of the devisee before the actual event upon which the interest would vest and the gift over become unnecessary, although, in the particular instance, the latter might be a simpler expression. His object being to provide against a particular result, he would say, "I give this over to my daughters, if that result happens," rather than name the event which would cause the result: so that, in our opinion, the main reasons given for the decision of *Young v. Robertson* would not apply to this case.

It is said that that case has been acted upon by the Lords Justices in the case of *Gregson's Trusts*, 34 Law J., Ch. 4. That case shews, no doubt, that there is no difference between real and personal estate, so as to prevent the application to real estate as well as to personal of the rule in *Young v. Robertson*, that words of survivorship should be referred to the period of distribution, where it appears from the collocation of the words that it was the intention of the testator to do so. In *Gregson's Trusts*, this intention was very clear,—“On the death of my wife, the estate shall be shared equally amongst the survivors of certain persons.” It would have been difficult there not to read survivors as [802] meaning surviving at the death of the wife: yet many authorities were quoted in favour of the opposite construction: and the Lords Justices, in giving judgment, expressly said that there were authorities both ways. Hence, for the reasons we have mentioned, the intention is by no means so clear: and, being in a codicil, the words ought to be more clear before we could say that they divested the interest given by the will.

Notwithstanding the case of *Young v. Robertson*, we see no reason for construing the words in the codicil in the present case in any other than their usually received and recognized technical sense.

We are of opinion that, according to the true construction of the will, the undivided moiety of the estates in question, on the death of the testator Richard Arnold, vested in his son John Arthur Arnold, in fee in remainder expectant on the determination of the particular estates devised to Harriett Arnold and her issue; and that, according to the true construction of the codicil, the executory devise over in the event of the said John Arnold dying without leaving issue, and before the estates became vested in him by virtue of the limitations in the will, was to take effect only in case the said John Arthur Arnold died without leaving issue before the said estates became vested in him in point of interest.

We further think that the said moiety did so vest in him in point of interest, and therefore that the said devise over of the said moiety never took effect. If so, the plaintiffs below are, under the circumstances stated in the case, entitled to recover that moiety.

We therefore affirm the judgment of the court of Common Pleas given in accordance with that of the Master of the Rolls.

Judgment for the plaintiffs below.

COMMON BENCH REPORTS. New Series. CASES
 ARGUED and DETERMINED in the COURT of
 COMMON PLEAS, and in the COURTS of
 ERROR, in Trinity Term and Vacation, 1865.
 By JOHN SCOTT, Esq., of the Inner Temple,
 Barrister-at-Law. Vol. XX. London, 1866.

[1] CASES ARGUED AND DETERMINED ON WRITS OF ERROR FROM THE COURT
 OF COMMON PLEAS, AND EXCHEQUER CHAMBER.

[IN THE HOUSE OF LORDS.]

THE COMPANY OF FREE FISHERS AND DREDGERS OF WHITSTABLE
v. GANN. 1865.

[S. C. 11 H. L. C. 192 : 11 E. R. 1305 (with note).]

1. The bed of all navigable rivers where the tide flows and reflows, and of all estuaries or arms of the sea, is by law vested in the Crown : but this ownership of the Crown is for the benefit of the subject, and cannot be used in any manner so as to derogate from or interfere with the right of navigation which belongs by law to all the subjects of the realm. — If, therefore, the Crown grants part of the bed or soil of a navigable river or an estuary, the grantee takes it subject to the public right, and cannot in respect of his ownership of the soil claim anything which interferes with the enjoyment of the public right. 2. Anterior to Magna Charta (by which such grants were prohibited), a several fishery in an arm of the sea or navigable river might have been granted by the Crown to a subject ; and the grant might include a portion of the soil for the purpose of the fishery. But this, like every other grant, whenever made, must have been subject to the public right of navigation.—Where, therefore, the plaintiffs claimed to be entitled by Royal grant to a portion of the bed and soil (below low-water mark), of the arm of the sea which forms the estuary of the river Thames opposite to the manor of Whitstable, in the open sea way, being the high road for the passage of vessels, and claimed, as an immemorial payment due to the lords of the manor, a sum of 1s. for every vessel which cast anchor within the precincts of that part of the bed or soil of the river within the manor which was claimed by them : Held that, inasmuch as this claim interfered with the right to anchor, which is a necessary part of the right of navigation, subject to which the original grant must be taken to have been made,—it could not be supported on the ground of ownership of the soil.—3. If such payment be claimed as an antient anchorage due, some facts must be shewn which prove, or from which it may be inferred, that the soil was originally within the precincts of a port or harbour, or that some service or aid to navigation was rendered to the public, in respect of which the alleged grant was made : but no such presumption can be made or inference drawn from the mere fact of an immemorial payment.

This was an action brought by the plaintiffs, a company incorporated by the 33 G. 3, c. 42 (local act), under the name of "The Company of Free Fishers [2] and Dredgers of Whitstable, in the county of Kent," to try their right to receive

a payment of 1s. for every vessel anchoring on certain land covered by the sea, the soil of which was claimed by the plaintiffs.

The declaration was in the indebitatus form for anchorage. The defendant pleaded never indebted.

The cause was tried before Erle, C. J., at Maidstone Spring Assizes, 1861, when a verdict was found for the plaintiffs, leave being reserved to the defendant to move to enter the verdict for him if the court should be in his favour upon the points hereinafter mentioned,—both parties undertaking to be bound by the decision of the court thereon, unless the court should give leave to appeal, and to appeal on those points only on which the court should so give leave. The evidence given at the trial was in substance as follows:—

By deeds of lease and release, bearing date respectively the 11th and 12th of October, 1791, the fee-simple of the manor of Whitstable, &c., were conveyed to Edward Foad and James Smith, in equal moieties, as tenants in common in fee. The following is an extract from the conveying part of the deed of release:—"All that the manor of Whitstable, with all and singular the rights, royalties, privileges, members, and appurtenances thereof, in the said county of Kent; and also all courts-leet, courts-baron, perquisites and profits of courts to the same belonging or in any wise appertaining; and also all those quit-rents payable yearly to the said manor by several persons, formerly said to amount to the sum of 13l. 18s., but now to the sum of 17l. 16s. per annum: And also all the fishery of Whitstable, being a royalty of fishery or oyster-dredging within the said manor, formerly computed to [3] be of the yearly value of 23l. 4s., but now of 76l. 15s. 2d. per annum, on an average for the last seven years; together with all and singular messuages, houses, outhouses, buildings, dove-houses, barns, stables, mills, tofts, yards, orchards, gardens, lands, tenements, meadows, leasowes, pastures, feedings, closes, inclosures, woods, underwoods, trees, rents and services of tenants and farmers, quit-rents, free-rents, rents of assize, ways, paths, passages, waters, streams, fishings, fishing-places, watercourses, ponds, pools, moats, warrens, wastes, waste grounds, commons, common of pasture, furzes, heaths, moors, marshes, courts-leet, courts-baron, views of frankpledge, perquisites and profits of courts and leets, homages, fealties, reliefs, heriots, escheats, fines, issues, amerciaments, goods and chattels of felons and fugitives and of persons attainted and of persons outlawed and put in exigent, deodands, waifs, estrays, treasure-trove, fines, forfeitures, mines, quarries, and all other royalties, franchises, liberties, rights, jurisdictions, privileges, immunities, profits, commodities, emoluments, advantages, and hereditaments whatever to the said manor, royalty, and fishery, hereditaments and premises hereby granted and released, or intended so to be, or any of them, belonging or in any wise appertaining, or therewith held, used, occupied, or enjoyed, or accepted, reputed, taken, or known as part, parcel, or member thereof, or to be had, received, perceived, or taken, used, exercised, or enjoyed in, upon, or out of or arising from the same manor or lordship, royalty, and fishery, hereditaments, and premises, or any of them, or any part or parcel thereof."

By deeds of lease and release, bearing date respectively the 24th and 25th of October, 1792, it was, amongst other things, recited and limited as follows: "And whereas, within the limits of the said manor [4] of Whitstable there is, and for many hundred years now last past hath been, a fishery for the growth and improvement of oysters, extending from the sea-beach for a very considerable distance into the sea, and which fishery during all that time hath been managed and carried on by and at the expense of a certain company of free dredgers called the Whitstable Company of Dredgers, who have held the same from time to time as tenants under the lord of the said manor, and claim to be entitled to hold the same as free fishers, on payment of such annual rents as are hereinafter mentioned: And whereas it hath been contracted and agreed by and between the said parties to these presents that, for the several considerations hereinafter mentioned, a division shall be made in the rights of the said manor, royalty, fishery, hereditaments, and premises, and to that end that the said manor and all the lands, grounds, quit-rents, and manor rights belonging thereto except as hereinafter is mentioned) shall be the property of the said Edward Foad, John Nutt, and Stephen Salisbury, their heirs and assigns, and that all the rights of the lord of the said manor in the said fishery, and the ground and soil thereof from the south and south-east sides of the sea-beach (which from time to time have been considered as the land boundaries of the said fishery), and in the customary payments

usually made to the lord of the said manor for or on account of the anchorage of any ship or vessel, or for the landing of any goods or merchandize, or for the admission of freemen, or other payments for the regulation of the freemen or fishery, and all other payments whatsoever at the water-court of free dredgers there within the jurisdiction of the said manor, and other such like payments, and all forfeitures, articles, and things which of right belong to and are the property of the lord of the said manor by reason of any [5] wrecks of the sea or such like rights and forfeitures arising within the limits of the said sea-beach, shall be the property of the said Thomas Foord, his heirs and assigns."

"All that *the said manor*, and the said messuages, lands, quit-rents, rights, royalties, liberties, privileges, hereditaments, and all and singular other the said premises hereby or mentioned or intended to be hereby granted and released, with their and every of their appurtenances, save and except the said royalty of fishery or oyster-dredging, and the right of taking oysters and other fish within the said manor, and the ground and soil of the said fishery, *and also the customary payments usually and of right made to the lord of the said manor for or on account of the anchorage of any ship or vessel or for the landing of merchandize within the said manor*, or for the admission of freemen, or other payments for the regulation of the freemen and fishery there, and all other payments whatsoever at the water-court of free dredgers there, and all such like payments, and all manner of forfeitures, articles, and things which of right belong and are the property of the lord of the said manor by reason of any wrecks of the sea, or such other like rights and forfeitures arising within the limits of the sea-beach aforesaid," were limited, as to one third, to Edward Foord, in fee, as to one other third, to John Nutt, in fee, and, as to the remaining third, to Stephen Salisbury, in fee.

And "all the said royalty of fishery or oyster-dredging, and the right of taking oysters, and other fish within the said manor, *and all the ground and soil of the said fishery*, extending as hereinafter is mentioned, and also the *customary payments usually and of right made to the lord of the said manor for or on account of the anchorage of any vessel or for the landing of any goods or merchandize within the said manor*, or [6] for the admission of freemen, or other payments for the regulation of the freemen and fishery there, and all other payments whatsoever at the water-court of free-dredgers there, and all such like payments, and all manner of forfeitures, articles, and things which of right belong unto and are the property of the lord of the said manor by reason of any wrecks of the sea or other such like rights and forfeitures arising within the limits of the sea-beach aforesaid, and all remedies for the recovery of the said premises respectively," were limited to the said Thomas Foord, in fee.

The deed of release contained the following clauses:—

"And, in order to ascertain the boundary of the said oyster-fishery, and how far the right of the said Thomas Foord, his heirs and assigns, therein shall extend, it is expressly agreed by and between the said Edward Foord, John Nutt, Stephen Salisbury, and Thomas Foord, for themselves severally and respectively, and for their several and respective heirs and assigns, that from henceforth the south and south-east sides of the sea-beach of Whitstable aforesaid, as the same is and hereafter shall be thrown up by the sea from time to time, shall be considered and taken as the boundary between the lands of them the said Edward Foord, John Nutt, and Stephen Salisbury, their heirs and assigns, and the lands of the said Thomas Foord, his heirs and assigns; and that such sea-beach *and all the lands and grounds from thence unto the sea so far as the said fishery extends*, whether the same be more or less than the quantity of land now belonging to the said fishery, and all payments or dues for the anchorage of any ships or vessels or for the landing of any goods or merchandize there, and for the admission of freemen, and other payments for the regulation of the freemen and fishery, and all other payments what-[7]-soever at the water-courts or courts of dredging there, and all wrecks of the sea and other manor rights and forfeitures there found, shall from thenceforth be held and enjoyed by and be the property of the said Thomas Foord, his heirs and assigns, subject to the right of the said company of dredgers in the said fishery:

"And, the better to effect the purpose of the now reciting indenture, the said Edward Foord, John Nutt, and Stephen Salisbury appointed the said Thomas Foord, his heirs and assigns, their attorney and attorneys, and did thereby give unto the said Thomas Foord, his heirs and assigns, power to appoint a steward or stewards and water-bailiff or water-bailiffs, or other usual officers of the said fishery, and to summon

and hold all such water-courts or courts of dredging as should be necessary to be held for admitting freemen to participate in the rights of the said fishery with the present and future freemen thereof, and to impanel and swear any jury at such courts, and make all such bye-laws and orders for better regulating the said company of dredgers as should be thought expedient and for the advantage of the company; and also to ask, demand, collect, and receive from all and every person and persons whomsoever all customary payments or dues for the anchorage of any ships or vessels, or for the landing of any goods or merchandize within the said manor, and for the admission of freemen, and other payments for the regulation of the freemen at the said courts, and all other dues, wrecks of the sea, and such like manor rights and forfeitures which should be there found, and to detain and keep the same for the use of the said Thomas Foord, his heirs and assigns, and, upon receipt thereof, to give acquittances, &c., and, in cases of refusal, to bring actions," &c.

By the 33 G. 3, c. 42, the said free fishers and [8] dredgers of Whitstable were incorporated. They have ever since carried on the fishery there to a great extent.

By indentures of lease and release bearing date respectively the 4th and 5th of June, 1793, and made between the said Thomas Foord of the one part, and the said Company of Free Fishers and Dredgers of Whitstable, in the said county of Kent, of the other part,—after reciting in the indenture of release the hereinbefore abstracted indentures of the 11th and 12th of October, 1791, a mortgage by the said Edward Foad to George Rigden, and the re-conveyance by the said George Rigden, and the said abstracted indentures of the 24th and 25th of October, 1792; and reciting that the said purchase so made by the said Thomas Foord of the said royalty, fishery, and hereditaments, was by him contracted for on the part of the Company of Free Fishers and Dredgers aforesaid, and the sums of 800l. unto the said Edward Foad, and of 1530l. unto the said James Smith, making 2230l., which were the consideration moneys in the said indenture of release of the 25th of October, 1792, mentioned to have been paid by the said Thomas Foord for the purchase of the said premises, were the moneys of the said company, and no part thereof of the said Thomas Foord, which he did thereby acknowledge,—it was witnessed, that, in consideration of the premises, and of 10s., he the said Thomas Foord did grant, release, and confirm unto the said Company of Free Fishers and Dredgers (in their actual possession, &c.), and to their successors and assigns, All that the royalty of fishery or oyster-dredging, and the right of taking oysters and other fish within the manor of Whitstable, in the said county of Kent, *and the ground and soil of the said fishery*, extending as thereinbefore was mentioned; and also the customary payments [9] usually and of right made to the lord of the said manor for or on account of the anchoring of any ship or vessel, or the landing of goods or merchandize, within the said manor, or for the admission of freemen, or other payments for the regulation of the freemen and fishery there, and all other payments whatsoever at the water-court of free dredgers there, and all such like payments, and all manner of forfeitures, articles, and things which of right belonged unto and were the property of the lord of the said manor by reason of the wrecks of the sea or other such like rights and forfeitures arising within the limits of the sea-beach aforesaid, and all and singular other the premises which in and by the said recited indentures of lease and release of the 24th and 25th of October, 1792, became vested in the said Thomas Foord, his heirs and assigns, or in any person or persons whomsoever in trust for him and them; and all the reversion, &c.; and all the estate, &c.; and all deeds, &c.,—To hold the same unto and to the use of the said Company of Free Fishers and Dredgers, their successors and assigns, for ever.

The defendant was the owner of a small vessel called the "Amoret"; and, on the 29th of September, 1860, the said vessel cast anchor at Whitstable on the land covered by the water of the sea, and *below low water-mark*: but the spot where the said vessel so anchored was and is within that portion of the manor of Whitstable and fishery aforesaid which is claimed by the plaintiffs under the above deeds, and under the circumstances herein stated, as their soil and freehold.

The plaintiffs' oyster-beds extend from the shore for about two miles out to sea; and the said vessel was anchored about half a mile from the shore, upon part of the land claimed by the said company, but not then used as oyster-beds.

[10] The plaintiffs' claim was for 1s. for anchoring on the soil which they alleged to be theirs: and they gave evidence to prove, and the jury found that, from 1775 continually down to the present time, they and those under whom they derived title

had from time to time claimed as of right to take, and had taken, the sum of 1s. from vessels casting anchor within that portion of the manor on which the defendant's vessel had cast anchor, and that they claimed to take it as a customary payment for such use of the soil.

The defendant at the time in question resided and dwelt within the Cinque Ports, at Whitstable,—Whitstable being part of the port of Faversham, which is a limb of Dover. The said vessel at the time she anchored as aforesaid was trading to Whitstable.

The charter of Edward the 4th in reference to the exemption of the Cinque Ports from certain dues, was put in evidence at the trial by the defendant: see *Jeake's Charters of the Cinque Ports*.

On the part of the defendant it was submitted that he was entitled to the verdict, on the following grounds,—first, that the soil of the sea where his vessel was anchored, being below low-water mark, was vested by law in the Crown, and could not be held by a subject,—secondly, that the company had no right to claim any payment for such anchorage,—thirdly, that, if ever the right to demand a payment for anchorage was vested in the lord of the manor of Whitstable, that right was extinguished and destroyed when the manor was divided into two parts (which for distinction were at the trial called respectively the terrestrial and the marine manor,)—fourthly, that, if the right was not so extinguished and destroyed, the owner of the terrestrial portion of the manor should have been joined as co-plaintiff,—fifthly, that the defendant was under the Cinque Ports charter proved at the trial exempt from the said claim for anchorage.

[11] In Hilary Term, 1861, a rule nisi was obtained, on the part of the defendant, to enter a nonsuit, on the following grounds,—first, that the soil of the sea where the defendant's vessel was anchored was vested in the Crown,—secondly, that there was no evidence of any grant of the said soil to the plaintiffs, and that the judge presiding at the trial ought not to have left it to the jury to say whether upon the evidence they were satisfied that the plaintiffs had the alleged right,—thirdly, that, if the soil was vested in the plaintiffs, they had no right to claim any payment for such anchoring,—fourthly, that there was no evidence to support the plaintiffs' case or their right to take the toll claimed, and that the learned judge should have so directed,—fifthly, that, if ever the right to demand a payment for anchorage was vested in the lord of the manor of Whitstable, that right was extinguished and destroyed when the manor was divided,—sixthly, that, if the right was not so extinguished or destroyed the owner of the terrestrial portion of the manor should have been joined as a co-plaintiff,—seventhly, that the defendant was under the charter proved at the trial exempt from the claim made,—eighthly, that the verdict was against the evidence.

Upon the argument of this rule, the court of Common Pleas held that, it being competent to the Crown to grant the soil of the sea-shore and the right to anchorage, the evidence given at the trial was sufficient to justify the presumption of a grant having a legal origin: that the right of distress was incident to the right to the anchorage: and that the right to the anchorage was not destroyed by the severance of the marine from the terrestrial part of the manor: and accordingly the rule was discharged: see 11 C. B. (N. S.) 387.

The defendant appealed to the Exchequer Chamber: [12] but the decision of the court of Common Pleas was affirmed: see 13 C. B. (N. S.) 853. The defendant then appealed to the House of Lords, and the case was argued there by Prentice and F. M. White, for the appellant (the defendant below), and by Lush, Q. C., Denman, Q. C., and Needham, for the respondents, the plaintiffs below.

The arguments were substantially the same as those urged below: it will therefore be sufficient to enumerate the authorities cited, which were as follows:—

For the appellant, *Warren v. Proctor*, 1 Mod. 104; *The Mayor of Nottingham v. Lambert*, Willes, 111; *Lord Pelham v. Pickersgill*, 1 T. R. 660; *The Mayor of Northampton v. Ward*, 2 Stra. 1238; the case of *The London Wharves*, 1 W. Bl. 581; *The Attorney General v. Barridge*, 10 Price, 350; *Anonymous*, 1 Campb. 517, n.; *Blundell v. Catterall*, 5 B. & Ald. 268; *Lord Falmouth v. George*, 5 Bingh. 286, 2 M. & P. 457; *Richards v. Bennett*, 1 B. & C. 223, 2 D. & R. 389; *Scrutton v. Brown*, 4 B. & C. 485, 6 D. & R. 536; *The Duke of Somerset v. Fagge*, 5 B. & C. 875, 1 D. & R. 747; *Williams v. Wilcock*, 8 Ad. & E. 333, 3 N. & P. 606; *The Mayor of Exeter v. Warren*, 5 B. & C. 773, Dav. & Mer. 524; *The Mayor of Colchester v. Brooke*, 7 Q. B. 339; *Martin v. Waddell*,

16 Peter's (U. S.) 369; *Den v. New Jersey*, 5 How, U. S. Rep. 426; *Post v. Nunn*, 1 South's (N. Jersey) Rep. 61; Callis on Sewers, p. 53; 2 Roll. Abr. 272; Com. Dig. *Prerogative* (D.), 48, *Toll* (C.); Bac. Abr. *Custom* (D.); Hale de Jure Maris, pp. 22, 31, 36; Hale de Portibus Maris, p. 74; Erskine's Institutes, book 1, tit. 8, s. 17; Bell's Principles of the Law of Scotland, ss. 645, 646; Chitty's Prerogatives of the Crown, 143; Scriven on Copyholds, p. 666; 3 Kent's Commentaries, part 6, § 52; Angell on Watercourses, c. 13, § 558; Angell's Tidal Waters, p. 42; Wharton's Law Lexicon, *Anchorage*.

[13] For the respondents,—Hale de Jure Maris, p. 31; Hale de Portibus Maris, pp. 36, 46; Wharton's Law Lexicon, *Anchorage*.

LORD WESTBURY, C.—My Lords,—In consequence of some uncertainty in the statements of the special case, it was admitted by the appellant at the Bar of the House that the payment demanded by the respondents had been made to the lords of the manor of Whitstable from time immemorial, and that the vessel of the appellant cast anchor within the limits of the oyster-bed or fishery claimed by the respondents.

The case appears to me to depend on principles which have long been settled. The bed of all navigable rivers where the tide flows and re-flows, and of all estuaries or arms of the sea, is by law vested in the Crown; but this ownership of the Crown is for the benefit of the subject, and cannot be used in any manner so as to derogate from, or interfere with, the right of navigation, which belongs by law to the subjects of the realm. The right to anchor is a necessary part of the right of navigation, because it is essential for the full enjoyment of that right. If the Crown, therefore, grants part of the bed or soil of an estuary or navigable river, the grantee takes subject to the public right; and he cannot in respect of his ownership of the soil make any claim or demand, even if it be expressly granted to him, which in any way interferes with the enjoyment of the public right.

The respondents claim to be entitled by Royal grant to a portion of the bed or soil (below low-water mark) of the arm of the sea which forms the estuary of the Thames opposite to the manor of Whitstable, in the open sea, a sea way, being the high road for the passage of vessels, and they claim a sum of one shil-[14]-ling for every vessel which casts anchor within that part of the bed or soil which is claimed by them. But this claim interferes with the free enjoyment of the right of navigation subject to which the original grant must be taken to have been made, and it cannot be supported on the ground of ownership of the soil.

If the payment be claimed as an antient anchorage due, some facts must be shewn which either prove, or from which it can be inferred, that the soil claimed by the respondents was originally within the precincts of a port or harbour, or that some service or aid to navigation was rendered to the public in respect of which the alleged grant was made; but nothing of the kind appears, and no such case can be presumed or inferred from the mere fact of an immemorial payment. No such case is made by the respondents, and the payment is demanded merely on the ground of its having been immemorially made to the lords of the manor of Whitstable and their assigns in respect of the ownership of the site—an ancient oyster-fishery now vested in the respondents.

Anterior to Magna Charta, by which such grants were prohibited, a several fishery in an arm of the sea or navigable river might have been granted by the Crown to a subject. The present fishery of the respondents must be taken to have been so granted; and the grant might include a portion of the soil for the purposes of the fishery. But this, like every other grant, whenever made, must have been subject to the public right of navigation; and I cannot suppose that the establishment of oyster-beds for the private emolument of the proprietors could be regarded by the law as an equivalent to the public for the imposition of this tax (at its commencement not inconsiderable) on the right of navigation.

Speaking with great respect for the learned judges in [15] the court below, it appears to me that the error of the judgments consists in not adhering to the clear principle that the grant by the Crown or any part of the bed or soil of this estuary below low-water mark, whether for a fishery or not, must by the common law have been subject to the public right of navigation, of which the right to anchor is an essential part; that no property can be claimed in the soil except subject to this overriding right; and that there is no fact or circumstance to warrant a presumption that any corresponding benefit was given to the public in return for the imposition of

this anchorage due. It is not suggested on either side that any further facts remain to be ascertained; and I see no utility, therefore, in directing a new trial. I shall therefore humbly move your Lordships that the judgment of the court below be reversed.

LORD WENSLEYDALE. My Lords,—From the loose and unsatisfactory manner in which this case has been stated, I think that your Lordships will find a difficulty in giving a satisfactory opinion upon some of the questions proposed to be raised. Speaking for myself, I must say that I should wish a further inquiry to take place, and should therefore have advised to direct a new trial between the parties. But, having heard what my noble and learned friend the Lord Chancellor has said upon that subject, and being acquainted also in some degree with the opinion of my noble and learned friend opposite, I do not mean to persist in that, although my own notion is that it is consistent with the statement made upon the record that some real legal ground might be found for the establishment of the right of anchorage; and therefore, so far as I am concerned, I would rather that the case should undergo further investigation.

[16] I perfectly agree that, from long enjoyment of a privilege, in this case of demanding the payment of anchorage for a period of ninety years, from 1775 to 1864, every reasonable presumption may be made that it has continued from time immemorial; but, where the privilege requires more than immemorial enjoyment in order to be legal and valid, some other facts must exist besides mere long enjoyment; and there must be some proof of those facts.

Now, to make a grant of anchorage in an arm of the sea where the fundus maris is the property of the Crown, but where every subject of the Crown has a right to navigate and to cast anchor when and where he thinks fit, as a necessary means of safe navigation, he cannot be deprived of that right by an usage, however long, unless there is some evidence of a sufficient consideration, of some advantage to the subject, to enable the Crown to confer upon a particular individual the privilege of receiving compensation from the subject, and thus depriving the subject of his undoubted right.

On this record it appears to me there is not sufficient evidence of any such facts.

It is much to be regretted that the great inconvenience of the technicalities of a bill of exceptions or special verdict being now in many cases done away with, and a statement of facts allowed on rules to shew cause instead, that somewhat more pains and care should not be taken to state all that is really material. I think that this case is wanting in this respect. Here is no proof, I think, except the enjoyment of anchorage for rather less than ninety years. The case is extremely defectively stated on both sides.

Upon the case, as found, some matters are very clear. The manor of Whitstable existed before the [17] Statute of Quia Emptores, 18 E. 4, c. 15, and there was an immemorial Company of Oyster Dredgers there, who had established before time of legal memory, and before the statute of Magna Charta, an oyster fishery on the sea-shore of Whitstable, within the limits of that fishery as claimed by that company, but not occupied by oysters. The defendant's vessel cast anchor. Whether the place in which the anchor was cast was actually within the limits to which the company was really entitled, and whether the anchor was cast because the vessel was in danger, or without absolute necessity, and purely voluntarily, is not stated. A claim for anchorage of 1s had been paid regularly since 1775 for anchoring within that portion of the manor in which the defendant's vessel had cast anchor; and that was claimed to be taken as a customary payment for the use of the soil.

In 1791 the manor of Whitstable and the fishery of Whitstable, being a royalty of fishery or oyster-dredging within the said manor, were conveyed to Edward Foad and James Smith, in equal moieties, as tenants in common, in fee.

By deeds of the 24th and 25th of October, 1792 (between whom does not appear), the manor was declared to be the property of Foad, Nutt, and Salisbury; and the rights of the lord of the manor in the fishery, and the ground and soil thereof from the land boundaries of the fishery, and the customary payments usually made to the lords of the manor for or on account of the anchorage of any ship or the landing of any goods, and also wrecks of the sea, were declared to be the property of Thomas Foord, his heirs and assigns; and the release contains a clause that the south-east and south-west sides of the sea-beach at Whitstable, as the same is or shall be thrown up by the sea, shall be taken to be the boundary between [18] the lands of Foad, Nutt,

and Salisbury, and their heirs, and those of Foord and his heirs : and from thence into the sea as far as his fishery extends, whether the same be more or less than the quantity of land then belonging to the fishery.

On the 30th of April, 1793, an act of parliament passed for incorporating the Company of Free Fishers and Dredgers : and on the 4th and 5th of June, 1793, Foord conveyed the Royalty of fishery and fishing oysters, and the dues of anchorage and landing, to the Company of Free Fishers and Dredgers.

The separation of what has been termed the terrestrial part of the manor from the fishery has been very properly held to be immaterial by the judges of both courts.

Evidence was then given of a charter of Edward IV., exempting the inhabitants of the Cinque Ports from terrage and other like charges : and that the defendant was an inhabitant. But it is wholly unnecessary to trouble ourselves with the question whether anchorage was included in the word terrage or not : for the lord of the manor of Whitstable's title dated from a period long before the reign of Edward IV., and the charter of Edward IV. could confer no exemptions.

There is no difficulty also in saying that the jury would be perfectly right in presuming that the payments which had been made ever since 1775 were made from beyond time of legal memory to the lord of the manor of Whitstable ; though that question does not appear to have been regularly put to them.

Again, it might be properly presumed that the oyster-fishery was granted to the lord of the manor.

Again, it is hardly necessary to discuss the question whether the vessel, on the occasion that she cast anchor, was in peril or not, or the casting of anchor was in a sense voluntary. If the company have a right to [19] anchorage in any case, I should think the right would exist in all cases.

But the principal difficulty I feel is that the right to the soil of the fundus maris within three miles below low-water mark, and to the fishery in it, though granted before Magna Charta, is undoubtedly subject to the rights of all subjects to pass in their vessels in the ordinary and usual course of navigation, and to take the ground there, or to anchor there at their pleasure, free from toll, unless the toll is imposed in respect of some other advantage conferred upon them, or at least on the public.

Subjects may have that advantage where they anchor in a port, in respect of the owner of the port being obliged to maintain it and keep it sufficiently repaired and ready for the reception of ships : and it may be that the company of dredgers may have had the anchorage assigned to them, beyond the time of memory, by the owners of the port, who may have had the right of anchorage immemorially by virtue of the rights of the port. But the case supplies no materials to enable us to come to that conclusion. We are told nothing about the port, its position, or the obligation of the owners.

It would be our duty, if the case admitted of it, to find a legal origin for a right so long enjoyed. It might also be due by right as a compensation for the injury, by anchoring within the limits of the oyster-fishery, to the brood of oysters. The grant of an oyster-fishery beyond the time of legal memory, which would require some expense and trouble to establish and keep up, would, I am strongly inclined to think, justify the imposition of such toll within the limits where oysters are placed to breed. Mr. Justice Coltman, a very able judge, in the case of *The Mayor of Colchester v. Brooke*, 7 Q. B. 355, thought that the [20] party might be liable by ancient custom to pay to the lord of the manor a reasonable payment, as the owner of the soil where there were oyster-beds, for grounding on the soil.

But, whether the place where the anchor was cast in this case was within the true boundaries of the immemorial oyster-beds, does not appear to be distinctly stated in the case ; or whether the particular place where the anchor was laid was near an oyster-bed, or anchorage there did then or could at any time prejudice the actual fishery or its extension, does not appear. It might be perfectly innocuous.

For these reasons, I think that the plaintiffs are not entitled to succeed. If my noble and learned friends agreed to it, I should prefer that there should be a new trial ; but I do not wish to persist in that against their opinion.

LORD CHELMSFORD. My Lords, — The principal question intended to be raised between the parties in this appeal is, whether the respondents, "The Company of Free Fishers and Dredgers of Whitstable," who are the owners of a fishery for the growth and improvement of oysters within the limits of the manor of Whitstable, are entitled

to demand from the appellant a payment for anchoring his vessel within the manor; their title to demand such payment being derived from the lord of the manor, whose predecessors have from time immemorial received a customary payment "for and on account of the anchorage of any ship or vessel within the said manor."

The special case upon which the judgment of the court of Exchequer Chamber was given is very loosely and imperfectly drawn, and omits many facts which are necessary to raise with proper precision the point to be decided. For instance, it is not stated whether [21] the claim for anchorage applies to all vessels, whether anchoring within the manor without any actual necessity, or driven to do so by stress of weather or by the exigencies of navigation. Again, it is said that the appellant's vessel was anchored upon a part of the land "*claimed* by the company," and that their claim was for anchoring upon the soil *alleged* to be theirs, not stating that it actually was theirs. And, instead of claiming the anchorage due as a payment made from time immemorial, it is only alleged that "the plaintiffs gave evidence to prove, and the jury found that, from 1775 continually down to the present time, they, and those under whom they derived title, had from time to time claimed as of right to take and had taken the sum of 1s. from vessels casting anchor within that portion of the manor on which the defendant's vessel had cast anchor, and that they claimed to take it as a customary payment for such use of the soil."

The learned counsel on both sides expressed their desire to have the important question, whether, under the circumstances of the case, the anchorage due could have a lawful origin, decided by the House: and for this purpose it was admitted on the part of the appellant that the payment for anchorage had been received by the lords of the manor of Whitstable, without interruption, from time immemorial, and that his vessel cast anchor upon the soil of the company within the limits of their oyster-fishery, and that there was no particular necessity for her coming to an anchor there. It may be observed that, if the payment can legally be claimed in respect of the soil, there is the more reason why it should be paid by those who are driven by necessity or led by their own convenience to anchor upon it, because they are the persons who really derive benefit from it.

In considering the question, it is necessary to bear [22] in mind that it applies exclusively to the claim of a toll or due for anchoring on the high seas, and not in any port or haven. I mention this in the outset, because Mr. Lush towards the close of his argument contended that the toll might be regarded as being claimed in respect of a port, Whitstable being a limb of Faversham, one of the Cinque Ports. The claim had never been put upon this ground in all the former discussions in the courts below; and it is clearly insufficient to sustain it. Mr. Lush admitted that the respondents were not the owners of the port, but suggested the possibility of the lords of the manor having obtained the port by devolution from the original owner. There is no ground whatever for this presumption; and, even if there were, the anchorage due is claimed, not in respect of the ownership of a port, but as a payment "of right made to the lord of the manor." The claim, too, is made solely in his character of lord, and not as the owner of a fishery: so that no question of competition between the right of passage of the public in the highway of the sea, and the right of an individual to have a several fishery there, can possibly arise.

The question is thus simply raised, whether, at any period of the history of this country, the Crown could have imposed upon the subjects a toll for anchoring their vessels upon the high seas within the limits to which its right to the soil of the sea-shore extends, without any other consideration moving from the Crown but the permission to use the soil for this purpose.

The case of the respondents is very shortly and distinctly stated by Lord Chief Justice Erle in his judgment in this case. He says: "The soil of the sea-shore to the extent of three miles from the beach is vested in the Crown: and I am not aware of any rule of law which prevents the Crown from granting to a [23] subject that which is vested in itself. If the Crown did grant the soil of the shore in question, it may well be that the right of taking an anchorage-toll of 1s. was granted with it."

With great respect for the learned Chief Justice, I do not think it can be assumed as an unquestionable proposition of law, that, as between the Crown and its subjects, the sea-shore to the extent mentioned is the property of the Crown in such an absolute sense as that a toll may be imposed upon a subject for the use of it in the regular course of navigation. In stating the right of the Crown in the sea-shore, the text-

writers invariably confine it to the soil between high and low-water mark. The three miles limit depends upon a rule of international law, by which every independent state is considered to have territorial property and jurisdiction in the seas which wash their coasts within the assumed distance of a cannon-shot from the shore. Whatever power this may impart with respect to foreigners, it may well be questioned whether the Crown's ownership in the soil of the sea to this large extent is of such a character as of itself to be the foundation of a right to compel the subjects of this country to pay a toll for the use of it in the ordinary course of navigation.

In the case of *The Mayor of Colchester v. Brooke*, 7 Q. B. 374, Lord Denman, in delivering the judgment of the court, said: "The right of soil in arms of the sea and public navigable rivers which the Crown has, independently of any ownership in the adjoining lands, must in all cases be considered as subject to the public right of passage, however acquired; and any grantee of the Crown must of course take subject to such right." Now, if the public possess this paramount right of passage, it seems to be rather inconsistent with such right that they should be compelled to make any [24] payment, however small, for the liberty to exercise it. And the respondents must be driven to contend, either that the right in its origin was not an absolute one, but that the Crown might permit it only under certain conditions, or that the right to navigate does not include in it the power to anchor at pleasure.

We were properly told in argument that, in considering the question, we ought not to confine our view to the present time, but should look to the early period of our history, when the powers of the Crown were much more ample and unfettered than they have since been. But I have searched in vain amongst the earlier authorities to find any clear and distinct proof of the Crown ever having claimed such a toll as that in question, without giving some benefit to the subject as a consideration for it. Indeed, it was admitted in the argument for the respondents, that some consideration for the right to take anchorage-dues was necessary to be shewn; but it was said that the mere use of the soil of the Crown by casting an anchor upon it was a sufficient consideration. None of the authorities referred to, however, support so wide a proposition. As far as I can discover, a payment for anchorage has always been claimed in respect of a port or harbour, the creation or erection of which is for the common benefit of navigation, and constitutes in itself a sufficient consideration.

Lord Hale, in enumerating the duties which arise from the *jus domini* or franchise of a port, mentions, "Anchorage, as a prestation or toll for every anchor cast there." *De Portibus Maris*, c. 6, p. 74. It was said by the counsel for the respondents, that it appears from the same high authority that toll might be taken for anchorage in a haven. This is true, but apparently only where the haven is within the limits of the franchise of a port. Hale describes a "haven" to be "a [25] place of a large receipt and safe riding of ships, so situate and secured by the land circumjacent that the vessels thereby ride and anchor safely, and are protected by the adjacent land from dangerous and violent winds:" c. 2, p. 46. But he afterwards uses the word to denote a portion of the port itself, as in page 54, where he says,—“In the consideration of a port, there are these two things involved, viz. first, the consideration of the interest of the soil both of the shore or town, which is the *caput portûs*, and of the soil of the haven itself wherein the ships do ride and apply.” And that the ownership of the soil of a haven, unless it is within a port, will not entitle the owner to take anchorage-dues for the use of it, is laid down in page 73, in these terms:—

“The ownership or propriety, is where the King, or common person, by charter or prescription, is the owner of the soil of a creek or haven where ships may safely arrive and come to the shore. This interest of propriety may, as hath been shewn, belong to a subject. But he hath not thereby the franchise of a port, neither can he so use or employ it, unless he hath had that liberty time out of mind, or by the King's charter.” And, after stating that the owner may bring in his own goods not customable, &c., he adds, “but he may not use it as a public port, nor take toll or anchorage there.” Mr. Justice Williams quotes this passage, in delivering his judgment in the Common Pleas, and says that, “it clearly assumes that, if the owner had a Royal grant, he might take anchorage.” I do not, however, understand this to be Lord Hale's meaning. It appears to me that the correct interpretation of his language is that, without the King's grant or charter, a subject cannot have the franchise of a port, and, without having a port, he cannot take toll or anchorage, which are dues arising from and incident to it.

[26] The counsel for the respondents, in their argument in support of their claim, insisted strongly upon the analogy presented by the right of fishing in the sea, which *prima facie* all subjects of the realm possess, and of which they might formerly have been deprived by a grant from the Crown to an individual of an exclusive right of fishing. But, in the first place, it does not appear that such a right of several fishery was ever granted in what may be called the open sea. Lord Hale states that "the King may grant fishing within a creek of the sea, or in some known precinct, that hath known bounds, though within the main sea" (page 17); and, again, that "a subject may by prescription have the interest of fishing in an arm of the sea, in a creek or part of the sea, or in a certain precinct or extent lying within the sea" (page 18). But, even if such a grant could have been lawfully made so as to extend beyond these defined limits, yet the right of several fishery appears to have been always subservient to the right of navigation; and the King could not enable the owner of a fishery to do any thing which, though within the competency of an exclusive owner, was an obstruction to the passage of ships upon the seas.

In *The Mayor of Colchester v. Brooke*, 7 Q. B. 355, Mr. Justice Coltman suggested that, although parties who wish to go up a navigable river are not obliged to wait for a particular time of the tide, yet it might be law that, if they take the ground, they may be liable to make a reasonable payment to the owner of the soil. This opinion is not stated with any positiveness; but yet it may be correct as applicable to a navigable river, because the owner of the soil may have given consideration for the payment, by rendering the river navigable.

The necessity of discovering a *quid pro quo* for the [27] claim in this case has driven the respondents to contend that the establishment of the oyster-fishery belonging to the respondents, being for the public benefit, might be considered to be a sufficient consideration for the imposition of the toll upon anchorage. It is difficult to understand how a benefit wholly unconnected with navigation, and not extending to the public generally, can be made the legal foundation for a local payment from vessels anchoring within a particular district. There is no reason why, if good to this extent, it should not be sufficient for a similar charge for all vessels casting anchor upon the soil of the Crown in any other part of the seas round this island.

I have, therefore, arrived at the conclusion that the undoubted right of the public freely to navigate the highway of the sea cannot be restricted by the imposition of any payment whatever, unless some good consideration can be shewn for it; and the respondents have failed to establish any other ground of title in the lords of the manor to the anchorage due than the mere use of their soil. This I consider to be wholly insufficient to justify the demand in question, unless it can be held that the right of navigation does not include the right of anchoring, which can hardly be seriously contended.

I admit that every intendment ought to be made in favour of a payment which has been uninterruptedly received time out of mind, supposing it presumably capable of a lawful origin; but, not being able to discover any ground upon which this claim of an anchorage due could have had a legal commencement, the case of *The Mayor, &c., of Nottingham v. Lambert*, Willes, 111, is an authority for shewing that no length of prescription can give it validity. I think the facts sufficiently admitted to render a new trial unnecessary.

[28] I am therefore of opinion that the judgments of the Exchequer Chamber and of the court of Common Pleas ought to be reversed, and judgment to be entered for the defendant.

Judgment reversed.

[IN THE HOUSE OF LORDS.]

RALSTON v. SMITH. Feb. 24th, 1865.

[S. C. 11 H. L. C. 223; 11 E. R. 1318 (with note).]

1. The object of the 5 & 6 W. 4, c. 83, authorizing disclaimers, was to enable the patentee, where his specification contains a sufficient and good description of a useful invention, but that description is imperilled or hazarded by something being annexed to it which is capable of being severed, leaving the original description,

in its integrity, good and sufficient, without the necessity of addition, to lop off the vicious matter, and leave the original invention as described in the specification untainted by that vicious excess. But it is not competent to him to convert a specification bad, in the sense of its containing no description of any useful invention at all, into a good specification, by adding words which would convert that which is a barren and unprofitable generality into a specific and definite and practical description.—2. The expression “new manufacture” in the 21 Jac. 1, c. 3, not only comprehends “productions,” but it also comprehends the means of producing them,—a new machine, for instance, or a new combination of machinery, or a new process, or an improvement of an old process.—3. The use of a roller and a bowl for calendering and embossing fabrics, and the means of regulating the relative speed of their motion, was well known. In the process of calendering, the roller was smooth, and the speed of the roller and the bowl was unequal: in the process of embossing, the roller was engraved or patterned, and the speed of the roller and of the bowl was equal. The plaintiff took out a patent for a combination of the engraved or patterned roller with the differential speed of the roller and the bowl, in order to effect the two processes by one operation. The patent professed to be for “improvements in embossing and finishing woven fabrics, and in the machinery or apparatus employed therein;” and the novelty professed to consist in the use of rollers having “*any design* grooved, fluted, engraved, milled, or otherwise indented upon them.” Finding that the effect of the differential speed, where the roller was engraved or indented longitudinally, was to destroy the fabric, the plaintiff entered a disclaimer, by which, besides abandoning the latter branch of the title of the original patent, he disclaimed “the use of any other description of designs upon the surface of the roller except *circular grooves*, flutes, or indentations made around its surface:”—Held, by the House of Lords,—affirming the judgment of the court below,—that the process described in the original specification was not the proper subject of a patent; and that the disclaimer was bad, as attempting to turn that which was an impracticable generality into a specific invention not described in the original specification.—4. *Spiral* grooves on the roller, which in their effect could not be practically distinguished from *circular* grooves, would be an infringement of the patent.

This was an action for the infringement of a patent granted to the plaintiff on the 23rd of November, 1858, for “Improvements in embossing and finishing woven [29] fabrics, and in the machinery or apparatus employed therein.”

The defendant pleaded,—first, not guilty,—secondly, that the plaintiff was not the true and first inventor of the invention mentioned in the declaration, and not disclaimed,—thirdly, that the supposed invention mentioned, and not disclaimed, was not a new invention,—fourthly, that the plaintiff did not within the time, &c., file a proper description of the invention,—fifthly, that the disclaimer extended the exclusive right, &c.,—sixthly, that the privilege in the declaration mentioned, and not disclaimed, was not for the sole working and making of any manner of manufacture. Issue thereon.

The cause was tried before Erle, C. J., at the sittings at Westminster after Trinity Term, 1860.

The specification contained the following description of the plaintiff’s alleged invention:—

“I employ a roller of metal, wood, or other suitable material, and groove, flute, engrave, mill, or otherwise indent upon it any desired design, and cause it to revolve with a bowl or bowls of paper or other substance, and, by means of gearing well known to mechanics, I give the circumference of the pattern-roller a quicker motion than the circumference of one of the bowls, so as to obtain a frictional action upon the surface of the fabric, as well as pressure, so that, if the fabric is moved transversely when fed to the machine, an infinite number of watering patterns may be given to the fabric at one operation or passage; but, if two operations be given, more antique or other varieties may be obtained, which can be still further varied, as desired, according to the number of times the fabric is allowed to pass through the machine.

“In addition to the variety of the pattern, a bright finish or lustre is given to the fabric by means of the [30] friction or rubbing action of the two surfaces of the roller and the bowl.

"I also obtain the same result by reversing the arrangement, and causing the circumference of the bowl to move quicker than the circumference of the roller, so as to obtain a similar frictional or rubbing action, the gearing being simply required to be adapted for the purpose.

"It is well known that, for calendering purposes, plain or polished rollers have necessarily been driven at a greater speed than the bowl or bowls; but hitherto it has not been considered practicable to give pattern-rollers the same relative movement.

"I claim as my invention, and which to the best of my knowledge and belief has not hitherto been used within the realm, the employment of grooved, fluted, engraved, milled, or otherwise indented rollers of metal, wood, or other suitable material, driven at a greater speed than the bowl or bowls connected with them, so as to exert a rubbing or friction upon the material submitted to their action, and thereby produce an infinite variety of pattern, as well as a bright finish or lustre, and also reversing the operation by giving the bowls a quicker motion than the pattern-roller."

On the 28th of January 1860, the plaintiff filed a disclaimer, in which he said,—"I disclaim the latter portion of the words of the title, 'and in the machinery or apparatus employed therein,' so that the title shall henceforth be in these words,—'Improvements in embossing and finishing woven fabrics.' And I disclaim the use of any pattern-rollers in performing my invention, except those which are made of metal or other suitable material, and have circular grooves, flutes, or indentations made around their surfaces. I disclaim the use of any other de-[31]scription of design upon the surface of such rollers, except such circular grooves, flutes, or indentations as aforesaid. And I also disclaim the production of watering patterns upon a fabric at one operation or passage of it between a pattern roller and a bowl, against which it works, except when the grooves, flutes, or indentations around the surface of such roller are as numerous as the warp-threads in the fabric to be operated upon, or nearly so. And I disclaim all parts of the description of my said invention contained in my said specification which are not contained in the said description as hereby altered, and I hereby alter such description, and that the same shall henceforth describe the undisclaimed parts of the said invention, in these words, &c.

"I employ a roller of hard metal or other suitable material, and make grooves, flutes, or indentations around it, and cause it to revolve with a bowl or bowls of paper or other suitable substance, and by means of gearing well known to mechanics I give the circumference of the pattern roller a quicker motion than the circumference of one of the bowls, so as to obtain a frictional action upon the surface of the fabric, as well as pressure. If the grooves, flutes, or indentations around the roller are as numerous as the warp-threads in the fabric to be operated upon, or nearly so, or if the fabric has already passed through between the roller and the bowl, and the fabric has slight transverse motions given to it when fed into the machine, an indefinite number of watering patterns may be given to the fabric at one operation or passage. If further operations be given varying the extent of the transverse motions, more antique or other varieties may be obtained, which can be further varied, as desired, according to the number of times the fabric is allowed to pass through the machine. In addition to [32] the variety of patterns, a bright finish or lustre is given to the fabric by means of the friction or rubbing action of the surface of the roller. I may also obtain the same result by reversing the arrangement, and causing the circumference of the bowl to move quicker than the circumference of the roller, so as to obtain a similar frictional or rubbing action by rubbing the surface of the fabric against the roller, the gearing being simply required to be adapted for the purpose. It is well known that, for calendering purposes, plain or polished rollers have necessarily been driven at a greater speed than the bowl or bowls; but hitherto it has not been considered practicable to give pattern-rollers the same relative movement, so as to obtain any beneficial result.

"Having thus fully described my invention and the mode of carrying the same into effect, I claim as my invention the employment of grooved, fluted, or indented rollers of hard metal or other suitable material, driven at a greater speed than the bowl or bowls connected with them, so as to exert a rubbing or friction upon the fabric submitted to their action, and thereby produce an indefinite variety of pattern, as well as a bright finish or lustre, and also reversing the operation, by giving the bowl a quicker motion than the pattern-roller."

The evidence in chief of the plaintiff was in substance as follows:—I am an

engraver and calico-printer. Before my patent, there was a known process called callendering effected by a pair of rollers, or a roller and a bowl, the cloth passing between the two. The roller and bowl moved at different surface speeds, for glazing purposes only; that is to say, when there was a gloss to be produced on the surface of the cloth, there was a different surface speed: the surface of the roller produced a sort of frictional effect upon [33] the surface of the cloth. There were other processes for finishing cloth for embossing, such as produced watering appearances. For embossing, a roller and a bowl were used, and the roller was engraved. The bowls were made of paper, made very hard by pressure. The roller turned the bowl without any gearing. The surface speed of both was the same. For calendering, to produce a glossy surface, there was gearing: the relative motions of the roller and the bowl could be varied by alterations in the gearing, by altering the relative sizes of the wheels and the numbers of their teeth. I had been employed as an engraver in engraving rollers for calico-printers and embossers: and it happened to me once that, after sending a person an engraved roller, complaint was made about the effect of it in embossing, that I had set it too sharp, and that it cut the cloth. I altered it, and made the flutings or projecting surface shallower. After I had made this alteration and sent it back, the purchaser of the roller came to me again, and also sent it back, stating that it had lost its lustre: the projecting lines were too flat upon the surface. In embossing in this way, the cloths are generally calendered before they are embossed. To have a high gloss, this must be done. I altered the roller, and put some cloth in it. In going through the regular calendering process, I made a slip, and very nearly cut my hand. When I took the bit out, it had a particular effect." [He then described as the result of subsequent experiments, that he found he could produce watering patterns, as well as the effect of embossing, by one and the same operation: and he proceeded.]—"In performing my invention, if a slight lateral motion is given to the cloth as it goes into the machine, that produces the watering effect: a larger extent of motion produces the moire antique: the [34] chief difference is the size of the pattern: there is an endless variety. In working with the roller and the bowl according to my invention, I give the roller a greater surface speed: that enables me to produce the glossiness upon the surface of the cloth, and at the same time to produce the pattern. Some time after I had produced my specification, I found that there were some descriptions of patterns upon rollers that could not be used in this way: and I put in a disclaimer. There were some descriptions of wooden rollers that would not do, and therefore I confined my claim to metal only. In performing my invention with my roller, I have in the pattern-roller made circular indentations. Round longitudinal indentations will not do."

On cross-examination, the plaintiff said: "My first model had circular grooves, complete circles round the cylinder in endless lines; each circle complete in itself: separate rings, not spiral. For the purposes of my patent, I did not use anything but circular grooves or ringed grooves for embossing: for the purpose of my patent, I had not used any but circular grooves up to the time of my specification: they were circular grooves, or separate rings, with differences in the width of the grooves. I made them by milling or by engraving. There is no new machinery used in giving this difference of surface velocity, to what was known before. Circular grooves were used for embossing: there is nothing new in circular grooves themselves. I do not know that I had observed that they were used in varying ratios to the number of warps in the material. The first that I used was much the same sort of thing as had been used before, in proportion to the number of grooves. The giving a slight lateral motion to produce a slight lateral effect, was a thing that had been done and was well known [35] before, in creeling cloths: that gave what is called the watered surface. The moire antique was never done before upon cotton, but upon silks. Some descriptions of rollers mentioned in my specification would not succeed in the material. The patent included wood. I disclaimed it, and confined it to metal. I do not know that anybody informed me that I should limit my invention to rollers with circular grooves, and that other patterns would not do. I discovered that myself. No material besides metal will beneficially answer the purpose of the roller, for what I call my invention. Other things besides paper will do for the bowls. Wood will: leather would: so would glass; but not every material."

In re-examination, the plaintiff said he had never before known calendering and embossing produced by a single operation; that he had known transverse motions

given in passing two pieces together through the rollers in this way: that he had known it done in this way when the metal roller went at the same velocity as the bowl: but he had never known it applied when the velocity was different.

At the close of the case, the counsel for the defendant objected,—first, that the alleged invention was a mere application of old processes, and not the subject of a patent,—secondly, that the specification did not describe any invention, and that the process described was impracticable—thirdly, that, at the date of the specification, the plaintiff had not invented what he now claimed as his invention,—fourthly, that the disclaimer was void, because it departed from the specification, and also because it stated that the rollers might “be made of metal or other suitable material,” without giving any criterion of suitability,—fifthly, that the claim as it then stood was as extensive as in the original specification, and was too large, and there-[36] fore bad,—sixthly, that the specification, as altered, did not state whether the production of watering patterns was claimed,—seventhly, that the disclaimer confined the claim to the use of rollers with *rings*, and, as the defendant had used *spirals* only, he had not infringed the plaintiff's patent.

A verdict was found for the plaintiff, subject to leave reserved to the defendant to move.

A rule nisi was accordingly obtained, and in Michaelmas Term, 1860, made absolute to enter a verdict for the defendant: see 9 C. B. (N. S.) 117.

Upon appeal to the Exchequer Chamber, the judgment of the court of Common Pleas was varied so far as to enter the verdict for the plaintiff on not guilty, but affirmed as to the rest: see 11 C. B. (N. S.) 471.

The plaintiff then brought error to the House of Lords, where the case was argued by Hindmarch, Q. C. (with whom was Bovill, Q. C.), for the plaintiff and by Grove, Q. C. (with whom was Aston), for the defendant.

The course of argument was substantially the same as in the courts below,—the following authorities being referred to:—

For the plaintiff: *Booth v. Kennard*, 1 Hurlst. & N. 527; *Steiner v. Heubl*, 2 Car. & K. 1022, 6 Exch. 607; *Seed v. Higgins*, 8 House of Lords Cases, 550; *Hills v. The London Gas Light Company*, 5 Hurlst. & N. 312; *Betts v. Menzies*, 10 House of Lords Cases, 117.

For the defendant: *Turner v. Winter*, 1 T. R. 602, 1 Webster's P. C. 77; *Stevens, v. Keating*, 2 Webster's P. C. 172, 2 Phill. 333; *Crane v. Price*, 4 M. & G. 580, 5 Scott, N. R. 338, 1 Webster's P. C. 407; *The Patent Bottle Envelope Company v. Seymour* 5 C. B. (N. S.) 164; *Horton v. Malon*, 12 C. B. (N. S.) 437; *Brook v. Astor*, 8 Ellis & B. 478; and *Hills v. The London Gas Light Company*, 5 Hurlst. & N. 312, and *Betts* [37] *v. Menzies*, 10 House of Lords Cases, 117, were distinguished.

LORD WESTBURY, C. My Lords. —The questions which are raised by this appeal are subjects of some nicety, and it is therefore right that the grounds of your Lordships' judgment should be very distinctly stated. I will call your attention first to the issues raised on the record in the action below.

The first plea, of not guilty, raised the question of infringement of the plaintiff's patent. The second plea alleged that the plaintiff was not the true and first inventor of the supposed invention. The third issue was that the invention in the declaration mentioned, and not disclaimed (that would be the invention as it stands in the amended specification) was not at the time of the making of the letters-patent a new invention. Those issues have all been found in favour of the plaintiff, and the findings are not sought to be disturbed by the defendant. The fourth issue amounts, when stated in a few words, to an allegation that the invention of the plaintiff has not been sufficiently and adequately described in the amended specification, that is, in the specification as it stands after the application of the disclaimer to the original specification. The fifth issue raises the question whether the disclaimer was warranted by the statute. That undoubtedly is, if not the most material, certainly one of the most material questions before the House. The sixth issue was that the invention or the privilege secured by the letters patent was not “any manner of new manufacture,” within the meaning of those words contained in the Statute of James (21 Jac. 1, c. 3), as they have been subsequently construed by decisions.

Your Lordships, therefore, have to try three questions,—the sufficiency of the description contained in [38] the amended specification,—the legality of the disclaimer,—and the fact whether the alleged invention is a new manufacture, within the statute.

Now, undoubtedly, the last issue is one which, if found in favour of the defendant, would almost supersede the necessity of considering the others: but, as there are independent issues upon these pleas, it will be requisite to consider all the three.

Before I come to these three questions, it is necessary, in order to render intelligible what I shall have to submit to your Lordships, that I should describe in as few words as I can the state of knowledge upon this subject antecedently to the plaintiff's patent, and what the plaintiff's patent appears to be, as it is found in the amended or corrected specification.

Antecedently to the plaintiff's patent, machines constructed of a roller revolving on a bowl were perfectly well known, as applied to the purpose of calendering, that is, to the purpose of giving a brilliant finish or gloss to the surface of any linen or cotton fabric, or fabrics composed partly of silk and partly of cotton. It was also found that the brilliant finish or gloss was greatly increased if gearing was applied to the machines so constructed, and the gearing was arranged in such a manner as to produce a differential velocity in the revolution of the roller and the revolution of the bowl; and that, if one bowl was made to revolve on the same roller at a greater amount of velocity, the effect was that a more perfect finish or more brilliant gloss was given to the face of the fabric. There was also known and used antecedently to the plaintiff's patent another machine which was similarly constructed, of an engraved roller and a bowl, and which was used for the purpose of impressing figures, patterns, or devices upon the surface of fabrics of the description I have mentioned. It also appears that [39] attempts had been made to unite the two, that is, to use the machine for the purpose of impressing or engraving the pattern on the fabric, with a differential velocity, so as at once to effect the operation of giving a brilliant gloss and also to impress upon the fabric the proposed pattern or engraved surface that might be desired. But it had been found antecedently to the plaintiff's invention that, if any figure or device was engraved upon the rollers for the purpose of impressing the device upon the fabric, and they were made to revolve with the differential velocity which I have mentioned, the edges of the engraving would tear the fabric, and the effect would be the destruction of the cloth that was submitted to that process. It is, however, most important to observe that the idea of producing a gloss by the differential velocity of the roller upon the bowl, and also the idea of using the same apparatus for the purpose of impressing a pattern or device on the fabric, were perfectly well known at the time of the plaintiff's patent.

Now, what the plaintiff appears to have done is this:—He discovered or found out that, although rollers with a device or engraving upon them longitudinally, or around the circumference, would have the effect of tearing the fabric of the cloth, yet, if the engraving of the roller was limited to this, viz. making around the roller an infinite series of circular grooves of small diameter, it would have the effect of producing a particular pattern upon the cloth, and at the same time it might be worked with a differential velocity, so as to effect the two operations of giving a gloss to the cloth, and at the same time impressing upon it a pattern, viz. that pattern which would be produced by a small number of grooves or flutes, and that this might be done without injuring the fabric.

What, therefore, the plaintiff has done, has been, to [40] take a particular pattern out of the infinite number of patterns that might be engraved upon the roller, and to use that particular pattern alone for the purpose of impressing the fabric of the cloth with that pattern, and also at the same time giving it a brilliant gloss or finish. And to that he has added what was also a well-known process, viz. that, if in the operation the cloth is fed into the machine in a particular way, viz. by a transverse motion, that appearance will be produced upon the cloth which is commonly denominated "watered," and which we see in watered silk,—a wavy character produced upon the surface of the cloth, which adds very much to its appearance and its value.

Before we can judge of the truth of the allegation that this is not a new manufacture, we must advert particularly to the original specification and to the plaintiff's disclaimer; because the question whether it is a new manufacture or not within the statute, must be determined upon the amended specification, that is, upon the specification reduced by the disclaimer.

It is quite clear that the original specification was utterly bad and void in law. It was expressed in such a way that the indentations, grooves, or flutings that were to be made upon the roller might be made, consistently with the language of the

original specification, longitudinally, and not merely in a circular form around the roller. And it is quite clear upon the evidence that any longitudinal grooves or longitudinal patterns would not have the effect desired, but would be destructive of the fabric. Therefore, upon the face of the original specification, there was in reality no invention that could be maintained. And, upon examining the plaintiff's own evidence, which is clearly admissible upon all the questions before your Lordships, it is plain that the original specific[41]-cation contained no sufficient and correct description of any useful or valuable invention. The plaintiff appears to have been perfectly aware of that : and, accordingly, by his disclaimer, he has altered in a most material form the original specification.

The first point to which I would direct attention is this :—The original specification says that upon the roller which is directed to be employed, you may “groove, flute, engrave, mill, or otherwise indent upon it any desired design.” Now, those words are so many verbs : groove “is one : “flute” is another : “engrave” is another : “mill” is another : and “indent” is another : and the accusative case, the substantive which is governed by all those verbs, is “any desired design.” According to the original specification, therefore, you might upon the roller,—not around the roller, but upon it,—in any form, spirally, or longitudinally, or in a circle, groove, or flute, or engrave, or mill, or otherwise indent any design that you desired. Now, it is clear, upon the plaintiff's own testimony, that, if you do so, you would produce a machine that would operate a destructive instead of a beneficial result.

In the amended specification, the plaintiff has struck out the material word “upon,” and, instead of that, he has put the distinctive word “around” the roller ; and he has altered the language so as to convert this general direction contained in the original specification into a specific direction to make grooves, flutes, or indentations around the roller. And, instead of the words being made to comprehend “any desired design,” these words are entirely struck out : and the only direction now consists of a direction to make circular grooves around the roller.

It is quite obvious upon that, that the limits of the authority or licence given to a patentee by the statute [42] with respect to disclaimers, are here very much transgressed. The object of the act authorizing disclaimers (5 & 6 W. 4, c. 83) was plainly this, that when you have in your specification a sufficient and good description of a useful invention, but that description is imperilled or hazarded by something being annexed to it which is capable of being severed, leaving the original description in its integrity, good and sufficient without the necessity of addition, then you might by the operation of a disclaimer lop off the vicious matter, and leave the original invention, as described in the specification, untainted and uninjured by that vicious excess. But it never was intended that you should convert a bad specification, in the sense of its containing no description of any useful invention at all, into a good specification, by adding words that would convert what has been properly called in the court below “a barren and unprofitable generality,” into a specific and definite and practicable description. It is quite clear that, if that could be done, you would have an opportunity of introducing into a bad patent which contained no useful invention whatever, some discovery that might be developed by further experiment, and which was altogether unknown at the time of the original specification, and not at all included in the description contained in it.

But a further observation occurs upon this, that not only was it never intended by the statute that a patentee should take advantage of it for the purpose of converting a bad description into a good description, in this sense, or that, when the original description was wholly bad, and contained no new invention, it should be converted into a description containing a good invention. But the statute never contemplated that a patentee should have the power, under the form of a disclaimer, of making material additions to the [43] original specification, so as by the aid of the corrected form of words and the additions so made to introduce into the specification an accurate and perfect description of an invention which you seek for in vain in the original specification.

But that is exactly what this patentee has done : for, after converting his general and impracticable description into a specific and definite direction, he goes on in the latter part of his specification to introduce this most extraordinary and most important addition :—He says,—“If the grooves, flutes, or indentations around the roller are as numerous as the warp-threads in the fabric to be operated upon, or nearly so ; or,

if the fabric has already passed through between the roller and the bowl, and the fabric has slight transverse motion given to it when fed into the machine, an indefinite number of watering patterns may be given to the fabric at one operation or passage." And then he goes on to describe the way in which the peculiar watering effect which is called in the trade by the name of "moire antique" may be produced. It would be impossible, therefore, for any one to say,—“I find in the original description that which is now brought out and accurately expressed in the amended specification.” Unless that can be done, the limits given by the statute have, I submit to your Lordships, been clearly transgressed.

If that be so, your Lordships, I think, will have no difficulty whatever in concurring with the court below in the conclusion that this is an extravagant use of the power of disclaimer, and much beyond the licence or authority given by the statute. I believe it will be found that that licence or authority consists only in the power of rejecting. It may sometimes happen that, when something is cut out, some few slight alterations may be required to render intelligible that which re-[44]-mains, and to that extent there would be authority by the statute to make a slight addition; but certainly there is no authority to alter a barren generality into a specific practical description, or to convert that which upon the description is not applicable to any one definite form, into a description applicable to a specific and definite mode of proceeding.

Adverting again to what I began with calling your Lordships' attention to, the question is, whether this description contained in the amended specification is or is not a description of anything which comes within the words “new manufacture,” as contained in the statute of James. It is necessary for that purpose to call your Lordships' attention to the fact that, not only did the disclaimer do what I have already described to your Lordships, but it went further, and became the original title of this patent: that title had been,—“Improvements in embossing and finishing woven fabrics, and in the machinery or apparatus employed therein.” The patentee has deliberately by the disclaimer struck out the last words, and has therefore deliberately reduced his patent to a patent for “Improvements in embossing and finishing woven fabrics.” And the question is whether, so regarded, taking in your hand (with the knowledge that existed at the time) this description contained in the specification, as corrected by the disclaimer, does it amount to a new manufacture?

I should have thought that the patentee might have maintained a patent for a new combination, if he had put his invention upon this ground, that he was the first person who discovered that the circular grooved roller would answer by one process the double purpose of calendaring and imprinting the fabric; and that he was the first person who had constructed a machine that was capable, without injury to the fabric, of [45] effecting together both those operations. If, therefore, the original title had remained, and had not been studiously disclaimed, I myself should have thought it very difficult to resist the conclusion that the patent was capable of being supported as a new manufacture, under this view, that it really did describe for the first time a new combination of machinery. Your Lordships are well aware that, by the large interpretation given to the word “manufacture,” it not only comprehends productions, but it also comprehends the means of producing them. There, in addition to the thing produced, it will comprehend a new machine or a new combination of machinery: it will comprehend a new process, or an improvement of an old process. But, if we look at this patent, and inquire whether there is an improvement in embossing or finishing woven fabrics contained in this amended specification, I am bound to say that, having regard to existing knowledge at the time, I think there is no such improvement as amounts to a new manufacture, because this mode of producing a brilliant gloss upon the surface was perfectly well known. Therefore, that woven fabrics might be finished according to one or the other of those two processes was perfectly well known. I cannot, therefore, having regard to the reduced specification which the patentee has now made to constitute the description of his invention, say that there is in it any new process entitling it to the denomination of a “new manufacture.” This is a matter, no doubt, of much delicacy: and it is a matter upon which unfortunately we are without any aid from the judgment of the court below; for I do not find that, either in the court of Common Pleas, or in the court of Exchequer Chamber, any one of the judges gave any opinion upon this point. The general verdict which was entered for the plaintiff upon the trial, has been [46] converted upon this particular issue into a verdict for the defendant. I cannot say

that my mind is free from doubt upon the subject : but, having regard, as I have already observed, to the operation of the disclaimer, and being of opinion that the specification as amended is a description, not of a machine, not of a new combination of machinery, but of a new process, I think there is nothing entitled to the character of a "new manufacture" to be found in that specification.

My Lords, for the reasons I have already given, I concur entirely with the court below in holding that the disclaimer very much exceeds the limits of the authority given by the statute : and upon that point, therefore, I think the appellant (the plaintiff below) has entirely failed, and that it would be a very mischievous use of the power of disclaimer given by the statute, if your Lordships were to allow of its being used in the manner desired by this patentee, which would in truth confound all inventions, and you would be unable to ascertain whether the thing introduced by the amendment was or was not known to the patentee at the time when he made the original specification.

There remains the fourth issue, viz. the question of the sufficiency of the description. Upon that point it was contended strongly on the part of the defendant, that the description contained in the amended specification was insufficient ; and he insisted very much upon this, that the direction to make indentation or grooves around the roller was given in such a manner that it would include spiral grooves as well as circular grooves : and that, if you admit that it would include spiral grooves, it follows that there is no limit to the spirality,—if I may adopt such a word : that therefore it would be possible to extend the groove until it became almost like a longitudinal indentation : [47] and that, in that shape, undoubtedly it must by the evidence be admitted to be not a valuable invention.

I think the answer to that argument is the language of the plaintiff's disclaimer. The disclaimer expressly repudiates any description of groove but a circular groove. That disclaimer is by the statute made part of the specification : and therefore I read the amended specification as containing a direction to cut round the roller circular grooves only, and not as including spiral grooves. It appears, in fact, that the grooves used by the defendant are spiral grooves : but that in truth the spirals are so minute, so numerous, and so closely approximating to circular grooves, that, according to the evidence, the difference is not discernible by the eye ; and accordingly it has been held that they did substantially amount to an infringement of the plaintiff's patent.

The learned counsel for the defendant then insisted that the language of the claim was wider than the direction, and that the claim would include spiral grooves, even if they were not included in the description. I cannot accept that mode of interpreting the specification. If there be a distinct direction given in an earlier part of the specification, to cut circular grooves only, and then if there be in a subsequent part of the specification a general reference to grooved rollers, I think your Lordships must take that to mean rollers grooved in the manner already specified, and that it would be unfair and unreasonable to take those words as indicating more than what has been expressly directed.

There were some objections raised to the specification, and particularly with regard to the uncertainty of the material, the language of the amended specification being that the plaintiff took "a roller of hard metal or other suitable material." I do not think [48] those words "or other suitable material" contain anything like such a generality of direction as would be fatal to the patent : "other suitable material," no doubt, would mean any material equally sufficient for the purpose with hard metal. I think your Lordships would be of opinion that there was no solid weight in that objection.

I believe these were the principal objections that were urged by the counsel for the defendant to the sufficiency of the description.

I think those objections were without weight ; and I must therefore advise your Lordships to concur with me that the court below was wrong in directing a verdict to be entered for the defendant upon the fourth plea, on the ground of the description being uncertain and insufficient : and I think your Lordships will be of opinion that, if there is no other objection to the amended specification, it is not properly open to be set aside upon the ground of uncertainty.

These observations comprehend, I think, the whole of the subject upon which the House has to determine. I should advise your Lordships, therefore, to reverse the decision of the court below so far as relates to the fourth issue, but to affirm the

judgment of the court below so far as relates to the illegality, that is to say, the unauthorised character of the disclaimer; and also to affirm the conclusion of the court below so far as it affirms the proposition that the alleged invention described in the amended specification is not, having regard to the disclaimer, a "new manufacture" within the meaning of those words contained in the Statute of James.

The result will be, that the appellant (the plaintiff below) will succeed so far as relates to the fourth issue, but will fail with regard to the other issues, viz. the fifth and the sixth.

[49] LORD CRANWORTH. My Lords,—By far the most material question in this case is as to the issue which is raised on the sixth plea. Now, as to that, I confess I entertain no doubt whatever of the correctness of the Lord Chancellor's opinion, viz. that the amended specification does not disclose anything that can, under the most liberal interpretation of the words, be deemed a "new manufacture." The evidence shews (indeed, there was no question or controversy upon that subject) that, long before this patent, the use of rollers was perfectly well known for the two objects of calendering and impressing patterns. For the purpose of calendering, the roller and the bowl (which is but another species of roller) were made always to revolve at unequal velocities; the result of which was to give the glaze or polished surface which we see in calendered cottons. The mode in which the pattern was impressed was by a roller and a bowl, the same as in the calendering process, except that it was necessary in that case that the roller and the bowl should revolve at *equal* velocities, because, otherwise (as was clearly explained), if there was a pattern that went at all across the roller, it would tear the cloth: and therefore it became impossible to use the roller with the bowl for that purpose, if they were revolving at *unequal* velocities. However, the use of the roller and the bowl for calendering, and of the roller and the bowl for impressing the patterns, was perfectly well known; and the use of the roller and the bowl going at equal velocities and at unequal velocities was also perfectly well known; and manufacturers were right in supposing that, ordinarily speaking, you cannot cause the roller and the bowl to revolve at unequal velocities so as to impress the pattern, because it would cause destruction to the fabric. But, what this patentee discovered (and I think it was a very useful [50] discovery) was, that there was one particular sort of pattern which might be impressed upon the roller, and made to revolve,—the fabric being passed between the roller and the bowl,—at an *unequal* velocity, without tearing. But I quite agree with what was said by Mr. Grove, and it could not possibly be disputed by any gentleman at the Bar, that it is not every useful discovery that can be made the subject of a patent, but you must shew that the discovery can be brought within a fair extension of the words a "new manufacture." Now, how is this possibly to be called a "new manufacture?" I, as a manufacturer, have my roller, which I am in the habit of rolling upon a bowl (if that is the proper expression); the fabric passing between the two moving at equal velocities. Then, I can impress my pattern upon it. I have my roller without any pattern engraved upon it: I can cause that and the bowl to revolve at unequal velocities, and it will calender. But I do not do them both,—that is the calendering process and the embossing,—at the same time, because I suppose that in so doing I shall tear my fabric; and I rightly so suppose, until the plaintiff makes the discovery that there is one particular sort of pattern which may be produced without tearing the fabric. Now, that is a very useful discovery: but it would be strange to say that it is a "new manufacture," and that therefore I am to be deprived of the most useful way of employing my roller. There is nothing new in the invention that, by a particular use of it, I shall obtain a result which I did not before know that I could obtain.

The Lord Chancellor has pointed out that, in the original specification, there was a claim for the machinery or apparatus employed. No doubt, the plaintiff thought that perhaps he could sustain such a claim: but he very properly, I think, disclaimed it; not that I think that, if he had retained it, it would [51] have made any difference, because, although improved machinery for this purpose would be a legitimate subject of a patent, the evidence would have failed him there, for there is no evidence to shew that there was any new machinery. Therefore I think it is perfectly clear that on the sixth plea, which is the most important of all the pleas, the verdict was very properly entered by the court below for the defendant.

So again, with regard to the fifth plea, I think the verdict was rightly entered

for the defendant. With regard to the fifth plea, I shall not go over again the ground which the Lord Chancellor has gone over. It is quite clear that the object of a disclaimer cannot be to create any new right not included in the original specification. It cannot be (as it is called) to extend the specification. What the plaintiff here has done is this:—He has filed a specification which I may say is in this sort of algebraical form,—“My specification consists of A., B., C., D., and all the letters of the alphabet, and any combination of all the letters of the alphabet.” But it turns out that nothing will really meet his case but the combination of F. and Z. together. Now, no doubt, when he had said,—“I claim a combination of all the letters of the alphabet,” a combination of F. and Z. would be included: but it would be trifling with the knowledge of mankind to say that that sort of specification would communicate anything. It is true that, by trying and puzzling over all possible combinations, you might have found out the particular combination upon which alone the plaintiff could have relied: but that is not what the words would properly mean, and not what any authority warrants you in taking as their proper meaning. The distinction was very clearly pointed out in the case of *Sack v. Higgins*, before this House, — 8 House of Lords Cases, 550,—that you may disclaim something which leaves un-[52]—touched a description which is in itself perfect: but that, where you have an imperfect description, you cannot say because it is (according to the language of one of the cases) a mere impracticable generality, “I exclude everything except one single case, which, though involved in it, could not by any reasonable investigation have been discovered by an ordinary person.” I think, therefore, with the Lord Chancellor that, upon the fifth plea also, the judgment of the court below was perfectly right.

“My Lords, I wish to make one observation with regard to a remark which fell from the Lord Chancellor. His Lordship said that he did not think that this part of the case, upon the sixth plea, had been adverted to in the court below. I think that is a mistake. I observe at the end of the judgment of Lord Chief Justice Erle, he says,—“We also observe that a patent for the exclusive right to one particular use of a known machine might be objected to, although the patentee may have discovered how to use the machine more beneficially than the owner knew.” I think it is apparent that Chief Justice Erle was there adverting to the sixth plea.

With regard to the fourth plea, I am not at all prepared to differ from the Lord Chancellor, though I confess I have had my doubts whether the court below was not right upon that also, viz. upon the question of what had been termed (we have manufactured a word for the occasion) “spirality.” At the same time, I think, by fair interpretation, we may take it that the new indentations which were described were intended to be circular: and, in that case, I think the specification, as amended, would be a good specification. Therefore, I concur with the Lord Chancellor in thinking that, upon that plea, we ought to reverse the judgment below, and direct a verdict to be entered for the plaintiff.

[53] LORD CHELMSFORD. My Lords,—I agree with my two noble and learned friends that the verdict ought to be entered for the plaintiff upon the fourth plea, and for the defendant upon the fifth and sixth pleas.

With respect to the fourth plea, which raises the question of the sufficiency of the specification as it stands after the disclaimer, I agree entirely with my noble and learned friend on the Woolsack, and concur in the reasons which he has given for his opinion in this respect, to which I have nothing to add.

The question raised by the fifth plea is, whether the disclaimer extended the exclusive right granted to the plaintiff by the letters-patent. It seems clear that the word “extend,” in the 5 & 6 W. 4, c. 83, cannot be used only in its ordinary sense of “adding to” or “enlarging,” because the exact meaning of the term “disclaimer” to which it is applied is, the renunciation of some previous claim actually or apparently made, or supposed to be made. It must therefore be intended to comprehend a case where the disclaimer would give the patentee a right which he could not have enjoyed under the specification as originally framed. Here, the specification was conceived in general terms, embracing an indefinite variety of modes of indenting upon all descriptions of rollers any desired design. The plaintiff afterwards discovered that no other rollers but those which had circular grooves, flutings, or indentations around their surfaces would answer: and he therefore by his disclaimer limited his invention to this description of roller only. Now, as these were not specifically described in the original specification, but were merely involved in the general terms which were

used, the plaintiff had not complied with the condition of the letters-patent, in particularly describing and ascertaining the nature of his invention. When, therefore, by his disclaimer, he confines his [54] claim to circular grooved rollers as his sole invention, though in one sense he may be said to narrow a right, yet he really extends it, because he thereby describes his alleged invention sufficiently to enable him now to assert a right under the patent which he never could have successfully maintained upon the original specification alone. Upon this short ground, and looking merely to the specification and the disclaimer, without referring to the evidence, I have come to the conclusion that the defendant is entitled to have the verdict entered for him on the fifth plea.

The sixth plea raises the question whether the plaintiff's supposed invention, or rather his discovery, is the proper subject of a patent. The claim made in the specification, as amended by the disclaimer, is for the invention of a process by which, by means of rollers and bowls, the rollers having grooves, flutes, or indentations around them, and revolving with greater velocity than the bowls, the embossing of patterns on fabrics and adding a finish or lustre to them may be effected by one single operation. Before the patent, an engraved roller and a bowl had been used, with equal surface speed, for embossing. For the process of calendering, two rollers, or a roller and a bowl, had been employed, having different surface speeds; and circular grooves for embossing had also been in use. There was, therefore, nothing new in the process of embossing with pattern-rollers, and nothing new in giving a differential speed to the roller and the bowl for the purpose of producing a gloss or finish, nor in the employment of circular grooves. But the plaintiff conceived the idea that the same machine, by means of gearing communicating motion from the roller to the bowl, could be made to produce any kind of pattern, and give a finish to certain fabrics, by one and the same operation. After he had taken out his [55] patent, he found that his general notion was erroneous, and that only one description of rollers, viz. those with circular grooves, could be successfully employed, and he therefore by a disclaimer limited his claim to this single application of the machine. What invention was there in all this? The plaintiff does not claim to have invented any new combination of machinery, although by part of the title of his patent, which he afterwards disclaimed, he appears originally to have considered that he was an inventor in this sense: nor has he introduced to the world any new process: but the utmost that he can lay claim to is, that he has discovered that by giving a differential motion to different parts of an old machine, a power existing in it might be developed and brought into action. It appears to me that such a discovery is not the subject of a patent, and that therefore the defendant is entitled to a verdict upon the sixth plea also.

The result will be that the decision of the court below upon the fourth issue is reversed, and a verdict entered thereon for the plaintiff; and that the decision of the court below on the fifth and sixth issues is affirmed.

Judgment accordingly.

[56] IN THE HOUSE OF LORDS.

THE MERSEY DOCKS AND HARBOUR BOARD v. CAMERON AND OTHERS. JONES
v. THE MERSEY DOCKS AND HARBOUR BOARD. June 22nd, 1865.

[S. C. 11 H. L. C. 443; 11 E. R. 1405.]

1. The only ground of exemption from poor-rate under the 43 Eliz. c. 2, is that which is furnished by the rule that the Crown is not bound by that statute: and, consequently, where valuable property capable of yielding a net rent above what is required for its maintenance in a state to command such rent is sought to be exempted on the ground that it is occupied by bare trustees for public purposes, the public purposes must be such as are required and created by the government of the country, and are therefore to be deemed part of the use and service of the Crown. 2. The Mersey Docks and Harbour Board, who occupy extensive docks and warehouses at Liverpool and Birkenhead under a variety of acts of parliament which enable them to impose rates and tolls on vessels using the docks, the revenues derived from which are to be applied by them *exclusively* in the erection, maintenance, and repair of the docks and works, and the discharge of the bond-debts and interest

charged upon them by the several acts of parliament, are not within the exemption. —3. The cases which have held that trustees occupying for charitable or public purposes (whether local or general) are not rateable in respect of such occupation, though the occupation is not as servants of the Crown, are not law.

The former of these was an action of replevin brought against the defendants for taking and detaining certain goods and chattels of the plaintiffs. The following case was stated for the opinion of the court of Common Pleas, pursuant to the Common Law Procedure Act, 1852:—

All the acts of parliament relating to the Liverpool and Birkenhead Docks and the Birkenhead Dock Company were to be referred to as part of the case. Those relating to the Liverpool Docks are twenty-two in number, and form a series extending from the 8th of Queen Anne to the 21st year of the reign of Her present Majesty, both inclusive. Those relating to the Birkenhead Docks and Birkenhead Dock Company respectively are thirteen in number, commencing with the 7 & 8 Vict. c. lxix., and ending with the 18 & 19 Vict. c. clxxi.

By rates made for the relief of the poor of the township of Birkenhead and for various other purposes, the Mersey Docks and Harbour Board (hereinafter called the plaintiffs) were in May, 1858, assessed in the sum of 167l. 10s. in respect of the annual value of the dock estates within the said township vested in them, according to the following schedule:—

[57] Description of property rated.	Name or situation of property.	Rate at 6d. in the pound.		
		£	s.	d.
Offices	Canning Street	1	3	0
Offices and store-room and land, workshops, mortar-mill, and steam-engine and machinery	Dock quay	4	12	6
Inclosed and uninclosed land occupied by pipes, drying-kiln, and cranes	Poolside	7	10	0
13 warehouses, timber-shed, and land connected therewith, and one shed	Poolside	46	2	6
Egerton and Morpeth Docks, part of great float, graving-dock, gridiron and cranes, and buildings on South Reserve	Poolside	108	2	0
		£167	10	0

The plaintiffs were in November, 1858, further assessed in the sum of 235l. 2s. in respect of the annual value of the dock estates within the said township vested in them, according to the following schedule:—

Description of property rated.	Name or situation of property.	Rate at 6d. in the pound.		
		£	s.	d.
Offices	Canning Street	1	10	8
Offices, store-room, steam-engine, mortar-mills, workshops, land	West of Egerton Dock	7	13	4
Steam-engine, mortar-mills, yard, lime-kiln, and land	On the South Reserve	6	3	4
Stable	Neptune Street		6	0
Inclosed land occupied by stone, &c., and uninclosed land and drying-kiln	Poolside	4	19	4
14 warehouses, wharf, cranes, one shed	Poolside	49	6	8
Timber-sheds, land, and steam-engine	Poolside	21	0	0
Egerton and Morpeth Docks, graving-dock, gridiron, sheds, and cranes on dock quay, land on ditto called the South Reserve, within the township	Poolside	144	2	8
		£235	2	0

The township of Birkenhead, in the county of Chester, was placed under the
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management of public commissioners, since incorporated under the title of "The Birkenhead Improvement Commissioners," by an act of parliament of 3 & 4 W. 4, c. lxviii.

In the year 1844, an act (7 & 8 Vict. c. lxxix.) was [58] passed, intituled "An act for constructing tidal-basins, a dock, and other works at Birkenhead, in the county of Chester, and for other purposes:" and it was thereby enacted that the commissioners constituted under the act of the 3 & 4 W. 4, c. lxviii., should be commissioners for carrying that act into execution, and should be called "The commissioners of the Birkenhead Docks," and should have authority to construct tidal-basins, a dock, and other works, and to purchase lands for those purposes, and to borrow on the credit of the rates and tolls by that act granted, and of any property vested in the said commissioners by virtue of that act, a sum not exceeding 400,000l. ; and as a security the commissioners might assign over the said rates, tolls, and property, or any part thereof, to any person advancing or lending the same money, by way of mortgage, in the manner and form therein directed and provided, and subject and according to the provisions and true intent and meaning of the act in that behalf. The material clauses of the last-mentioned act with reference to the liability of the commissioners to be rated to the poor-rate in respect of the premises in their possession under the act, are set out in the case of *The Birkenhead Dock Trustees v. The Birkenhead Commissioners*, 2 Ellis & B. 148, which case is hereafter referred to.

By an act of the 8 & 9 Vict. c. iv., intituled "An act for the construction of a dock, wharf walls, and other works by the Birkenhead Dock Commissioners, at Birkenhead, in the county of Chester," additional powers were given to the said dock commissioners, enabling them to make a floating-dock and other works, and to borrow a further sum of money, not exceeding 600,000l., on mortgage as aforesaid.

By an act 10 & 11 Vict. c. cclxiv., intituled "An act to authorize the Birkenhead Dock Commissioners to [59] construct an additional dock and other works at Birkenhead, in the county of Chester, and for other purposes," and by the 10 & 11 Vict. c. cclxv., intituled "An act to alter and amend the acts relating to the Birkenhead Commissioners' Docks, and to make further provision with respect to the construction of sea or wharf walls along the Wallasey Pool, and for other purposes," additional powers were conferred upon the said commissioners.

By another act, the 11 & 12 Vict. c. cxliv., intituled "An act to alter and amend the several acts relating to the Birkenhead Commissioners' Docks, and to transfer the several powers of the said commissioners to a corporate body, to be entitled 'The Trustees of the Birkenhead Docks,' and for other purposes," the several rights, duties, powers, authorities, privileges, and immunities conferred upon the said dock commissioners by the former acts, for carrying into execution the several purposes and provisions of the said former acts and that act, were vested in certain persons thereby incorporated by the name of "The Trustees of the Birkenhead Docks."

By an act of 8 & 9 Vict. c. lx., a company called "The Birkenhead Dock Company" was incorporated, with a capital of 1,000,000l., divided into shares, and with powers to make and maintain docks, warehouses, and other works at Birkenhead; and by the following acts, viz. 11 Vict. c. ix., intituled "An act to enable the Birkenhead Dock Company to sell or lease their land," and 16 & 17 Vict. c. clxxvii., intituled "An act to amend the acts relating to the Birkenhead Docks Company, and to enable the company to make a railway for their works, and for other purposes," and of which the short title is "The Birkenhead Dock Company's Act, 1853," the powers of that company were in various ways amended and enlarged.

By articles of agreement dated the 16th of May, [60] 1855, and made between the trustees of the Birkenhead Docks, the Birkenhead Dock Company, and the corporation of Liverpool, it was agreed that all the property, as therein described, of the trustees of the Birkenhead Docks, and of the Birkenhead Dock Company, should, subject to any liabilities affecting the same, be purchased by and transferred to and vested in the corporation of Liverpool: and by the act of 18 & 19 Vict. c. clxxi., shortly called "The Birkenhead Docks Act, 1855," that agreement was confirmed; and it was enacted by ss. 7, 8, 9, and 10, as follows:—

Sect. 7. "Subject to the provisions of this act, all the docks, lands, and buildings of or to which the trustees were immediately before the commencement of this act, by virtue of the trustees' acts or of any them, or otherwise howsoever, seised, possessed, or entitled either at law or in equity, and the caisson belonging to those

docks, are by this act transferred to and shall be vested absolutely in the corporation, but nevertheless upon the several trusts and conditions, and to and for the several uses and purposes upon, to, and for which the trustees were theretofore seised or possessed or entitled to the same respectively, and *subject to the several liabilities created by act of parliament*, and also subject and without prejudice to the several leases and agreements for leases specified in the first schedule to the agreement for transfer, so far as such leases and agreements respectively are valid."

Sect. 8. "Subject to the provisions of this act, all the works, land, and buildings, working-plant and materials, office-furniture, and such like effects of the company, and all the estate, right, title, and interest of the company, or held upon trust for the company, in and to all the lands (hereinafter called the Herculaneum lands) which by the act of 11 & 12 Vict. c. xlii., the Herculaneum Dock Company were authorized to [61] sell (being lands to which, as appears by that act, the company are entitled), are by this act transferred to and shall be vested absolutely in the corporation, *subject to the liabilities created by the act of parliament*, save such as the Herculaneum lands can be relieved from under the said act of 11 & 12 Vict. c. xlii., and subject to the covenants referred to in the 2nd section of that act, and to the several leases and agreements for leases specified in the second schedule to the agreement for transfer, so far as such leases and agreements respectively are valid."

Sect. 9. "Provided always that the transfer and vesting of the property of the trustees and of the company respectively shall not take effect until the delivery by the corporation to the trustees and the company respectively of the bonds of the corporation to be as by this act provided delivered to them respectively."

Sect. 10. "Notwithstanding such transfer and vesting, and except only as is by this act otherwise provided, all purchases, sales, conveyances, leases, mortgages, bonds, contracts, agreements, securities, and other acts and things before the commencement of this act made, done, entered into, executed, or instituted under or by virtue of the recited acts or any of them, or with reference to the purposes thereof respectively, shall be as good, valid, and effectual to all intents and purposes whatsoever; for, against, and with reference to the trustees and the company respectively as if the said act were not passed, and may be proceeded in and enforced accordingly."

The said bonds were shortly afterwards delivered accordingly, and the said property became vested in the corporation of Liverpool.

By s. 16 of the same act it was further enacted as follows:—"From and after the commencement of this act, the docks, lands, buildings, and caisson of the [62] company by this act respectively transferred to and vested in the corporation, shall be one undertaking; and all the powers, privileges, and authorities of the corporation under this act shall accordingly extend and apply to that one undertaking, and to the corporation and all other persons respectively with respect to the same."

Sect. 17 recited and enacted as follows:—"And whereas, by the Liverpool Dock Act, 1851, provision is made for the election, nomination, and appointment of twenty-four persons to be a committee, called 'The committee for the affairs of the estate of the trustees of the Liverpool Docks,' which committee, when assembled, or any seven or more of them, shall have, use, and exercise exclusively all and every the powers and authorities in relation to the execution and carrying into effect the several purposes of that act and the several acts therein recited (which acts relate to the Liverpool Docks) given to or vested in the trustees of the Liverpool Docks or the committee by that act and the acts therein recited, or any of them, or which by any act thereafter to be passed may be given to or be vested in the trustees of the Liverpool Docks or the committee: And whereas it is expedient that the undertaking of the corporation under this act so far as now completed and adapted for the accommodation of shipping, and so from time to time as and when further portions thereof shall be so completed and adapted, should be managed by the said committee for the affairs of the estate of the trustees of the Liverpool Docks: Be it therefore enacted that so much and such parts of the undertaking by this act vested in the corporation as are now completed, or as may be hereafter completed, shall, as and when the same are adapted to the accommodation of shipping, be managed by the said committee, who shall have and ex-[63]ercise all such rights, powers, and authorities in relation thereto as if the same undertaking was vested in the trustees of the Liverpool Docks under or by virtue of any of the acts relating to those trustees, and the acts formed a part of their estate."

Sect. 18. "The said committee shall keep separate accounts of their annual receipts

arising out of the undertaking of the corporation under this act, and of their annual expenditure in relation thereto, which accounts shall be open to inspection at all reasonable times by the council of the borough of Liverpool, or any committee thereof, or by any person or persons appointed by them to inspect the same; and such accounts shall be annually audited in like manner as the accounts of the trustees of the Liverpool Docks; and the annual surplus (if any) of the receipts arising out of the said undertaking, over and above the expenditure connected therewith, shall be paid over by the committee to the corporation, and shall be by them applied, as far as the same will extend, in and towards the payment of the interest accruing on the bonds issued by the corporation for the purposes of their undertaking, and for carrying the same into effect, and in relief of the borough-fund, so long as such bonds shall form a charge thereon."

Sect. 22. "From and after the commencement of this act, and until parliament shall otherwise provide, all the powers and provisions of the recited acts respectively with respect to the management of the undertaking by this act vested in the corporation, and with respect to the levying of tolls and dues, and with respect to the appointment and payment of officers for the management and working of the undertaking, and with respect to the making of regulations for the use and preservation of the works of the undertaking, and the protection of property in or upon the same, [64] and with respect to the making of bye-laws, and all the rights and authorities of the trustees and the company respectively incidental to and consequent on such powers and provisions respectively, shall apply to the undertaking of, and shall be exercisable and may be had and enjoyed by, the said committee of the Liverpool Docks, as if the same respectively had originally been conferred on and made applicable to the trustees of the Liverpool Docks and their undertaking respectively: Provided, nevertheless, that all liabilities imposed upon the trustees by the said recited acts respectively with reference to any of the matters aforesaid, shall apply to and be enforceable against the corporation."

Sect. 27. "If at any time hereafter the trustees of the Liverpool Docks shall be authorized by parliament to become the purchasers of the undertaking by this act vested in the corporation, then, upon being re-paid or adequately secured the re-payment of all moneys expended by them in the purchase or completion of the said undertaking, or in relation thereto, or for the payment of which they shall have become liable, and being paid or relieved from all liability, expense, or loss incurred by them for the purpose of the said undertaking or incident thereto, with interest thereon, or on such other terms as may be mutually agreed upon, and approved by parliament, the corporation shall and they are hereby required to transfer the said undertaking as conferred upon the corporation by this act to the said trustees of the Liverpool Docks, together with all their powers, rights, privileges, and authorities in relation to the said undertaking, to the end that the same, and the future control and management thereof, may thereafter be vested in the said trustees of the Liverpool Docks as part of the dock-estate of Liverpool."

[65] By the 20 & 21 Vict. c. clxii., intituled "An act for consolidating the docks at Liverpool and Birkenhead into one estate, and for vesting the control and management of them in one public trust, and for other purposes," and shortly called "The Mersey Docks and Harbour Act, 1857," the plaintiffs were incorporated. That act recites, among other things, "that it is expedient that the constitution of the Liverpool Dock trust should be altered, and that the docks of Liverpool and Birkenhead, and the powers in relation thereto of the trustees of the Liverpool Docks and of the corporation, and the north reserve near Birkenhead, and the observatory and landing-stage belonging to the said corporation, and the control over pilotage, harbour-lights, and other matters conducing to the safety or convenience of the shipping frequenting the port of Liverpool, should, subject to the provisions of the said Mersey Conservancy Act and of this act, be vested in a new trust; and that the rights now lawfully exercised by the trustees of the Liverpool Docks and by the corporation, of levying rates and dues on shipping frequenting the port of Liverpool, or on goods carried in such shipping, should be transferred to the new trust, upon such terms and for such consideration as are hereinafter mentioned, and that the proceeds of such rates and dues should be applied to the benefit of the port of Liverpool and of the shipping and trade of the said port."

By sections 26, 30, 49, 50, 51, 56, 59, and 61 of the same act, it is enacted as follows:—

Section 26. "All such estate and interest in the docks, buildings, and other property, both real and personal, situate at Birkenhead or elsewhere, as are transferred or intended to be transferred to the corporation of Liverpool by the Birkenhead Docks Act, 1855, shall, upon and after the 1st day of January, [66] 1858, vest in the board, but subject to all charges and liabilities affecting the same."

Section 30. "All powers, rights, and privileges vested in or exercisable by the corporation of Liverpool, the Liverpool Dock Trustees, the Liverpool Dock Committee, or any of such authorities, under or in pursuance of or for the purpose of any of the acts mentioned in the schedule hereto, and not inconsistent with this act, shall, from and after the 1st day of January, 1858, be vested in and exercisable by the board."

Section 49. "Subject to the provisions of this act, the board shall stand possessed of all the property, powers, rights, and privileges hereby transferred to them, upon the trusts and for the purposes upon and for which such property, powers, rights, and privileges were held previously to the commencement of this act."

Section 50. "From and after the 1st day of January, 1858, all docks and works belonging to the board, and all docks and works that may hereafter belong to the board, shall be deemed to constitute one estate only, hereinafter called 'The Mersey Dock Estate;' and a uniform system of management shall be adopted with respect to the whole of such Mersey Dock Estate."

Section 51. "The board shall immediately after the commencement of this act proceed with the construction of the outer works at Birkenhead, referred to in 'The Birkenhead Docks Act, 1853,' with a view to the completion of the same substantially in accordance with the plans that have been sanctioned by parliament."

Section 56. "The following rules shall be observed by the board with respect to the moneys received by them under this act, that is to say,—

"(1) The conservancy expenditure shall be defrayed out of the conservancy receipts:

[67] "(2) The pilotage expenditure shall be defrayed out of the pilotage receipts:

"(3) No portion of the conservancy receipts or pilotage receipts shall be applied in aid of the general expenditure:

"(4) Save as by this act is provided, no moneys receivable by the board shall be applied to any purpose unless the same conduces to the safety or convenience of ships frequenting the port of Liverpool, or facilitates the shipping or unshipping of goods, or is concerned in discharging a debt contracted for the above purposes."

Section 59. "The board shall render to parliament as soon as may be after the 24th day of June in every year an account of its receipts during the preceding year ending the 24th of June, and the manner in which the same have been applied."

Section 61. "From and after the 1st day of January, 1858, all such provisions contained in the acts specified in the first schedule hereto, or in any other act, as are inconsistent with this act, are hereby repealed."

The constitution and management of the Liverpool dock trust, and the application of its revenues, will appear from the case of *The King v. The Inhabitants of Liverpool*, 7 B. & C. 61, 9 D. & R. 780, from the 8th year of Queen Anne to the date of that case, being shortly prior to the passing of the next mentioned act. That report, so far as the case stated for the opinion of the court was concerned, was to be referred to as part of this case.

Under the acts of 6 G. 4, c. clxxxvii., and the 14 & 15 Vict. c. lxxiv. (being two of the acts comprised in the said series), such constitution was altered by the appointment in manner directed by those acts of the said committee, called "The committee for the affairs of the estate of the trustees of the Liverpool Docks;" [68] and all the powers and authorities of the said trustees of the Liverpool Docks were vested in such committee: and such constitution, so altered as last mentioned, continued until all the powers both of the said committee and trustees were transferred to the plaintiffs by the act of 20 & 21 Vict., as hereinbefore mentioned.

By sections in the Liverpool Dock acts passed after the 8 Anne hereinbefore mentioned, all the acts in the said series, including the 8 Anne, c. 12, are directed to be read and construed as one act.

After the passing of the 20 & 21 Vict. c. clxii., the plaintiffs proceeded with the construction of the docks at Birkenhead; and they are still incomplete

The plaintiffs manage the whole dock estates now vested in them as one estate, by

their servants and agents, who receive and account for to them the dues and other moneys arising from the management of the said estates; and no part of the estate and premises comprised in the above schedules is let off to other persons, nor are any rents paid to the plaintiffs for any part thereof.

The present bond debt of the plaintiffs chargeable on the rates and duties levied under the acts is, and at the respective times of the making the said assessments was, upwards of 7,000,000*l.* sterling.

The present dock-rates and dues were before and at the time of the making of the said assessments, and still are, applied to public purposes only, and according to the directions of the 20 & 21 Vict. c. clxii. (the Mersey Docks and Harbour Act, 1857), and the other acts of earlier date herein and therein referred to; and no member of the board derives any private advantage or emolument whatsoever from the execution of the trusts of the dock-estates.

All the docks, sheds, tramways, railroads, offices, [69] tenements, and other things mentioned in the above schedules, were made, erected, and provided respectively under and in pursuance of the said several acts of parliament, or some of them (except the said act of 1857), and they consist partly of premises which before the passing of the 18 & 19 Vict. c. clxxi. were the property of and in the possession of the said Birkenhead Dock trustees, and partly of premises which before the passing of the same act were the property of and in the possession of the said Birkenhead Dock Company; and the whole of the said premises were used at the times of the said assessments solely for the purposes of the dock business, and are not used for any other purpose whatever; and the plaintiffs individually derive no personal benefit from the use or occupation of any part thereof; and all revenue of every kind derived by them from any part of the property is carried to the credit of the general dock-estate, and is appropriated and applied as all the other dock-dues and proceeds derived from the rest of its property are in accordance with the provisions of the various acts of parliament.

On the 28th of April, 1851, the trustees of the Birkenhead Docks were assessed to a rate made for the relief of the poor of the township of Birkenhead, in respect of the annual value of their estates within the township of Birkenhead, as follows:—

	Estimated value.	Rateable value.	Rate at 6 <i>l.</i> in the pound.		
			£	s.	d.
Lionel Goldsmid, William Bayley, jun., and others, trustees of the Birkenhead Docks.					
Offices, workshops, and premises	£550	£500	12	10	0

The trustees gave notice of appeal against the rate, upon the ground that their said estates were not rateable to the relief of the poor. A special case was stated by consent, and by order of a judge, under the [70] 12 & 13 Vict. 45, for the opinion of the court of Queen's Bench. The case was argued on the 3rd of June, 1852, when the court gave judgment that the said estates of the Birkenhead Dock trustees were rateable to the poor rate. Judgment in accordance with the decision of the court of Queen's Bench was afterwards, on the 18th of October, 1852, entered by the court of quarter sessions.

The questions for the opinion of the court of Common Pleas were,—whether the said judgments of the said courts of quarter sessions, or either of them, were conclusive; and, if not, whether the plaintiffs were rateable to the relief of the poor in respect of the property enumerated in the above first schedule, or any part of it; and, if they were not, whether the action could be maintained.

If the court should be of opinion that the plaintiffs were rateable, or that the action could not be maintained, then judgment was to be entered for the defendants for such sum as the court should think they were entitled to distrain for, and costs. If the court should be of a contrary opinion, then judgment was to be entered for the plaintiffs, for 3*l.* 3*s.* damages, and costs.

The court of Common Pleas, after time taken to consider, gave judgment for the defendants, on the ground that, whether or not the Mersey Docks and Harbour Board were exempted from liability to be rated to the poor in respect of their occupation of the Birkenhead Docks, by reason of their occupation not being a beneficial one,

the exemption furnished only a ground of appeal to the quarter sessions against the rate, and not ground for an action in respect of a levy made to enforce the rate: see 9 C. B. (N. S.) 812.

The judgment of the Common Pleas was affirmed by the Exchequer Chamber, on error, without argument: [71] and the case was now brought by writ of error to the House of Lords.

JONES AND OTHERS v. THE MERSEY DOCKS AND HARBOUR BOARD.

This was an action of replevin brought by the plaintiffs against the defendants for taking and detaining certain goods and chattels of the plaintiff: and by consent of the parties and under a judge's order pursuant to the Common Law Procedure Act, 1852, the following case was stated for the opinion of the court of Common Pleas:—

By a rate made for the relief of the poor of the parish of Liverpool on the 2nd of June, 1858, the plaintiffs were assessed in the sum of 20,580*l.* 18*s.* 8*d.*, in respect of the annual value of the dock estates within the said parish vested in the said board. The following is a copy of the assessment:—

	£	s.	d.
“Wet-docks and basins, cranes, sheds, and wharfs connected therewith, within the parish, viz. Wellington, Bramley, Moore, Nelson, Stanley, Collingwood, Salisbury, Clarence, Trafalgar, Victoria, Waterloo, Prince's, Canning, Albert, Salthouse, Wapping, King's, and Queen's docks . . .	18,900	0	0
Graving-docks, and graving-blocks, engines, and sheds connected therewith, at the Clarence, Prince's, Canning, King's, and Queen's docks . . .	746	13	4
Transit-sheds and offices, Prince's dock . . .	375	13	4
Tramway, railroad, and sidings, and high level railway along the side of the docks within the parish . . .	233	6	8
Dock-offices, comprising general offices, treasurer's offices, solicitor's offices, secretary's offices, marine surveyor's offices, board-room, and store-room . . .	116	13	4
Depot for wrecked goods, Waterloo dock . . .	52	10	0
Depot for wrecked goods, Prince's dock . . .	32	13	4
[72] Transit-shed, west side of Nelson dock . . .	23	6	8
Transit-shed, west side of Nelson dock . . .	23	6	8
Transit-shed, west side of Nelson dock . . .	23	6	8
Transit-shed, west side of dock entrance to Waterloo dock . . .	20	8	4
Weighing-machine, George's dock passage . . .	14	0	0
Weighing-machine, Prince's dock . . .	11	13	4
Telegraph-office, Tower Buildings . . .	7	7	0”

The plaintiffs did not appeal against the said rate.

The distress in question was levied in consequence of the non-payment of the rate. The plaintiffs entered into the usual replevin-bond, and brought this action.

The dock estates within the parish of Liverpool became vested originally in the mayor, aldermen, bailiffs, and common council of the borough of Liverpool, as trustees of the docks and harbour of Liverpool, by virtue of several acts of parliament. Part of those estates was granted voluntarily by that corporation, part was sold by that body to the trustees for a pecuniary consideration, and other parts were purchased by the trustees from private individuals, according to the powers given to them by the said before-mentioned and other acts, being twenty-two in number, and forming a series extending from the first year of Queen Anne to the 21st year of Her present Majesty, both inclusive: all of which were to be referred to as part of the case.

Before the construction of many of the present works, part of the land was shore, both above and below high-water mark: but the greater part consisted of land and buildings in the occupation of individuals rated to the relief of the poor of the said parish. The dock-estates at present consist of docks, basins, piers, jetties, graving-docks, gridirons, wharfs, quays, sheds, offices, buildings, landing-stages, slips, [73] stairs, river-walls, dams, embankments, locks, gates, bridges, sluices, tunnels, cuts, channels, roads, railways, tramroads, cranes, engines, machinery, and other matters

and conveniences requisite to form complete docks: and the trustees are authorized to receive large sums of money under the name of dock-rates and duties for the accommodation of vessels in the said docks, by virtue of the said acts of parliament.

Under and by virtue of the 6 G. 4, c. clxxxvii., and the 14 & 15 Vict. c. lxiv. (being two of the acts comprised in the said series), a committee was appointed in the manner directed by these acts, called "The committee for the affairs of the estate of the trustees of the Liverpool Docks;" and all the powers and authorities of the said trustees of the Liverpool Docks were vested in such committee.

By statute 20 & 21 Vict. c. clxii. (which was also to be referred to as part of the case), intituled "An act for consolidating the docks at Liverpool and Birkenhead into one estate, and for vesting the control and management of them in one public trust, and for other purposes," s. 26, all the docks, lands, buildings, and other property, real and personal, situate at Liverpool, that were held by or in trust for the trustees of the Liverpool Docks became vested in the plaintiffs, under the style of "The Mersey Docks and Harbour Board," but subject to all charges and liabilities affecting the same.

By s. 49 of the last-mentioned act, it is enacted, "that, subject to the provisions of this act, the board shall stand possessed of all the property, powers, rights, and privileges hereby transferred to them, upon the trusts and for the purposes upon and for which such property, powers, rights, and privileges were holden previously to the commencement of this act."

The 56th section enacts as follows:—"The follow-[74]-ing rules shall be observed by the board with respect to the moneys received by them under this act, that is to say,—1. The conservancy expenditure shall be defrayed out of the conservancy receipts,—2. The pilotage expenses shall be defrayed out of the pilotage receipts,—3. No portion of the conservancy receipts or pilotage receipts shall be applied in aid of the general expenditure,—4. No sums shall be payable in respect of docks by any vessel that does not use the same,—5. Save as by this act is provided, no moneys receivable by the board shall be applied to any purpose, unless the same conduces to the safety or convenience of ships frequenting the port of Liverpool, or facilitates the shipping or unshipping of goods, or is concerned in discharging a debt contracted for the above purposes."

The 59th section is as follows:—"The board shall render to parliament as soon as may be after the 24th of June in every year an account of its receipts during the preceding year ending the 24th of June, and the manner in which the same have been applied."

The board manages the dock-estates by its servants and agents, who receive and account for to the board the dues and other moneys arising from the management of the said estates; and no part of the estates and premises comprised in the above assessment or schedule is let off to other persons, nor are any rents paid to the board for any part thereof.

With regard to the application of the moneys received as dock-duties, the statute 8 Anne, c. 12, s. 9, under which the first dock was built, enacts as follows:—"That all and every such sum and sums of money that shall be raised and received by the duties aforesaid, and recovered for any the forfeitures in this act appointed, other than so much thereof as shall be laid out and allowed to the collector or other necessary [75] officer for the collecting and managing the said duty for charges of recovering the same, shall by the said mayor, aldermen, bailiffs, and common council for the time being be applied and disposed of to the building and repairing the said new dock or basin and other works, and for the securing, preserving, amending, and maintaining the said dock or basin and harbour of Liverpool, and to no other use or purpose whatsoever."

By sections in subsequent acts, all the acts in the series, including this of 8 Anne, are directed to be read and construed as one act.

All the dock-rates payable by the former acts of parliament were repealed by the 51 G. 3, c. cxliii., one of the above-mentioned series, by which new rates were substituted.

The 27th section of the statute is as follows:—"That all the moneys which shall be collected, received, levied, borrowed, and raised by and under this act, shall be applied in paying and defraying the charges and expenses attending the obtaining and passing this present act, and to the paying the expenses and charges attending the levying and collecting the said rates and duties; and, after the paying and appro-

priating one third part of the said moneys to and for the purpose of making and completing the southernmost portion of the said north docks as hereinafter is mentioned, then to the paying off and discharging the present bond-debt of 114,705l. 19s. 4d., and the debt of 67,406l. 18s. 7d. owing by the said trustees to the corporation of Liverpool for the purchase of land and strand intended for the site of the southernmost of the said two northern docks, and any future bond-debt, and the interest on the same, and to the paying and discharging the interest and all other moneys which may be hereafter borrowed and taken up at interest under the provisions of this act [76] upon the credit of the said dock-rates and duties as aforesaid, and to the carrying into execution the purposes of this act and the recited acts, in the making, erecting, building, furnishing, and maintaining such docks, basins, piers, and other works and buildings in the port of Liverpool under the said acts and this act, and to the paying, defraying, and satisfying all other charges and expenses already incurred or hereafter to be incurred in the carrying into execution or under or in consequence of any of the said former acts or this present act: and the residue or surplus of all moneys arising from such rates or duties which shall remain after such application thereof as aforesaid shall from time to time be applied in or towards the re-payment of the principal moneys which shall have been borrowed under this act, until such principal moneys shall be re-paid, and all assignments of or mortgages upon the rates and duties are paid off, satisfied, discharged, and redeemed: and, when by the means last aforesaid all the principal moneys which shall have been borrowed shall be repaid and all assignments and mortgages upon the said rates are satisfied and redeemed, then and in such case it shall be lawful for the said trustees, and they are hereby required, to lower and reduce the said rates and duties hereby granted and made payable as far as the same can be done in the then state of the docks, basins, buildings, and other works and buildings of the said port, and leaving sufficient for all charges of management and collection of rates and other concerns of the said docks, basins, piers, works, and other buildings, and improving, repairing, and maintaining the same, and for the carrying into execution the provisions of the said former acts and this act."

By the 6 G. 4, c. clxxxvii., another of the said series, power is given by the 105th section to the said trustees to levy certain fresh rates; and by the 106th section [77] to lower all rates, and to raise the same again: and by the 130th section it is enacted "that all the moneys which shall be collected, levied, borrowed, and raised under this act or the said recited act, shall be applied in any order with respect to priority of such application as to the said trustees shall seem expedient and proper (except as by this act provided as to the time of payment of assignments of the said rates and duties granted by virtue of the said recited acts), in paying and defraying the charges and expenses of obtaining this act, and in paying the expenses and charges of collecting the rates and duties, and all interest due and to grow due from time to time on moneys borrowed or taken up at interest by the several trustees, and any principal moneys that may be called in from time to time, and in the general management and conducting of the said trust-estate, in the construction of the works by this and the said former acts authorized to be erected, established, and maintained, in supporting, maintaining, and repairing the same and every part thereof, and in carrying into execution all the provisions of the several recited acts, and this act, and in paying off and discharging the whole or any part of the present bond or other debt, and any future bond or other debt, and all interest due and to grow due thereon, and also in the defraying, paying, and satisfying all the charges and expenses already incurred or hereafter to be incurred in carrying into execution the several purposes of, or under or in consequence of any of the clauses, provisions, powers, or authorities contained in the said former acts or this act."

By the 4 & 5 Vict. c. xxx. another of the said series, power is given to the said trustees to erect transit-sheds, to make a wet-dock, to construct other works, and to raise a further sum of money, and to levy certain additional rates: and by the 124th section it is [78] enacted "that all the moneys which shall be collected, levied, borrowed, or raised under or by virtue of the said recited acts and this act, shall be applied, in any order with respect to priority of such application as to the said trustees shall seem expedient, in and towards the completion of the several docks, transit-sheds, warehouses, and other works by the said recited acts and this act authorised to be made, formed, erected, and built, and for and towards the several objects and purposes in the said recited acts and this act mentioned, in the general management and conduct-

ing the said trust-estates, and carrying into execution all the provisions of the said several recited acts and this act, and for the general improvement and reparation of the docks, basins, and works of the said trustees."

By 7 & 8 Vict. c. lxxx. another of the said series, power is given to the trustees to construct additional docks, and raise further sums of money: and by the 127th section it is enacted that "all the moneys which shall be collected, levied, borrowed, or raised under or by virtue of the said recited acts and this act, shall be applied,—first, in and towards the payment of all expenses of and attending the passing of this act, and then in and towards the completion of the several docks and other works by the said recited acts and this act authorized to be made and constructed, and, for and towards the several objects and purposes of the said recited acts and this act mentioned, and in the general management and conducting of the said trust-estate, and carrying into execution the provisions of the said recited acts and this act, and for the general improvement and reparation of the said several docks and other works of the said trustees."

By the 9 & 10 Vict. c. cix., another of the said series, power is given to the said trustees to construct additional wet-docks and other works, and to raise a further [79] sum of money: and by the 47th section it is enacted that "all the moneys which shall be collected, levied, borrowed, or raised under and by virtue of the said recited acts and this act, shall be applied, first in and towards the payment of all expenses of and attending the passing of this act, and then in and towards the completion of the several docks and other works by the said recited acts and this act authorized to be made and constructed, and for and towards the several objects and purposes in the said recited acts and this act mentioned, and in the general management and conducting of the said trust-estate, and carrying into execution the provisions of the said recited acts and this act, and for the general improvement and reparation of the several docks and other works of the trustees."

By the 11 Vict. c. 10, another of the said series, power is given to the said trustees to construct additional docks and other works: and by the 40th section it is enacted "that all money which shall be collected, levied, borrowed, or raised under and by virtue of this and the said recited acts, shall be applied in and towards the payment of all expenses of and attending the passing of this act, and in and towards the construction and completion of the several docks, warehouses, and other works by the said recited acts and this act authorized to be made and constructed, and for and towards the several objects and purposes in the recited acts and this act mentioned, and in the general management and conducting of the said trust-estate, and carrying into execution the provisions of the said recited acts and this act, and for the general improvement of the several docks and other works of the said trustees."

The board are bound to apply the present dock-rates and dues, and all other moneys received by them out of the dock-estate, according to the directions of the [80] several acts of parliament; and no member of the board derives any private advantage or emolument whatsoever from the execution of the trusts of the dock-estates.

All the docks, sheds, tramways, railroads, offices, and other things mentioned in the above assessment, were erected and provided under and in pursuance of the said several acts of parliament, or some of them, solely for the purposes of the dock business, and are not used for any other purpose whatsoever; and all revenue of any kind derived by the board from any part of the property is carried to the general dock-estate, and is appropriated and applied in manner shewn by the accounts (for the year 1858) which accompanied and were to form part of the case.

By the 4 & 5 Vict. c. xxx. s. 52, the trustees were impowered to build warehouses on the quays of one of the docks; and by the 11 Vict. c. xxx., s. 3, such power to build warehouses was extended to all the dock quays: and by s. 71 of the first-mentioned, and by s. 4 of the secondly-mentioned act, such warehouses were expressly made subject to all parochial and other rates. None of the warehouses built in pursuance of the said acts are included in the above assessment.

The question for the opinion of the court of Common Pleas was,—whether the Mersey Docks and Harbour Board was rateable to the relief of the poor in respect of the property enumerated in the above schedule, or any part of it.

If the court should be of opinion in the affirmative, then judgment was to be entered for the defendants for such sum as the court should think they were entitled to distrain for, and costs. If the court should be of a contrary opinion, then judgment was to be entered for the plaintiffs, for their costs of suit.

The court of Common Pleas in this case gave judgment for the defendants, holding that the Mersey Docks and Harbour Board were rateable in respect of the Birkenhead Docks; see 8 C. B. (N. S.) 114.

The judgment of the Common Pleas was affirmed by the Exchequer Chamber, on error, on the 13th of May, 1861 (*a*): and the case was now brought by writ of error to the House of Lords.

(*a*) The case was argued before Crompton, J., Hill, J., Bramwell, B., Channell, B., Blackburn, J., and Wilde, J. The judgment was as follows:

CROMPTON, J. If it had been necessary to decide this case on an examination of the case of *The King v. The Inhabitants of Liverpool*, 7 B. & C. 61, 9 D. & R. 780, which was decided in 1825, and all the numerous decisions which have since taken place on subjects of this kind, I for one should have wished to have heard further discussion, and to have heard fully what could be said on both sides about the matter: but, confining myself to this particular property, I think that we have enough before us to decide the case.

It seems to me that it is a most important principle that, where there has been a decision acquiesced in for a long period, and where the legislature has passed acts of parliament and made provisions upon such a subject, and especially where parties have been led to act upon the faith of those provisions made by the legislature, that is a very strong argument indeed, and one hardly to be met, in favour of adhering to a previous decision upon which we may take the legislature to have acted. That is much more strongly the case where, as in this case, there may be a serious argument either on the one side or the other, as to whether the original case may not have been right. For my own part, I have always been inclined to carry that case very far indeed: but there are a great many cases which, in the present state of one's notions, we should think were wrongly decided in former ages, to which we have adhered because everybody has acted upon them, because the legislature has constantly interfered, and because parties have acted on the faith of such legislative interference. It does appear to me that this is entirely a case of that kind. I quite agree with the view which was taken by Lord Chief Justice Tindal in the case which has been referred to of *Cross v. South*, 2 Q. B. 885, 2 Gale & D. 812: and, indeed, it was very much in my mind in one of the cases cited, viz. *The Town Commissioners v. The Overseers of Chirkton*, 1 Ellis & Ellis, 516, where there had been a legislative enactment upon the subject, which I think very much increases the difficulty of dealing with any subject-matter. Now, here, we do not profess to deal with any other property except that which is now immediately before us: we must deal with that.

It is said that the Birkenhead case is coming before us. We must deal with that as we best may. Confining ourselves to the present case, we have a decision in 1825. We may begin before that, and say that, from the time when these docks first came into existence in Queen Anne's time, although they were the property of the corporation of Liverpool in another capacity, and although the property of the corporation itself was rateable, yet the property in these docks, although belonging to the corporation as trustees of the Liverpool Docks, was never attempted to be rated. We learn from the documents before us, that there was such an attempt in 1808: but the attempt failed. Then, in 1825, the case is directly as to the particular property before the court of King's Bench: and at the same time the case of *The King v. The Trustees of the River Wye Navigation*, 7 B. & C. 70, n., 9 D. & R. 788, was before them: and they gave a decision on this property, and held it not to be rateable.

Since that time different acts have been passed: and we are told, and I believe correctly, that at that time the money advanced upon these docks was about 700,000*l.*, or something of that kind. We and now that many millions have been advanced on it. Then we find that, after that decision, which certainly has never been directly contravened, there may have been cases where the distinction taken is very nice: but there is no case in which the judges, in deciding a case apparently in contravention of it, have expressly said that they disagreed with *The King v. The Inhabitants of Liverpool*: on the contrary, they have laboured always to find some distinction to found a decision upon in the matter before the court.

In that state of things we find these acts of parliament passed. The first is the act of 4 Vict. c. xxx.: and there the legislature are giving this dock company power to erect warehouses and to construct new docks, and, as my Brother Hill reminds me,

[82] The cases were argued in the House of Lords during the last Session, by Sir Fitzroy Kelly, Q. C., Quain, and Parker, for the board, and by Bovill, Q. C., Miller, Q. C., and C. Hutton for the overseers,—the following judges being present at the argument, viz. Pollock, C. B., [83] Williams, J., Byles, J., Blackburn, J., Mellor, J., and Pigott, B.

The contention on the part of the board was that the funds intrusted to them for administration being made specifically applicable by the various acts of par-[84]liament referred to in the cases to the maintenance of public works, and the trustees having no power to apply them otherwise than as directed by those acts, the property so vested in them could not be subject to poor-rates.

[85] The following authorities were referred to:—*The King v. St. Luke's Hospital*, 2 Burr. 1053; *The King v. St. Bartholomew*, 4 Burr. 2435; *Lord Amherst v. Lord Sommers*, 2 T. R. 372; *The King v. The Mayor of London*, 4 T. R. 21; *The King v. The Commissioners of Salter's Load Sluice*, 4 T. R. 730; *The King v. Woodward*, 5 T. R. 79; *The King v. The Inhabitants of Liverpool*, 7 B. & C. 61, 9 D. & R. 780; *The King v. The Trustees of the River Weaver Navigation*, 7 B. & C. 70, n, 9 D. & R. 788; *The Governors of the Poor of Bristol v. Wait*, 5 Ad. & E. 1, 6 N. & M. 383; *The Queen v. The Mayor of Liverpool*, 9 Ad. & E. 435, 1 P. & D. 334; *The Queen v. The Guardians of Wallingford Union*, 10 Ad. & E. 259, 2 P. & D. 226; *The Queen v. The Inhabitants of Exminster*, 12 Ad. & E. 2, 4 P. & D. 69; *The [86] Queen v. Shepherd*, 1 Q. B. 170, 4 P. & D. 534; *Crease v. Sawle*, 2 Q. B. 885, 2 Gale & D. 812; *The Queen v. Lady Emily Ponsonby*, 3 Q. B. 14, 1 Gale & D. 713; *The Queen v. Badcock*, 6 Q. B. 787; *The Queen v. St. George's, Southwark*, 10 Q. B. 867; *The Queen v. The Baptist Missionary Society*, 10 Q. B. 884; *The Queen v. Lonquood*, 13 Q. B. 116; *The Queen v. The Harrogate Commissioners*, 15 Q. B. 1012; *The Overseers of Birkenhead v. The Trustees of Birkenhead Docks*, 2 Ellis & B. 148; *The Queen v. The Inhabitants of Manchester*, 3 Ellis & B. 386; *Smith v. The Inhabitants of Birmingham*, 7 Ellis & B. 483; *The Queen v. Stewart*, 8 Ellis & B. 360; *Hodgson v. The Local Board of Carlisle*, 8 Ellis & B. 230; *The Justices of Lancashire v. Stretford*, E. B. & E. 225; *The Queen v. The Inhabitants of Stapleton*, 4 Best & Smith, 629, 33 Law J. (M. C.) 17.

to borrow large sums of money upon the property. Then, in the 71st section, there is this distinct enactment, "that the occupancy by the trustees of all or any of the warehouses to be erected under the provisions of this act, shall be subject to the payment of all parochial and other local rates now levied and hereafter to be levied in the said parish of Liverpool, in like manner as the same are or would be payable in respect of warehouses the occupation of which is beneficial." Nothing could, I think, be more strong to shew that the legislature then were acting upon the avowed notion that the docks themselves were property the occupancy of which is not beneficial. It may be called rather a pregnant of that affirmative proposition, "hereafter to be levied, in like manner as the same are or would be payable in respect of warehouses the occupancy of which is beneficial." That seems to me to imply directly that the occupation of the property of the docks would not be beneficial.

Well, then, when persons come forward upon such an act of parliament to lend their money, I think they may fairly say, "We were induced to suppose that the property on which we relied for our security would not be subject to these rates;" and it would be a very strained construction of such an act of parliament to say that the new docks to be made under this act are to be rated, whereas the warehouses are only rateable under the 71st section. It seems to me that it follows directly, if Mr. Bovill's argument be right, that, although this is necessary for the rating of the warehouses, yet that the docks themselves would be rateable. I cannot but conceive that persons coming in under this act of parliament to lend money might complain very justly that they were misled by the legislature, if any different construction were put upon it.

Then we find in the 9 & 10 Vict. c. cix., s. 34, this proviso in a similar act of parliament, "Provided always that the said warehouses to be built on the Albert Dock quays shall be deemed to have been built for the purposes of rating under the provisions of the said recited act passed in the fourth year of Her present Majesty." There is a similar enactment in the 11 Vict. c. x., s. 4, "that the occupancy by the trustees of all or any of the warehouses to be erected under the provisions of this act, shall be subject to the payment of all parochial and other local rates now levied and hereafter to be levied in the parish of Liverpool, or other the parish, township, or place in which

The following questions of law were put to the judges :—

"1. Are the Mersey Docks and Harbour Board 'occupiers' of the docks vested in them, within the true meaning of the word 'occupier' in the statute of 43rd Elizabeth ?

"2. If they are 'occupiers,' within the statute, are they exempted from liability to be rated for relief of the poor, by the operation or effect of the statute of 4 Vict. c. xxx., 9 & 10 Vict. c. cxix., 11 Vict. c. x., 18 & 19 Vict. c. clxiv., and 21 & 22 Vict. c. xcii., or any of them, or by reason of the purposes for which they occupy the same, or on any other ground appearing in the special case ?

"3. Does the act of 20 & 21 Vict. c. clxii. (the act of 1857) impose upon the board a liability to poor-rate in respect of the docks, estate, and property vested in the board, or any and what part thereof, by virtue of the 26th and 27th sections of the last-mentioned act ?"

[87] The judges having desired time to answer these questions, the further consideration of the cause was postponed : and, on the 7th of July, 1864, there being a difference of opinion amongst them, the learned judges attended and gave their several judgments *seriatim*, as follows :—

BYLES, J. 1. In answer to your Lordships' first question, I am of opinion that the Mersey Docks and Harbour Board are not occupiers, within the true meaning of the statute 43 Eliz. c. 2.

No doubt, they are occupiers in the strict legal sense of that word, that is to say, they are in possession of the land, and are the proper parties to bring an action of trespass. But the sense in which your Lordships use the word "occupiers" is, the sense in which it is used in the earlier leading cases on the subject : and that sense must be borne in mind, in order to understand those cases.

I conceive the occupation, to be an occupation within the statute, must be a beneficial one. The rate is to be raised "*according to the ability of the parish*" and "*by taxation*;" both which expressions import,—first, that the occupation is to produce profit or pecuniary benefit to the occupier himself, or some one whom he represents, —and, secondly, that each assessment is to be in proportion to that benefit. This

such warehouses may be situated, in like manner as the same are or would be payable in respect of warehouses the occupancy of which is beneficial."

Now, through all this course of legislation, on three distinct occasions, in different years, when new docks have been made, and new warehouses have been erected, there is always this provision, "Mind, the warehouses you erect under this act shall be subject to be rated,"—the legislature probably thinking that the valuable ground for warehouses in private hands was taken from the parish, and therefore thinking it not unfair, with regard to those, to make a special provision : but, in my mind, it raises a strong case under that mode of adhering to old cases, which has always been very strong in my mind that, where there has been a decision acquiesced in for a long time, with which the legislature have meddled in the way of legislation, and which they must be assumed to have known, and to have taken as the foundation of what they were acting upon, that it is not right for courts of co-ordinate jurisdiction, or a court of error,—for, I think this maxim applies equally to courts of error, to disturb it. The legislature has interfered, and has taken upon itself to make provision by that act of parliament, and people have acted upon the provision so made. With reference to the former decisions, I think that neither a court of co-ordinate jurisdiction nor a court of error ought to interfere in such a case. If there is any hardship, it must be left to the legislature. And therefore I think that, upon this ground, confining ourselves to the question of this property, we ought to affirm the decision of the court below, and in so doing uphold the decisions of 1825 and 1827,—*The King v. The Inhabitants of Liverpool*, 7 B. & C. 61, 9 D. & R. 780, and *The King v. The Trustees of the River Weaver Navigation*, 7 B. & C. 70, n., 9 D. & R. 788,—as recognized and acted upon by the legislature in the act of parliament to which I have referred.

Channell, B. I also am of opinion that this judgment ought to be affirmed : and I am of that opinion upon the particular grounds which my Brother Crompton has so distinctly explained.

Blackburn, J. I am of the same opinion only upon the ground that these particular acts make a private state of the law as to the Liverpool Dock Estate. What may have to be done in other cases it is not necessary now to inquire into.

The rest of the court concurring, the judgment was affirmed.

construction is fortified by the consideration that the statute, when it was passed, authorized an assessment in respect of personal as well as real property.

Accordingly, such has been the construction of the statute from the earliest times: indeed, it may be said that such was the contemporaneous exposition. The date of the statute is 1601. It was stated at your Lordships' bar that the first edition of Dalton's Justice [88] was published a year or two after that date, and that the author in that edition says that the overseers are to raise the rate by taxing the occupiers, "*proportioning* them to an annual benefit." I have not had access to the earlier editions of this work, but certainly those words are repeated in the 5th edition, published in 1635.

It seems, therefore, plain from the object of the act, from its words, and from the earliest exposition, that the occupier must, in order to be rateable, enjoy a beneficial occupation. It is not essential that this occupation should be for the individual benefit of the occupier himself: it may be for the benefit of another: it may be for the benefit of a plurality of other persons,—of a considerable number of other persons,—or even of a number not certainly defined, but limited by locality or other circumstances. Yet I conceive that, if the property be occupied for the benefit *not* of a number of persons more or less defined, but for the benefit of the *public at large*, then it is not rateable. This conclusion seems to me to be the result of a long series of authorities.

I do not rely on the exemption of the Crown; for, that exemption would take place on the principle that the Crown is not bound by an act of parliament, unless named therein. But even this exemption is merely personal: for, tenants of the Crown occupying for their private benefit are rateable.

Whether occupiers for the service of the general government are exempt on the ground that they represent the Crown, may be doubtful. It should rather seem that they are exempt because they occupy for public purposes. Thus, the Birmingham Post Office was held not rateable; Lord Campbell treating it as clear, but expressing regret, "that property taken for public purposes is not rateable:" *Smith v. The Guar-*[89]*dians of Birmingham*, 7 Ellis & B. 483. Upon the same ground an occupation by the Horse Guards (*Lord Anherst v. Lord Sommers*, 2 T. R. 372) was held not rateable: Mr. Justice Buller and Mr. Justice Ashhurst laying it down as law, not only that the possessions of the Crown were not rateable, but that the possessions of the *public* were not rateable; and that, in the case then before them, the plaintiff was exempt "*because he was like a trustee for the public, deriving no benefit for himself.*"

The exemption is not confined to premises occupied for the purposes of general government: it extends to occupations for the purposes of local government also. Thus, buildings occupied by the local police, "held," say the court, "for public purposes" (*The Justices of Lancashire v. Stretford*, E. B. & E. 230); a shire-hall (*Hodgson v. The Local Board of Health of Carlisle*, 8 Ellis & B. 116); the county-courts (*The Queen v. The Overseers of Manchester*, 3 Ellis & B. 336); a county-gaol (*The Queen v. Shepherd*, 1 Q. B. 170, 4 P. & D. 534); reformatory schools supported by voluntary subscriptions open to several counties, and within the statute 17 & 18 Vict. c. 86 (*Sheppard, App., The Churchwardens of Bradford, Resp.*, 16 C. B. (N. S.) 369),—are all exempt from poor-rates.

The exemption extends to trusts and charities for the benefit of the public at large, though entirely unconnected with government. Public hospitals are exempt. St. Luke's Hospital was held not rateable, on the ground that there was no beneficial occupier,—*Ree v. St. Luke's Hospital*, 2 Burr. 1053: so was St. Bartholomew's Hospital,—*Ree v. St. Bartholomew's the Less*, 4 Burr. 2435. I conceive that the exemption of hospitals and other charities stands on the ground, not that they are charities, but that they are *public* charities, and that there is no beneficial occupier except the [90] public: and so the court of Queen's Bench held, when they decided that Bethlehem Hospital was not rateable,—*The Queen v. St. George's, Southwark*, 10 Q. B. 852, 865: so also they held in a recent case,—*The Queen v. The Inhabitants of Stapleton*, 4 Best & Smith, 629, 33 Law J., M. C. 17: and the court of Common Pleas in *Sheppard, App., The Churchwardens of Bradford, Resp.*, 16 C. B. (N. S.) 369. Both courts in these two cases draw a distinction between private and public charities, holding the first rateable, and the last not. "The premises," say the court of Queen's Bench, in the first case, "are occupied for the purposes of a highly laudable charity, but one of a *strictly private nature.*" The same distinction was taken by the court of Queen's Bench in other cases;

particularly *The Queen v. The Licensed Victuallers' Society*, 1 Best & Smith, 71, 76, and *The Queen v. The Baptist Missionary Society*, 10 Q. B. 884.

On the same ground, of dedication to public purposes, reposes also the exemption of churches and other places of religious worship. Even before the recent statute, churches and chapels were exempt from rates, if no profit to individuals was actually made by letting the pews. — *The King v. Woodward*, 5 T. R. 79; *The King v. Agar*, 14 East, 256. So that it is a mistake to suppose that the exemption of churches and chapels depends merely on the statute 3 & 4 W. 4, c. 30. That statute, which applies to church-rates as well as poor-rates, and probably with an original and especial view to the former, extended the then-existing exemption, by exempting from rates all places dedicated exclusively to public religious worship, even when the pews are let, and profit is thus made of the building.

In *The King v. The Mayor of London*, 4 T. R. 21, where the question arose whether certain trustees of a [91] barge-way and toll-gate should be rated, Mr. Justice Grose says that, "to exempt themselves from the rate, the trustees should have shewn that they were *trustees for the public*." In *The King v. Salt's Load Sluice*, 4 T. R. 730, the property was held not rateable, because all the money collected must be expended for what Lord Kenyon calls the public purposes of the act.

The history of the property now under your Lordships' consideration in many ways confirms the position that property occupied for public purposes is not rateable. From the earliest construction of the Liverpool Docks, in the time of Queen Anne, down to the year 1806, they had never been rated: but, in 1806, an attempt was made to rate them. The sessions quashed the rate: and the court of Queen's Bench (whether by consent or otherwise, does not appear,) confirmed the order of sessions. The attempt, however, was repeated about twenty years after, in 1827; and the case was then fully argued. The statutes were brought before the court; those statutes directing then, as now, that certain burdens should be discharged, and that, after their discharge, the rates should be lowered. The court of Queen's Bench held that there was no beneficial occupation in any person, and confirmed the order of sessions, striking out the assessment: *The King v. The Inhabitants of Liverpool*, 7 B. & C. 61, 9 D. & R. 780.

About the same time *The King v. Weaver Navigation*, 7 B. & C. 70, n., 9 D. & R. 788, was argued, and decided in the same manner. "The surplus tolls of the navigation," said Bayley, J., "remaining over and above the expenses of supporting the navigation, are to be applied to the building and maintaining of bridges and highways. *These are public purposes*: and, as no part of the moneys received can be applied to private purposes, those moneys are not rateable in the hands of the trustees:" 7 B. & C. 73.

[92] These cases were followed by *The Queen v. The Mayor, &c., of Liverpool*, 9 Ad. & E. 435, 1 P. & D. 334, in which the law was again held to be clear, that property dedicated to public purposes was not rateable: and the doctrine was applied to the property of the municipal corporation of Liverpool situate *within* the precincts of the borough of Liverpool, because the general Municipal Corporation Act, 5 & 6 W. 4, c. 76, had directed that all the surplus funds of the borough should be appropriated for the public benefit of the inhabitants and the improvement of the borough. In the next year, the court of Queen's Bench decided, on the same grounds, that the property of a municipal corporation was not rateable, though situate *without* the precincts of the borough: *The Queen v. Exminster*, 12 Ad. & E. 2, 4 P. & D. 69. In both these cases, all the previous decisions were canvassed and confirmed: the foundation of the judgment in both cases being the acknowledged proposition that property dedicated to public purposes is not rateable. The only question was, whether the benefit of the inhabitants of a particular borough, they being but a section of the public, was a public or a private purpose: and in both cases it was held that the property of a municipal corporation was property dedicated to public purposes, and not rateable.

These decisions caused the statute 4 & 5 Vict. c. 48, to be passed, the language of which is not only very strong to shew that the legislature itself considered that property dedicated to public purposes was and is not rateable, but seems to me to create a statutable bar to holding that even property owned and occupied by municipal corporations is rateable in cases beyond the scope of the enacting clause. I forbear to comment minutely on the language of the statute, because of the length to

which the observations would extend; [93] but almost every line is deserving the attentive consideration of your Lordships. Two observations, however, I must be pardoned for making: first, the statute is not a declaratory, but an enacting statute; secondly, so far from reflecting on the correctness of the then recent decisions, it adopts and affirms them in certain cases, at the end of the proviso to the 1st section. The statute there continues the exemption from poor-rate in cases where the area of the borough and the area covered by a single poor-rate are co-extensive, because in such a case there is no reason for interfering with the existing law. To put the case in the clearest light,—suppose, what has actually happened in some boroughs, and may be the case in many, that the value of the corporate property renders a borough-rate unnecessary; and suppose that there is an entire poor-rate for the borough, which is also not an uncommon case (either because the borough includes but a single parish, or because the management of the poor in the borough is consolidated by a local act): in such a case I conceive that the municipal property is still by the express words of the statute, not only exempt, but exempt, not because the statute so enacts, but because it had been exempted by law before the act passed, and the exemption is recognized and continued.

The language, therefore, of the statute 43 Eliz. c. 2, the whole current of the authorities I have cited to your Lordships, and many others with which I refrain from fatiguing your Lordships, as well as the language of the recent statute, 4 & 5 Vict. c. 48, seem to me to shew that land occupied for public purposes is not rateable.

On the other side, great reliance was placed by the appellants on the case of *The Governors of the Bristol Poor v. Wait*, 5 Ad. & E. 1, 6 N. & M. 383. But that case seems to me reconcileable with the position that, [94] where the general public are the occupiers, the property is not rateable; for, in that case, only a section of the public were the occupiers, that is to say, the representatives of the poor of a particular district. Indeed, this distinction between the former cases and the case of *The Governors of the Bristol Poor v. Wait* is drawn by the court of Queen's Bench itself in *The Queen v. The Wallingford Union*, 10 Ad. & E. 259, 269, 2 P. & D. 226. To what extent the property rated is occupied for the public at large, is and always must be a question of degree, where it is extremely difficult to draw the line, and where it is likely there will be conflicting decisions.

The conflict of the case of *The Governors of the Bristol Poor v. Wait*, if any, is with *The Queen v. The Mayor, &c., of Liverpool*, 9 Ad. & E. 435, 1 P. & D. 334, and *The Queen v. The Inhabitants of Exminster*, 12 Ad. & E. 2, 4 P. & D. 69, where borough property was held not rateable. But, even with respect to this apparent conflict, it may be observed that the occupation was in *The Queen v. The Mayor, &c., of Liverpool* for the benefit of all the inhabitants of a district, and in the case of *The Governors of the Bristol Poor v. Wait* it was only for a portion of the inhabitants, that is to say the poor of the district. And, if your Lordships have to choose between these authorities, I have already called your Lordships' attention to the fact that *The Queen v. The Mayor, &c., of Liverpool* and *The Queen v. The Inhabitants of Exminster* are recognized by the legislature as law, and are continued in some cases as the then-existing law up to this moment, by the authority of the statute.

The decision in *The Governors of the Bristol Poor v. Wait* was followed, as to the Taunton Market, in *The Queen v. Badcock*, 6 Q. B. 787; as to the Huddersfield Water-works, in *The Queen v. The Overseers of Long-wood*, [95] 13 Q. B. 116; and as to the Harrogate Water-works, in *The Queen v. The Harrogate Commissioners*, 15 Q. B. 1012. These cases are all subject to the same observation as the case of *The Governors of the Bristol Poor v. Wait*. The question was, whether the occupation was for the public at large, or for the partial benefit of a section of the public: see the observations of the court of Queen's Bench, in *The Queen v. St. George's, Southwark*, 10 Q. B. 867.

The decision in *The Trustees of Birkenhead Docks v. The Overseers of Birkenhead*, 2 Ellis & B. 148, is really no authority on this point, because it proceeded entirely on the ground that there did not then appear to be, as now there is, a statutable obligation to reduce the tolls when their produce should exceed the expenses. It is quite true, however, that the court, or at least the Lord Chief Justice, did indicate a wish to depart from the authorities as to the rateability of property dedicated to public purposes.

That case was followed by *The Tyne Commissioners v. The Overseers of Chirton*, 1 Ellis & Ellis, 516, which was decided by Lord Campbell and Mr. Justice Crompton on the

ground that the parties benefited were only a particular section of the public, viz. those who used the docks. But Mr. Justice Wightman seems to rest his judgment on the ground that it did not appear that there could not be a surplus revenue: and Mr. Justice Hill, though he assents to the conclusion, does not give his reasons, which, for anything that appears, may have been the same as those which influenced Mr. Justice Wightman.

I cannot help thinking that these recent authorities, when the precise point decided in each case, and the ground on which the judgment proceeded, are carefully examined, will be found as authorities not to be at variance with the position that an occupation [96] clearly and entirely for the benefit of the whole public is not rateable. But, whatever weight may be attributable to some of them, or, more properly, to the expressions of some judges, it seems to me very slight compared with the weight which ought to be attributed to the antiquity, number and consistency of the authorities which shew that overseers cannot usurp the authority of parliament in taxing the general public.

Then comes the next inquiry, —Is the property now under consideration occupied for the benefit of the public at large?

Prima facie it should seem that it is so: for, not only have all the Queen's subjects a right to use the docks at their free will and pleasure, paying their fair contribution to the expenses and nothing more, but all persons whatsoever, from what quarter of the globe soever they may come.

It is objected, first, that the use of the docks is not for all the public, but only for a section of the public, that is to say, for as many of them as have invested their capital in ships or barges or boats. It might also be said that a navigable river cannot be a public highway, because it is only for those who have invested their capital in ships or barges or boats; or that a public turnpike-road, or indeed any public highway, is not a public carriage-way or bridle-way, because, when used as a carriage-way or bridle-way, it is only for those who possess or use carriages or horses.

It is objected further by the appellants that the incumbrances on the docks have the effect of making them rateable. It is contended that, as interest and a portion of the principal of the debt is annually paid to the bond-holders out of the produce of the tolls, to this extent at least there is a beneficial occupation by [97] the board, in trust for the bond holders: because it is said that, if a tenant from year to year occupied the property and received the tolls without paying the instalments of the principal and the periodical interest of the debt, he would be willing to pay a rent, and that this theoretical rent is the criterion and measure of the rateable value of the occupation. But I conceive that no tenant could be supposed to receive the tolls without paying the charges. The tolls are appropriated to the payment of the expenses, including charges of construction and repair, and never can by law exceed that limit. As soon as the tolls do exceed it, they are by law to be reduced. If the amount now paid every year to the bond-holders had been actually incurred for construction and repair in that year, it is plain there could be no rent. But the payment made in each year is still but the cost of construction and repair proportioned to that year, and spread over several years, and averaged. If the fact that the expenses have not been incurred within the year created a distinction, then a bricklayer's or mason's bill not paid within the year, but charged on the next or following years, would make the land in those years rateable. It can make no difference that the creditor is not the bricklayer or mason himself, but the assignee of the debt due to the bricklayer or mason.

It is quite true that, when land is let to a tenant, the value of the occupation to the occupier is alone considered in estimating its rateable value, and charges on the reversion are not regarded, and are not deducted. But the payments made out of the tolls in discharge of debts and interest in the case now before your Lordships, are not charges on a supposed reversion: they represent what are in ordinary cases expenses annually incurred to enable the land to com-[98]-mand the rent. They are like tithes, or tithe-commutation rent-charge, which must be paid by the occupier, to prevent the tithe-owner from entering: or like contributions to a sea-wall, to prevent the land from being overflowed; or like the annual or periodical expenses for repairs: all which are to be deducted, in estimating the annual letting and rateable value of property: see 6 & 7 W. 4, c. 96, and 25 & 26 Vict. c. 103.

It may, indeed, be said that the expenses incurred in permanently improving land,

e.g. in building a house on the land, are additions and not deductions from the rateable value, though the annual average repairs of that house when built are so. But, when a private house is built, the disposable annual income derived from the land is increased, and therefore the rateable value of the land is augmented. But, in the case before your Lordships, the disposable annual income from the docks is not and never can be augmented: for the tolls always must be reduced to such a point as to leave no disposable income.

The objection of the appellants that these charges are to be treated like mortgages or charges on the reversion of ordinary property, and not to be regarded in estimating rateable value, seems inconsistent with itself; for the argument rather seems to shew that they *are* to be regarded, not, indeed, as a deduction, but as causing an addition to the value, and that the docks when incumbered with debt are rateable, and when free from incumbrance are not rateable.

Again, if these docks are rateable on the ground of the debts and interests owing by them and secured upon them, then it will follow that, in the case of turnpike-roads which are involved in debt (at least in those cases where the soil is in the commissioners, as sometimes happens), the road will be rateable to the [99] poor, because, being involved in debt, the bond-holders receive interest.

It is objected, lastly, by the appellant, that there is no substantial distinction between docks made by a joint-stock company and the docks now under consideration. But, if there be no legislative limit imposed on the tolls, or on the profits of the joint-stock enterprise, then the two cases are widely and obviously different: for, in the case of a joint-stock company, the land used for the undertaking may produce profit to the company, and on that ground would be clearly rateable. And, even if the limits of profit be fixed by the legislature by imposing a maximum of tolls, still, in the case of a commercial joint-stock company, whatever margin of profit is left to the shareholders over and above the ordinary rate of interest on floating capital, confers a rateable value on the land.

On this principle and to this extent it is that a railway or any other joint-stock company is rateable in respect of its occupation of land. You take the gross income, and deduct expenses, including in the deductions not only interest on the floating capital, but even tenant's profits thereon: and what is left after these deductions is profit to the shareholders, and that profit constitutes the rateable value of the railway. No one ever heard of augmenting the rateable value of a railway or other property by the sum payable as principal or interest on its debentures. What the shareholders receive for their profit derived from the occupation of the land forms theoretical rent, and therefore the rateable value of the land, not what the creditors receive for their debts or interest.

In the Liverpool Docks there are no shareholders, and no profit can ever be received by any one: all that can be done is to keep down interest and pay the debts, neither of which payments constitutes profit [100] to any one. Whatever proportion of the tolls is not wanted for this purpose, must, as already observed, be immediately taken off.

However, in a case of this nature, probably authority rather than general reasoning ought to decide the question. I do not understand your Lordships to ask, and therefore it would be officious and presumptuous to express any opinion on the effect of the precedents cited in binding your Lordships as the supreme tribunal. But I conceive that a judge sitting either in one of the superior courts of law, or even in the Exchequer Chamber, would consider himself concluded by authority in answering your Lordships' first question. And for confirmation I venture to refer your Lordships to Mr. Justice Crompton's language as to the effect of the decisions, in pronouncing his judgment in the court of Exchequer Chamber. He says: * "With regard to the former *decisions*, I think that neither a court of co-ordinate jurisdiction, nor a court of error, ought to interfere in such a case." And, independently of the respect due by our system of law to precedent, a judge would have to consider some of the consequences which must follow from adopting at this late period a new construction of the statute of Elizabeth.

If a dedication to public purposes be consistent with rateability, then, for the future, public hospitals like St. Bartholomew's Hospital, St. George's Hospital, the London

* Ante, p. 85, n.

Hospital, St. Thomas's Hospital, and other establishments of the like nature in the metropolis and throughout the kingdom, with a multitude of other public charities, become at once subject to poor-rates. Lunatic asylums, like St. Luke's or Bethlehem, in the metropolis, and county lunatic asylums, also become assessable at their letting value; though in many instances the exemption of such institutions is recognized by acts of parliament, providing that land taken for the purpose shall retain its rateability to the extent of the value of the land without the buildings upon it. Churches and chapels (but for the recent statute) would, even where the pews are not let, have become rateable; for property is to be rated, not at what a tenant does give, but at what he would give for it in its actual condition: 6 & 7 W. 4, c. 96. County-gaols, county-reformatories, county-courts, and courts of justice, not only in counties and cities, but in the metropolis also (not indeed in Westminster Hall, because that is one of the Queen's palaces), may become rateable. The property of the Crown in the occupation of the Crown, will, no doubt, still be protected from rateability: but old questions, now at rest, will re-appear as to other buildings occupied for public purposes, like the Horse Guards, the Admiralty, many buildings and residences at Portsmouth, Plymouth, Chatham, Milford Haven, and Greenwich, the British Museum, the National Gallery, Greenwich Hospital, the Custom House, the General Post Office, burial grounds, many of the apartments in Somerset House, the premises occupied by the poor-law commissioners and public bodies, public bridges, turnpike roads, and the soil of many navigable rivers, if not of public highways themselves. In many of these instances, money has been expended and money borrowed on the faith of precedent, the law having been considered as settled by its authorized expounders for so many years. In the case now before your Lordships, as pointed out by Mr. Justice Hill in the court of Exchequer Chamber, new docks have been constructed, and large sums of money borrowed, on the faith of the decisions in this and other cases.

If the fact that the indebtedness of the board, and the application of their revenues to the payment of [102] principal and interest, makes them liable to be rated, then, as I have already said, I think the principles on which the railways and other joint-stock enterprises throughout the kingdom have hitherto been rated will be unsettled.

2. In answer to your Lordships' second question, —If at the time of the passing of the acts enumerated in the question it had been clear on authority and principle that the Liverpool Docks were rateable, then I think the words contained in the sections referred to would not have exempted them from rateability.

But that is almost an impossible suggestion: for had that been so, such enactments could never have found their way into a succession of statutes. I conceive that those enactments are to be read, like every other written instrument, with reference to the existing and surrounding facts. Those facts are that, from the time of the first establishment of the docks, in the reign of Queen Anne, they had never been rated, except on two occasions, on both of which occasions they had been pronounced exempt from rates by the court of Queen's Bench. These two decisions had been acquiesced in and acted on for fifty years since the first, and thirty years since the last decision. No one can doubt, I think, that the successive penmen who drew the acts, and all the parties to them,—the board, the corporation, and the several parishes,—took it to be clear, first, that an occupation not beneficial was not rateable, and, secondly, that the docks (as distinguished from the warehouses) were not rateable on that ground. The opinion of the draughtsman of itself goes for little or nothing: but that opinion (in the presence of parties interested to dispute it, passed unchallenged five times through both Houses of Parliament. I think that circumstance amounts to a recognition by parliament of the law that a beneficial [103] occupation is necessary to rateability, and that the occupation of these docks by the Mersey board is not beneficial. It will moreover be observed that these acts are not mere private acts, but public acts, and not merely public in a technical sense, but upon a matter affecting the general public.

I think further that the enactments disclose evidence of a bargain to which was needed and obtained the sanction of parliament, between,—first, the lenders of money,—secondly, the board and their predecessors in estate,—thirdly, the parochial authorities of Liverpool,—and, fourthly, the general public; the effect of which bargain is that a certain portion of the property is to be rateable, and the residue not rateable. And that opinion seems to have been entertained by the court of Exchequer Chamber.

I may add, in conclusion, that the court of Queen's Bench twice,—and the last

time after argument before four of the most eminent judges who ever presided in that court,—had held these docks not rateable. And at this moment there stand the unanimous decisions of the court of Queen's Bench in 1827, the unanimous decision of the court of Common Pleas in 1862, and the unanimous decision of the court of Exchequer Chamber, in error from the Common Pleas, to the same effect.

3. In answer to your Lordships' third question,—I am of opinion that the act of 20 & 21 Vict. c. clxii., ss. 26, 27, does not impose on the board any liability to poor-rates, which but for those clauses would not exist.

The words should seem *prima facie* to regard charges or liabilities upon *the land*, such as debts, and perhaps easements. It was stated at your Lordships' bar that there are from twenty to twenty-four *charges on the land*, properly so called, and independent of poor-rates, to which the words in that sense would be applicable. [104] But the poor-rate which, as I have already reminded your Lordships, originally affected personal property in the same way as real property, has repeatedly been held to be no charge on the *land* at all, but only on the *person who occupies*, in respect of the profits of his occupation: *Case v. Stephens*, Fitzgib. 297, 298; *Theed v. Starkey*, 8 Mod. 314; *Earl of Bute v. Grindall*, 2 H. Bl. 265; *Rowls v. Gells*, Cowp. 451.

Moreover, the poor-rate is a personal charge, which exists or does not exist according to the character of the occupier, as he is or is not a person liable to be rated. Suppose these general words in a grant to the Crown, or in a deed conveying land to trustees of a court of justice or of a church, it is plain that they would not impose on the grantee a liability to poor-rate, if he were exempt from rates. Or, suppose them to exist in a statutable conveyance to the Crown, to which the Crown is a party, e.g. for fortifications; or in a statutable conveyance to any other clearly exempted occupier; I conceive that the words would not impose poor-rates on occupiers not otherwise liable to pay.

Again, the act of the following year, 21 & 22 Vict. c. xc., s. 3, while incorporating the general Lands Clauses Act (8 & 9 Vict. c. 18), excepts s. 133 of that general act, which exempted section provides for the preservation of the liability to *poor-rates* and *land-tax* in certain cases. But s. 5 of the local act preserves the *land-tax*, but is silent as to the poor-rate,—shewing, as I conceive, that the legislature intended to preserve the *land-tax*, but not the *poor-rate*.

Lastly, the act 20 & 21 Vict. c. clxii., is an act for consolidating the docks at Liverpool and Birkenhead into *one estate*, and vesting the control of them in *one public trust*: and it would be singular if one portion of the property should be rateable and one not rateable, under precisely similar circumstances. And this [105] observation is strengthened by remembering that, where such a distinction exists (as in the case of the warehouses), it is created by express words.

BLACKBURN, J., delivered the unanimous opinion of the remainder of the judges who were present at the hearing, as follows:—

My Lords,—The opinion which, with your Lordships' permission, I am about to read, contains the joint answers to your Lordships' questions, of the Lord Chief Baron, Mr. Justice Williams, Mr. Justice Mellor, Mr. Baron Pigott, and myself.

1 To the first question put to us by your Lordships in these cases, we answer that, in our opinion, the Mersey Docks and Harbour Board are occupiers of the docks in question within the true meaning of that word as used in the statute of 43 Eliz. c. 2.

Our reasons for that opinion are as follows:—The statute 43 Eliz. c. 2, s. 1, requires the overseers of every parish to raise by "taxation of every inhabitant, parson, vicar, and other, and of every occupier of" various kinds of real property, and inter alia of lands in the parish, "in such competent sum as they shall think fit," a stock for setting the poor of the parish to work, and for the relief of the poor of the parish.

Though the words of this enactment might seem to give the overseers a discretion to tax each inhabitant in such arbitrary sum as they might think fit, it has long been settled that the taxation of the different persons must be equal and in proportion to the value of their respective means. It would appear from the passages cited at your Lordships' bar from Dalton's County Justice, that this was determined very shortly after the statute was passed. It has always been so held; and the legislature, by the Parochial Assessment Act, 6 & 7 W. 4, c. 96, has affirmed this principle, [106] by enacting that no rate shall be valid unless made "upon an estimate of the net annual

value of the several hereditaments rated thereunto, that is to say, of the rent at which the same might reasonably be expected to let from year to year, free from all usual tenant's rates and taxes, and tithe-commutation rent charge, if any, and deducting therefrom the probable average annual cost of the repairs, insurance, and other expenses, if any, necessary to maintain them in a state to command such rent."

In order, therefore, that a valid rate may be imposed, it is essential that the occupation be of value beyond what is required to maintain the property; for, if the occupation be of so little value that the hypothetical tenant (under the Parochial Assessment Act) would either give no rent, or a rent which, after deducting the annual expense of the maintenance, would leave no overplus, there is nothing to rate.

The question whether replevin lies has been waived, and therefore it is not necessary further to consider whether in such a case the more proper expression would be that the person in possession of the property was not an *occupier at all* within the meaning of the Statute of Elizabeth, so that the overseer had no jurisdiction to make the rate, and consequently that the levying of it might be resisted in replevin or trespass, or whether, as seems to have been the opinion of the Queen's Bench in *The Churchwardens of Birmingham v. Shaw*, 10 Q. B. 868, and *The Queen v. Bradshaw*, 2 Ellis & Ellis, 836, 29 Law J., M. C. 176, he is an *occupier* whom as such the overseers have jurisdiction to tax, though on appeal the rate must be reduced to nothing.

But, that question having been waived, this is now immaterial. Whichever may be the true mode of enunciating the position, it is clear that there can be no valid rate, unless the occupation be such as to be of [107] value; and, if the words "beneficial occupation" are to be understood as merely signifying that the occupation is of value (which is obviously the sense in which the phrase is used in many of the cases cited at the bar), it is clear that a beneficial occupation is essential as the foundation of the rate: but it is equally clear that, if the phrase be understood in this limited sense, the Mersey Docks and Harbour Board have a beneficial occupation; for, they actually occupy land as docks, and, in virtue of that occupation receive payments from the shipping using the docks,—at present greatly in excess of what is necessary to maintain the docks. Hereafter, the charges on shipping may be reduced so as greatly to diminish the revenue derived from this occupation,—possibly at some future time to render it no greater than the sum requisite to maintain the docks: but, while the dues on shipping are maintained at their present rate, it is clear that the hypothetical tenant would give for the occupancy of the docks, as at present enjoyed by the Mersey Docks and Harbour Board, a rent greatly in excess of what would be necessary to maintain the docks in a state to command that rent.

Where there is an actual demise of property to an occupier who pays rent to the owners of the property, the tenant, if a subject, is rateable, without any regard to the purpose to which the rent is applied. It is immaterial whether the landlord enjoys the rent himself or is obliged to pay it away as interest to mortgagees, or even (as is the case with the tenants of Crown property) pays it into the consolidated fund or the privy-purse of the sovereign. The occupier in each case is rateable: and, if the matter were now for the first time to be determined without reference to the decisions, it would seem that, where the owners of the property are themselves in occupation, and receive the value [108] the amount of which is measured by the rent which the hypothetical tenant would give, the purpose to which that amount is applied ought to be as immaterial as if there had been a real demise at the rent; and the occupiers, if subjects, ought to be rated, whatever be the object for which the property is occupied, unless some special enactment exempted them. But the decisions have now settled that there is an exemption: and the important question in the present case is, what is the nature of the occupation and of the purposes which bring the occupier's case within that exemption. And on this question the decisions are to some extent inconsistent, and it is necessary to examine them.

The Crown, not being named in the statute of Elizabeth, is not bound by it; and consequently the overseers cannot impose a rate on the sovereign in respect of lands occupied by Her Majesty, nor on those occupied by Her servants for Her Majesty.

The exemption depends entirely on the occupier, and not on the title to the property. The tenants of Crown property, paying rent for it, are rateable like all other occupiers: and it has even been determined that, where apartments in Hampton Court, a Royal palace, were gratuitously assigned to a subject, who occupied them by the permission of the sovereign, but for the subject's benefit, the subject was rateable

in respect of her occupation of this Royal property: *The Queen v. Lady E. Ponsonby*, 3 Q. B. 14, 1 Gale & D. 713. On the other hand, where a lease of private property is taken in the name of a subject, but the occupation is by the sovereign or her servants on her behalf, the occupation being that of Her Majesty, no rate can be imposed: *Lord Amherst v. Lord Sommers*, 2 T. R. 372.

So far the ground of exemption is perfectly intelligible: but it has been carried a good deal further, and applied to many cases in which it can scarcely be said that the sovereign or the servants of the sovereign are in occupation. A long series of cases has established that, where property is occupied for the purposes of the government of the country, including under that head the police and the administration of justice,—no one is rateable in respect of such occupation. And this applies not only to property occupied for such purposes by the servants of the great departments of state, such as the Post Office (*Smith v. The Guardians of Birmingham*, 7 E. & B. 483), the Horse Guards (*Lord Amherst v. Lord Sommers*, 2 T. R. 372), or the Admiralty (*The Queen v. Stewart*, 8 Ellis & B. 360,—in all which cases the occupiers might strictly be called the servants of the Crown,—but also to property occupied by local police (*The Justices of Lancashire v. Stratford*, E. B. & E. 225, 230), to county buildings occupied for the assizes and for the judge's lodgings (*Holqson v. The Local Board of Health of Carlisle*, 8 Ellis & B. 116), or occupied as a county-court (*The Queen v. The Overseers of Manchester*, 3 Ellis & B. 336), or for a gaol (*The Queen v. Shepherd*, 1 Q. B. 170, 4 P. & D. 534).

In these latter cases, it is difficult to maintain that the occupants are strictly speaking servants of the sovereign, so as to make the occupation that of Her Majesty: but the purposes are all public purposes of that kind which by the constitution of this country fall within the province of government, and are committed to the sovereign; so that the occupiers, though not perhaps strictly servants of the sovereign, might be considered in consimili casu. And the decisions are uniform, and were not disputed at the Bar, that the exemption applies so far: but there is a conflict between the decisions as to whether the exemption goes further.

There are several cases relating to charities, which [110] were mentioned at your Lordships' bar, but were not much pressed, nor, as it seems to us, need they be considered now; for, whatever may be the law as to the exemption of property occupied for charitable purposes, it is clear that the docks in question can come within no such exemption.

There is, however, one case on this subject, that of *The King v. St. Luke's Hospital*, 2 Burr. 1053, which it is necessary to notice, on account of the effect which in *The King v. The Commissioners of Salter's Lound Sluice*, 4 T. R. 730, was attributed by Lord Kenyon to part of what fell from Lord Mansfield in that case. In *The King v. St. Luke's Hospital*, the question before the court was, whether Joseph Mansfield was rateable as occupier of St. Luke's Hospital: but the court entered into the larger question, whether there was any one who could be charged as occupier, saying very truly that, unless there was some one who could be so charged, no rate could be imposed. Lord Mansfield as to that is reported to have said,—“As to the lessees, mere nominal trustees cannot be esteemed ‘occupiers,’ or rated as such.” In the subsequent case of *The King v. St. Bartholomew the Less*, 4 Burr. 2435, Lord Mansfield says that the corporation of London “are not de facto the occupiers of St. Bartholomew's Hospital: the poor are the occupiers, but they are not rateable.” This may perhaps shew that Lord Mansfield only meant to lay down the position that those in whom the legal estate is vested are not necessarily the occupiers: which is no doubt true: no one could contend that the person in whom a term assigned to attend the inheritance had vested could be rated as occupier, in point of law, of the estates de facto occupied by the cestui que trust. But, if Lord Mansfield meant (as it rather seems that Lord Kenyon thought he did) that the persons in actual valuable occupation of the property are not rateable if they [111] occupy in a merely fiduciary character, it is a position which cannot be maintained. The counsel for the Mersey Dock and Harbour Board at your Lordships' bar did not attempt to maintain any such general position: they limited themselves to contending that such was the law where it was a public trust; for which they cited authorities which they said must be overruled unless that position was maintained. And we think they were justified in so saying: but we also think that there are conflicting decisions which must be overruled if it is maintained.

The first case in which the position was advanced that trustees occupying valuable property, but prohibited from taking any individual benefit from it, were not rateable, seems to have been *The King v. The Mayor of London*, 4 T. R. 21, decided in 1790. There, Mr. Justice Buller in his judgment says: "It has been objected that they are not liable to this rate, because they held it on a public trust; but, in the first place, it does not appear to be the case of a trust at all; and if it did, perhaps the consequence contended for would not necessarily follow." It certainly seems that the doctrine contended for was not at that time, 1790, considered as established.

The King v. The Commissioners of Salters' Lound Sluice, 4 T. R. 730, was decided in 1792. In the argument, the clauses of the act under which the commissioners held were referred to and argued on: but Lord Kenyon's judgment does not appear to have proceeded on the ground that their effect was to prohibit the payment of poor-rate. He says: "The trustees have a bare naked trust, not coupled with any interest. If any interest resulted either to the commissioners or to the owners of the adjoining land after the public purposes of the act were answered, these tolls might have been rated. But it is admitted that all the money which is collected under this act of parliament [112] must be expended for the purposes of the act, and therefore, upon the ground upon which the Court proceeded in *The King v. St. Luke's Hospital*, 2 Burr. 1053, viz. that there was no occupier, these commissioners are not liable to be rated."

The counsel for the parish and township in the cases at your Lordships' bar did not attempt to deny that this decision was in favour of their opponents: they admitted (and, we think, quite properly admitted) that the decision was against them; but they denied that it was law. The counsel for the Mersey Board were fully justified in relying on this case as entitling them to the benefit of Lord Kenyon's judgment: but we think that, when they proceeded to argue that the decision acquired additional authority because it was acquiesced in, they fell into a fallacy. When the court of Queen's Bench has decided in favour of a rate, those who are rated may, if they are so advised, bring replevin, and (subject to the question whether replevin lies in such a case) may carry the case up to the House of Lords; and, therefore, where a decision in favour of a rate is not disputed further, it may properly be said to be acquiesced in. But, when the court of Queen's Bench has decided against a rate, and quashed it, there is no way whatever in which the parish officers can raise the question again: and acquiescence in a decision cannot add any weight to it, when there is no possible way of disputing it.

The next cases to be found in the Reports, in which any similar point arose, were those of *The King v. The Inhabitants of Liverpool*, 7 B. & C. 61, 9 D. & R. 780, and *The King v. The Trustees of the River Weaver Navigation*, 7 B. & C. 70, n., 9 D. & R. 788, in 1827. It appears from the papers in the Appendix to this special case (p. 38), that, in 1806, the Liverpool sessions made an order excluding the Liverpool Docks from a rate for the relief of the poor of the parish of [113] Liverpool, subject to a case intended to obtain the opinion of the King's Bench on the question whether the corporation of Liverpool were rateable as occupiers of the docks; and that, in 1808, the order of sessions was confirmed, but, under what circumstances, does not appear.

The late Lord Abinger was counsel for the parish both in that case and in the case of 1827: and the attorneys of the corporation of Liverpool in 1827 could not be ignorant of the circumstances attending the confirmation of the order of sessions in 1806. Yet, on the argument of the case, as reported in 7 B. & C., neither side alludes to what, if a decision at all, must have been precisely in point. It seems therefore probable that, though the rule confirming the order in 1808 is not drawn up as by consent, the former case was compromised, and that there was no decision of the court in 1808.

However this may be, there can be no doubt that the court of King's Bench, in 1827, acted upon the authority of *The King v. Salters' Lound Sluice*, 4 T. R. 730: Lord Tenterden saying in *The King v. The Inhabitants of Liverpool*,—"Here, the trustees were not occupiers in the ordinary sense of the word, and no profit was received for the use of any person:" and Bayley, J., saying (p. 73),—"The principle of this decision is applicable to the case of *The King v. Trustees of the River Weaver Navigation*. There the surplus tolls remaining over and above the expenses of supporting the navigation were to be applied to the repairing and maintaining of bridges and highways. Those were public purposes: and, as no part of the moneys received could be applied to private purposes, those moneys were not rateable in the hands of the trustees."

There is no dispute that those two decisions, if they [114] are to be followed, are decisive in favour of the Mersey Docks and Harbour Board, at least in the first of the cases at your Lordships' bar, and reduce the case of the overseers of Birkenhead to that point mentioned in your Lordships' third question.

The next case to which it is necessary to call attention is that of *The Governors of the Bristol Poor v. Wait*, 5 Ad. & E. 1, 6 N. & M. 383, decided in 1836. In that case the governors of the Bristol poor had taken property for the purpose of putting out their poor there. A rate had been imposed on them in respect of this occupation, and was levied by distress. The governors of the Bristol poor brought replevin, for the purpose of questioning the validity of this rate. In the judgment of the court, the point raised is said to be, "whether the plaintiffs were such occupiers of the property as to be rateable to the poor." And the decision was that they were. The judges who decided this case probably did not suppose that they were deciding anything inconsistent with the decisions in *The King v. Salter's Load Sluice*, *The King v. The Inhabitants of Liverpool*, and *The King v. The Trustees of the Weaver Navigation*, which appear not to have been cited on the argument or brought to their notice: but we do not see how the cases can stand together. The governors of the poor of Bristol were as much bare naked trustees, having no personal interest in the occupation of this property, as the commissioners of Salter's Load Sluice: and, if one set of trustees were on that ground not occupiers, we do not see how the others could be occupiers: and, if the application of the surplus funds of the Weaver Navigation to the bridges and highways of Cheshire, so as to be in relief of the county-rate, was a public purpose rendering the trustees of that navigation not rateable, it is difficult to see why the application of whatever value was derived [115] from the lands occupied by the governors of the Bristol poor to the maintenance of the poor of Bristol, and so in relief of the poor-rate of the city of Bristol, was not a public purpose also. We think that in this case the court of King's Bench, probably without being aware of it, came to a decision inconsistent with, and therefore shaking the authority of, *The King v. Salter's Load Sluice*, *The King v. The Inhabitants of Liverpool*, and *The King v. The Weaver Navigation*.

The decision in *The Governors of the Bristol Poor v. Wait*, 5 Ad. & E. 1, 6 N. & M. 383, has been repeatedly acted upon, and never questioned, that we know of. As the decisions in this case and those which followed it were decisions in favour of the rate, and consequently might have been questioned in replevin, the acquiescence in them does add something to their authority.

The Municipal Corporation Act (5 & 6 W. 4, c. 76) restricted the power of the municipal corporations named in Schedules A. and B. to that act over what had been their private estates, and compelled them to pay the net proceeds into the borough-fund, which was applicable, first to the payment of the existing debts of the corporation, and then to the corporation expenses, and the surplus, if any, for the public benefit of the inhabitants and the improvement of the borough. The court of Queen's Bench in *The Queen v. The Mayor, &c., of Liverpool*, 9 Ad. & E. 435, 1 P. & D. 334, decided in 1839 that the effect of this enactment was, to render the corporations no longer liable to be rated in respect of any property occupied by them. The reason given by the court for this decision was, that they found "the principle settled by the decisions already made, and felt it to be their duty to act upon them, and not, upon the apprehension of any inconvenient or unforeseen consequences, to question or weaken [116] their authority." They proceed to state the cases of *The King v. The Inhabitants of Liverpool*, 7 B. & C. 69, 9 D. & R. 780, and *The King v. The Weaver Navigation*, 7 B. & C. 70, n., 9 D. & R. 788, and say,—"We feel it to be impossible substantially to distinguish these cases, and especially the latter, from the present. The extent and approximation to something like national benefit are in kind, and almost in degree, the same. The public in the one case is the same town of Liverpool; in the other, the county of Chester." The court do not explain why the same argument did not avail in *The Governors of the Bristol Poor v. Wait*, 5 Ad. & E. 1, 6 N. & M. 383, where the city of Bristol was held *not* to be the public: but they did not intend to depart from that decision, and in the same year acted upon it in *The Queen v. The Guardian of Wallingford Union*, 10 Ad. & E. 259, 2 P. & D. 226, in which latter case an attempt but, as it seems to us, not a successful one, is made to reconcile the decision with that in *The Queen v. The Mayor, &c., of Liverpool*, 9 Ad. & E. 435, 1 P. & D. 334.

Mr. Justice Crompton, in *The Tyne Commissioners v. Chirton*, 1 Ellis & Ellis, 516,

stated that the decision in *The Queen v. The Mayor, &c., of Liverpool* created at the time great surprise. We think, however, that the conclusion came to by the court in that case does logically follow from the decisions in *The Queen v. The Inhabitants of Liverpool* and *The Queen v. The Trustees of the Weaver Navigation*, and that the court had in that case to choose whether they could consider it a *reductio ad absurdum*, and say that decisions leading to such a conclusion must be wrong in principle, or to say that, the decisions being binding on them, they must hold that the conclusion was not wrong. They adopted the latter course, apparently not at that time perceiving that it was inconsistent with the [117] principle of their own decision in *The Governors of the Poor of Bristol v. Wait*. A few years later, the court of Queen's Bench, in several cases to be presently cited, adopted the former course: and the question now pending in your Lordships' House seems to us to be in substance which set of decisions are to be followed in future.

The effect of the decision in *The Queen v. The Mayor, &c., of Liverpool* was immediately nullified by the act of 4 & 5 Vict. c. 48: but that enactment did not declare the decisions erroneous. On the contrary, the act was couched in language which, though not *declaring* the decision to be law, indicates that the framers of the act thought that it was law: and the fact that an act couched in such terms was passed by the legislature affords an argument of more or less weight, that the error of the court, if it was one, was acquiesced in, and had become *communis error*.

This is, we think, the latest authority in point of date relied on by the counsel for the Mersey Docks and Harbour Board.

The next case in order of date was *The Queen v. Badcock*, 6 Q. B. 787, in 1845. In the judgment of the court the conflicting cases are cited. The court does not attempt to reconcile them, but observes that, in all the cases where the occupation was held to be of such a public nature as to exempt the property from rateability, "the public, as such, unlimited by the bounds of *county, borough, or parish*, had a direct interest in the benefit which the application of the funds produced: and that the case then before them did not come within that principle. The passage here cited has been repeatedly quoted with approval as giving the true principle of exemption. It does include all the cases already cited, in which the occupation was for the purposes of government. But the [118] principle thus laid down cannot be made to embrace either *The King v. The Trustees of the Weaver Navigation*, where the funds were applicable to the relief of the county-rate of Cheshire, or *The Queen v. The Mayor, &c., of Liverpool*, where the funds were brought into the borough-fund, in relief of the borough-rate in that particular borough.

In *The Queen v. The Churchwardens, &c., of Liverpool*, 13 Q. B. 116, in 1849, the court of Queen's Bench, acting upon the principle laid down in *The Queen v. Badcock*, 6 Q. B. 787, held that the commissioners of the Huddersfield Waterworks were rateable to the relief of the poor.

All the cases which we have hitherto cited were decided before Lord Campbell took his seat upon the Bench. It is right to notice this: for it has often been supposed, and indeed was said in the argument at your Lordships' bar, that the decisions in his time on the subject of exemptions from rates, were innovations introduced in consequence of his strong individual opinion that the exceptions from rateability had been carried further than was warranted by law or reason. But we think that the cases which we have cited shew that before he came upon the Bench that opinion had been entertained and acted upon, and that in consequence the decisions had got into such a state as to be inconsistent with each other; so that it had become necessary to overrule one set of the inconsistent decisions, unless the law was to be administered without any reference to principle, deciding each case as it arose, according as the facts might be supposed to approximate more nearly to those in the one set of decisions or the other.

Several cases were decided in Lord Campbell's time which closely resembled that of the Huddersfield commissioners (*The Queen v. The Churchwardens, &c., of Liverpool*), and which were decided in the same way, without rendering it necessary to go further than had been done in that case, until, in 1822, the case of *The Trustees of Birkenhead Docks v. The Overseers of Birkenhead*, 2 Ellis & B. 148, arose. Mr. Justice Crompton was a party to that decision: and in *The Tame Improvement Commissioners v. Chorton*, 1 Ellis & Ellis, 516, he has given some account of the deliberations on that case (though his observations were misunderstood by the reporter); and he repeated it during the argument in the Exchequer Chamber of the case at bar. It appears that this learned judge was at first startled at being called upon to act on a principle

in direct opposition to the considered decision of the court of Queen's Bench in *The Queen v. The Mayor, &c., of Liverpool*, 9 Ad. & E. 435, 1 P. & D. 334, though he had always thought that decision wrong; and that he was the more unwilling to act in direct contradiction to that case, because the legislature, in the 4 & 5 Vict. c. 48, when enacting that the decision should no longer be practically operative, did not express any disapprobation of the principle of the decision, but rather used language seeming to assume that it was good law; and he doubted whether the case should not be followed, though not approved of, leaving it to the legislature to correct it. The rest of the court thought that the time had come when the court could no longer halt between two sets of decisions, but must follow that which was law; and Mr. Justice Crompton ultimately agreed with them. Lord Campbell, in his judgment (perhaps out of deference to the doubts which Mr. Justice Crompton had at first entertained), seeks to avoid expressly overruling the previous decisions, and suggests that perhaps *The King v. The Commissioners of Salter's Load Sluice*, 4 T. R. 730, and *The King v. The Inhabitants of Liverpool*, 7 B. & C. 61, [120] 9 D. & R. 780, may be distinguishable, on the ground that the private acts in those cases were construed by the courts as amounting to a prohibition to pay poor-rate. But the counsel on both sides at your Lordships' bar agreed that no such distinction could be maintained; and we think that neither Lord Kenyon nor the court of King's Bench in Lord Tenterden's time proceeded on any such ground. And in the subsequent cases of *The River Lea Navigation* (cited in the Appendix X.), and *The Tyne Improvement Commissioners v. Chirton*, 1 Ellis & Ellis, 516, in 1859, no such distinction was made. The court of Queen's Bench, in that last case, acted upon the broad principle, that though, where the property was occupied for public purposes, "such as," says Lord Campbell, "a post-office or a military store depot, where the purposes for which the property is occupied are purposes created by the government of the country," there was no rateable occupier, the occupation of a public dock was not an occupation for such public purposes, and that the commissioners occupying such a dock were rateable in respect of the value of that occupation, estimated according to the rule laid down in the Parochial Assessment Act, unless an exemption was conferred by some subsequent statute; and that the enactments in the Tyne Improvement acts as to the application of the rates received (which are in substance the same as those in the Liverpool acts) did not amount to such an exemption; and Mr. Justice Crompton, after stating his former doubts when *The Birkenhead* case was argued, said that he now thought that case laid down the proper rule. This, we think, must be considered as the rule now acted upon in practice in the court of Queen's Bench.

Such being the state of the authorities, it seems to us no longer possible to support the decisions relied on [121] by the counsel for the Mersey Docks and Harbour Board. We quite agree that it is very desirable to adhere to decided cases, though this principle may be carried too far. It has been forcibly remarked by an American author of repute (1 Phillips on Insurance, 393 g.) that, where the objection to the decisions is inconsistency with admitted fundamental principles, it is an adhering to an inconsistency and contradiction, and tends to reduce jurisprudence from a science to an aggregation of dogmas." Still, the inconvenience caused by the unsettling the law and disturbing what was quiet is so great, that we agree that even a court of error should be slow to reverse decisions which, though originally wrong, have long been uniform. When such is the case, it may often be proper to persevere in the error, and leave the remedy to the legislature. It may be that, if the attention of the court of King's Bench had in 1836 been called to the case of *The King v. Liverpool* and *The King v. Weaver Navigation*, before they decided *The Governors of the Bristol Poor v. Wait*, this principle, which is strongly laid down in *Crease v. Sawle*, 2 Q. B. 862, 2 Gale & D. 812, would have led them to decide *The Governors of the Bristol Poor v. Wait* otherwise than they did. But all this inconvenience has been already incurred; the recent decisions have been such as to disturb the quiet state of things; and a decision of your Lordships' House affirming *The King v. The Inhabitants of Liverpool* and the non-rateability of the Liverpool Docks, must reverse the decision in *The Tyne Commissioners v. Chirton*, 1 Ellis & Ellis, 516, and render the docks in the Tyne rateable. And such a decision, though not necessarily reversing the numerous decisions based on *The Governors of the Bristol Poor v. Wait*, by which poor-houses, and gas-works, and water-works in the hands of public trustees have been held rateable, must greatly shake their authority, [122] and disturb a principle of rating now generally adopted throughout the country.

The balance of convenience, if that be a legitimate consideration, is now in favour of adhering to the more recent decisions. And, if we view the case on principle, without regard to the decisions either way, it seems to us clear that the Mersey Docks and Harbour Board ought to be rated.

The counsel referred to many expressions in the local acts shewing that the Mersey Docks were thought likely to confer great public benefit, and to be very advantageous to the commerce of this country: and there is no doubt that that expectation has been realized, and that these docks are of great public benefit: but not more so than the docks in the River Thames, all of which are in the hands of private companies, and are undoubtedly rateable.

The rate is imposed, not in respect of the value of the benefit conferred on the public, or that portion of it which uses the docks, but is on the occupiers of the docks in respect of the value to them derived from the payments taken for that use. And we think it impossible to point out any real distinction in this respect between the occupation of a dock formed by a company under an act of parliament incorporating the Companies Clauses Act and the Harbours, Docks, and Piers Clauses Act, 1847, and the occupation of the Mersey Docks by the Mersey Docks and Harbour Board.

A company forming a dock under an act of parliament incorporating these acts, is bound to maintain the docks, and to keep harbour-masters and other officers there, and to allow the public to use the dock on payment of the rates, and to allow Her Majesty's vessels to use it without making any payment: and by these means they confer a benefit on the public. The company, by virtue of its occupation, receives the rates on shipping using the docks, and the amount [123] thus received is applicable to keeping up the docks, and then to paying interest on the loans, the amount of which is limited, and then in paying dividends on the share capital: and it is common to have a maximum limit put on the rate of the dividend (a): when that maximum dividend is reached, the rates must be lowered. It is indisputable that a company thus occupying a dock is an occupier, and rateable as such. Now, if, without in any way altering the mode in which the docks are enjoyed by the public, or altering the rates leviable, or changing the harbour-masters and others who manage it, we change the name of the body who occupy it, from that of "the company" to that of "the board," and if, instead of "the company" paying to the shareholders a maximum dividend on their capital, "the board" pay to the same individuals the same identical sums, but call them "interest on bonds," instead of "maximum dividend on share capital," what difference does this make? If *The King v. The Inhabitants of Liverpool*, 7 B. & C. 61, 9 D. & R. 780, be supported, it makes this difference, that what was formerly an occupation in respect of which the company was rateable, has by this change of name, without any change in the thing, become an occupation for public purposes, for which the board is not rateable. If the decision in *The Tyne Commissioners v. Chilton*, 1 E. & E. 516, is to be supported, the change in name makes no difference in the rateability.

We think the latter the correct view of the law, and therefore we answer your Lordships' first question in the affirmative.

2. We now proceed to answer the second question put by your Lordships. And we are of opinion that there is nothing in the matters referred to in your Lordships' questions to exempt the board from being rated in respect of their occupation.

[124] We have already, in answering your Lordships' first question, given our reasons for thinking that the purposes to which the rates are applicable are not such as to exempt them from rateability: and we are further of opinion that the effect of the statutes applicable to the Liverpool Docks is not such as to exempt them from the payment of poor-rate. There are no negative words prohibiting the application of the rates to payment of the poor-rate. And we think, in conformity with the decision in *The Tyne Commissioners v. Chilton*, 1 Ellis & Ellis, 516, that enactments directing that the revenue shall be applied to certain purposes, and no others, are directory only, and mean that, after all charges imposed by law on the revenue have been discharged, the surplus, or free revenue, which otherwise might have been disposed of at the pleasure of the recipients, shall be applied to these purposes.

We have only, therefore, to consider the reasons on which the court of Exchequer

(a) See the Gasworks Clauses Act, 1849, 10 & 11 Vict. c. 15, s. 30.

Chamber based their decision in the first of the present cases; and with very great respect for those who concurred in that judgment, we think that they acted on a principle sound in itself, but not applicable to the case before them.

Where an act of parliament has received a judicial construction putting a certain meaning on its words, and the legislature in a subsequent act in *pari materia* use the same words, there is a presumption that the legislature used those words intending to express the meaning which it knew had been put upon the same words before: and, unless there is something to rebut that presumption, the act should be so construed, even if the words were such that they might originally have been construed otherwise. And, if the decision in *The King v. Liverpool*, 7 B. & C. 61, 9 D. & R. 780, had been that certain words used in the former acts had amounted to an exemption from poor [125]-rate, and those same words had been repeated in the subsequent acts, it would, on this principle, have been a fair inference that the legislature intended by using the same words to give the exemption. But this is not the case here. The legislature had by former acts conveyed to the trustees the docks, to be held for certain purposes. The court of King's Bench had decided that, as an incident of law, those who held land for such purposes were not rateable to the relief of the poor. When the legislature again in fresh acts used the same language, it shewed that they intended to convey the land to be occupied for the same purposes; and that, if the law did annex non-rateability as an incident to such an occupation, the legislature had no objection; but it did not afford any argument that the legislature intended to annex that incident, in case it should be discovered that it was not annexed by law. And the clauses enacting that the warehouses should be rated carry this argument no further.

During the course of the argument at your Lordships' bar, the Lord Chancellor put the case of an express recital in the act, to the effect that it had been decided in *The King v. Liverpool* that the dock trustees were not liable to poor-rate in respect of land occupied by them, and that it was expedient that no such exemption should be given to them in respect of the occupation of new warehouses acquired under the new act, and then, after that recital, an enactment in the terms in which it is now expressed: and he asked the counsel at the bar two questions,—first, whether such a recital could be construed to amount to a declaratory enactment that the decision in *The King v. The Inhabitants of Liverpool* was good law!—secondly, whether the acts, framed as they were, could have a greater effect than they would have had if framed with such an express recital? The counsel for the Mersey Docks and Harbour Board were not able to give any [126] answer to those questions that would support the decision of the court of Exchequer Chamber. Mr. Justice Blackburn (the only judge who, being a party to the decision in the Exchequer Chamber, was also present at the argument at your Lordships' bar,) admits that he cannot answer them; and his inability to do so has led him to change the opinion which he entertained when in the Exchequer Chamber. We have no reason to believe that the other judges who joined in that judgment have changed their opinion. We have the most sincere deference for their judgment; and, as we have had no opportunity of hearing what answer they would have made to the way the case has been put in your Lordships' House, it is with diffidence that we have formed our opinion that they have misapplied the ground of their decision: but, entertaining that opinion, we are bound to express it.

We therefore answer your Lordships' second question in the negative.

3. The answers, which we give to the first and second questions put by your Lordships in effect answer the third question. In our opinion, the liability to a poor-rate is imposed on the board by the general law, and not by virtue of the sections of the acts referred to.

We therefore answer your Lordships' last question in the negative.

The opinions of the learned judges were ordered to be printed, and the House took time to consider.

LORD WESTBURY, C., now said. My Lords,—The questions raised in this appeal depend in a great measure on the inquiry what is the occupation of real property which is liable to be rated under the 1st section of the 43 Eliz. c. 2, independently of the decided cases, several of which are irreconcilable with each other.

[127] 1. It would seem to be easy to answer this inquiry; and, having regard to the Parochial Assessment Act, 6 & 7 W. 4, c. 96, it may be said in answer that occupations, to be rateable, must be of property yielding or capable of yielding a net annual value, that is to say, a clear rent over and above the probable average annual

cost of the repairs, insurance, and other expenses, if any, necessary to maintain the property in a state to command such rent. It is in this sense that I understand the words "beneficial occupation," wherever it is said that to support a rate the occupation must be a beneficial one: for, on principle, it is by no means necessary that the occupation should be beneficial to the occupier. It is sufficient if the property be capable of yielding a clear rent over and above the necessary outgoings. The only occupier exempt from the operation of the act is the King, because he is not named in the statute. And the direct and immediate servants of the Crown, whose occupation is the occupation of the Crown itself, also come within the exemption. But this ground of exemption does not warrant many decisions which have held that property used for public purposes is not rateable. So also trustees who are in law the tenants or occupiers of valuable property upon trusts for charitable purposes, such as hospitals or lunatic asylums, are in principle rateable, notwithstanding that the buildings are actually occupied by paupers who are sick or insane. If the matter were *res integra*, I could not concur in the decision of Lord Mansfield in the case of *St. Luke's Hospital* (2 Burr. 1053), in which he is reported to have said that mere trustees cannot be esteemed occupiers, or rated as lessees, or with his conclusion in the case of *The King v. St. Bartholomew's*, 4 Burr. 2435. But, with a slight verbal alteration, I agree entirely with the remark of the learned judges in the present case that, if Lord [128] Mansfield meant that the persons in the legal occupation of valuable property are not rateable if they occupy it in a merely fiduciary character, it is a position which cannot be maintained. To these observations and decisions of Lord Mansfield, that which appears to me to be the erroneous doctrine of several subsequent decisions is to be attributed. This is plain on an examination of Lord Kenyon's judgment in the case of *The King v. The Commissioners of Salter's Load Sluice*, as reported in 4 T. R. 730. Lord Kenyon refers to the decision in the case of *St. Luke's Hospital* (2 Burr. 1053), and adopts the position that trustees who have a bare naked trust, not coupled with any interest, are not liable to be rated: and he uses language which, with the decisions of Lord Mansfield, has introduced the notion that, if valuable property be in the possession of trustees who are bound to apply the whole of the proceeds to public but not government purposes, that is, in works or purposes for the better accommodation or use of the public, they are not liable to be rated. There is nothing in the act of Elizabeth, or in the reason of the thing, to warrant this conclusion. No exemption is thereby given to charity or to public purposes, beyond that which is strictly involved in the position that the Crown is not bound by the act. And it is a remarkable fact that, whenever these opinions of Lord Mansfield and Lord Kenyon have not been presented to the court of Queen's Bench, the judges have adopted the correct view of the statute. Thus, in *The King v. The Inhabitants of Liverpool*, 7 B. & C. 61, 9 D. & R. 780, decided in the year 1823, and in *The King v. The Trustees of the Weaver Navigation*, 7 B. & C. 70, n., 9 D. & R. 788, decided in 1827, the case of *The King v. The Commissioners of Salter's Load Sluice*, 4 T. R. 730, was cited and relied on, and the court of Queen's Bench [129] adopted the language of Lord Kenyon, and followed his decision. But, in the case of *The Governors of the Poor of Bristol v. Wain*, 5 Ad. & E. 1, 6 N. & M. 383, decided in 1836, the case of *The King v. The Commissioners of Salter's Load Sluice* does not appear to have been referred to: and the court recurred to the correct view of the statute of Elizabeth, and held that the governors of the Bristol poor, who had taken some buildings and land on lease for the occupation of their poor, although they were bare trustees, and held for a public purpose only, were such occupiers of property as to be liable to be rated to the poor.

This case in its turn has been followed in other decisions as an authority: and it might have been supposed that the authority of *The Salter's Load Sluice* case, and its two satellites, *The King v. The Inhabitants of Liverpool*, and *The King v. The Trustees of the Weaver Navigation*, had come to an end. But, in the year 1839, the court of Queen's Bench, in the case of *The Queen v. The Mayor, &c., of Liverpool*, 9 Ad. & E. 435, 1 P. & D. 334, returned to its old allegiance, and again set up the authority of *The King v. The Inhabitants of Liverpool*, 7 B. & C. 61, 9 D. & R. 780, and *The King v. The Trustees of the Weaver Navigation*, 7 B. & C. 70, n., 9 D. & R. 788. This last case of *The Queen v. The Mayor, &c., of Liverpool* was decided on the principle that, since the Municipal Corporation Act (5 & 6 W. 4, c. 76), the property of a municipal corporation is held upon trust for the purposes of the borough-fund, and therefore that the corporation of Liverpool were bare trustees of the property in question for public

purposes. The mischief of this decision was remedied by the act of 4 & 5 Vict. c. 48; but, unfortunately, that act did not declare the law.

Some subsequent decisions of the court of Queen's Bench have been marked by much timidity. They [130] have in effect departed from the grounds of the decisions in *Salter's Lound Sluice* case and its attendant cases, but have at the same time attempted by very questionable distinctions to save whole the authority of those cases. Thus, in the cases of *The Queen v. Badcock*, 6 Q. B. 787, and *The Queen v. Longwood*, 13 Q. B. 116, there is an attempt to distinguish between the interest of the unlimited public and the interest of the public limited by the bounds of a county, borough, or parish.

At last, in the case of *The Tyne Improvement Commissioners v. Chirton*, 1 Ellis & Ellis, 516, the court of Queen's Bench recurred to that which is in my opinion the true principle, viz. that the only ground of exemption from the statute of Elizabeth, is, that which is furnished by the rule that the sovereign is not bound by that statute, and that consequently where valuable property capable of yielding a net rent above what is required for its maintenance is sought to be exempted on the ground that it is occupied by bare trustees for public purposes, the public purposes must be such as are required and created by the government of the country, and are therefore to be deemed part of the use and service of the Crown. If this be the true criterion of exemption from rateability where the property is valuable, it is clear that the Mersey Docks are liable to be rated.

In this country, many works tending greatly to the convenience and benefit of the public,—and, in that sense, public works,—are the result and creation of private enterprise; being made or performed by money subscribed by the public on the terms or in the hope of receiving such interest out of the proceeds of the works as will in the judgment of the subscribers make the investment a profitable one. Such is the condition of the Mersey Docks, which are in truth property used [131] and occupied for the profit and benefit of a number of persons; and it is the same thing, in substance, as if the docks had been demised by the subscribers to the trustees, on the terms of maintaining the docks and paying to the subscribers a rent equivalent to the interest on their bonds. I am, therefore, clearly of the same opinion with the majority of the learned judges, that the Mersey Docks and Harbour Board are occupiers of the docks and harbour within the true meaning of the word “occupier” in the act of Elizabeth.

2. The answer to the second question put to the learned judges is in effect a mere consequence of the answer to the first question; for, it cannot be pretended that the statute of Elizabeth has been repealed, either expressly or impliedly, by any of the statutes which apply to the Liverpool Docks, or that the liability of the trustees or occupiers which is the result of the true interpretation of the act of Elizabeth, has been discharged or altered by anything contained in the local statutes. On this head, it is unnecessary to say more than that I concur with the observations of the majority as the judges, in their elaborate opinion delivered by Mr. Justice Blackburn.

The result is, that I humbly move your Lordships to reverse the decision of the court of Exchequer Chamber in *Jones v. The Mersey Docks and Harbour Board*, but to affirm their decision in the case of *The Mersey Docks and Harbour Board v. Cameron*.

LORD CRANWORTH. My Lords,—I concur with my noble and learned friend in thinking that judgment ought to be given for the plaintiffs in error.

I have given full attention to the opinions of the learned judges who assisted us at the hearing; and, concurring as I do in that delivered by Mr. Justice Blackburn, on behalf of himself and four of the other [132] five judges, I do not feel it necessary to go into the question at length. That very able opinion seems to me to exhaust the subject. By the statute of Elizabeth, the overseers are directed to raise the money necessary for the relief of impotent poor, by taxation of (inter alios) every occupier of lands in the parish. That the Mersey Docks and Harbour Board are occupiers of land in the parish of Liverpool, cannot be doubted; and so, unless there be something to exempt them, they are rateable. The argument on their behalf has been that, though they are occupiers, their occupation is not a beneficial occupation; and the statute, it was contended, contemplated only such an occupation as is beneficial to the occupier, or to some other person or persons for whose behoof the occupier is occupying. If by “beneficial occupation” is meant an occupation of something valuable,—something in its own nature beneficial to some one,—I think it is fair to consider that that word is impliedly included in the statute. It was not meant to

impose the duty of contributing to the relief of the poor on any one merely because he might be the occupier of a barren rock neither yielding nor capable of yielding any profit from its occupation. But I can discover nothing either in the words or in the spirit of the act exempting from liability the occupier of valuable property merely because the profits of the occupation are not to be enjoyed by him or by any one in whose behoof he is occupying, but are to be devoted to the benefit of the public. In the opinion of the five judges delivered by Mr. Justice Blackburn, that learned judge has traced with great care and accuracy the progress of the decisions on this subject; and I should be merely wasting the time of the House if I were to go over again what has been so well done by him.

The court of Queen's Bench seems to me to have [133] fallen into error in the time of Lord Kenyon, if not in that of Lord Mansfield, in proceedings which unfortunately were incapable of being questioned in a court of error. The decisions so made were followed in similar proceedings in the times of Lord Ellenborough and Lord Tenterden. The doctrine on which they rested was shaken in some cases which occurred when Lord Denman was Chief Justice, and eventually were in substance overruled when Lord Campbell presided in the court of Queen's Bench. In these circumstances, thinking, as I do, that there is nothing in the statute of Elizabeth expressly or impliedly exempting from rateability the occupiers of valuable property merely because the benefit of the occupation is to go to the public, I think your Lordship ought not to consider yourselves fettered by any decisions of the courts below; but that you ought to lay down the law as you think it ought to have been laid down if this question had arisen before any of those decisions had been pronounced. I therefore concur in the motion of my noble and learned friend on the woolsack.

To avoid all misconception, I wish to add that there are certain cases to which the observations I have made do not apply. The Crown, not being named in it, is not bound by the act. It follows, therefore, that the lands or houses occupied by the Crown, or by servants of the Crown for the purposes of the Crown, are not liable to be rated: and I conceive that it is from confusion between property occupied for public purposes and property occupied by the Crown or servants of the Crown, that the mistake has arisen. This principle exempts from rates not only Royal palaces, but also the offices of the Secretaries of State, the Horse Guards, the Post office, and many similar buildings. On the same ground, police-courts, county-courts, and even county buildings occupied as lodg[ings] [134] at the assizes for the judges, have been held exempt. These decisions, however, have all gone on the ground, more or less sound, that these might all be treated as buildings occupied by servants of the Crown, and for the Crown; extending in some instances the shield of the Crown to what might fitly be described as the public government of the country. In none of these cases was exemption conceded on the ground contended for in the present case: and I cannot but think that the error which has crept into the decisions has arisen from confusing cases like the present with those in which the interests of the Crown or its servants were concerned.

LORD CHELMSFORD. My Lords,—It is impossible, in entering upon the consideration of these appeals, to refrain from an expression of surprise that there should arise at the present day, after more than two centuries and a half from the time of the passing of the act, a necessity for interpreting any part of the 43 Eliz. c. 2; and yet, from the numerous cases which have been cited in argument at your Lordships' Bar, it is evident that the exact meaning of the important word "occupier," in the rating clause of that act (s. 1) must be regarded as hitherto an unsettled question.

Those who have to establish the liability of these docks to be rated to the poor-rate, have, with respect to the Liverpool Docks, to contend against the authority of a decision probably in 1808, but certainly in 1827, upon the very subject in question. In one of the appeals, the latter decision was expressly founded upon a case determined more than thirty years before, and which has since been regarded and acted upon as an unquestionable authority. Under these circumstances, the counsel for the parishes might expect that [135] the House would feel the same reluctance to disturb these decisions as was expressed by Tindal, C. J., in *Croase v. Sault*, 2 Q. B. 885, 2 Gale & D. 812, and would say with him,—"It would be extremely inconvenient, and indeed mischievous, to overrule a class of cases which have been much discussed, and sanctioned by many eminent judges, and which are now constantly acted upon,

because we might not feel perfectly satisfied with the reasons assigned for their decision. If we could permit ourselves to disregard these authorities on that account, we might feel disposed on the same ground to reject others which have put a construction on the 43 Eliz. c. 2, which we were by no means sure it ought to bear if we were now for the first time called upon to explain the meaning of its language." Crompton, J., in delivering the judgment of the court of Exchequer Chamber in the case of *The Mersey Docks and Harbour Board v. Jones*, said, with reference to the former decisions,—"I think that neither a court of co-ordinate jurisdiction nor a court of error ought to interfere in such a case. If there is any hardship, it must be left to the legislature." By this last observation, the learned judge seems to have considered that this House, as well as the courts of original and appellate jurisdiction, ought to yield implicitly to the authority of long-established decisions. But the same reasons for acquiescence do not apply to the different tribunals. The courts rightly abstain from overruling cases which have been long established, because, if they did so, they would only disturb, without finally settling, the law. But, when an appeal from any judgment is made to this House, however it may be warranted by previous authorities, the very object of the appeal being to bring those authorities under review for final determination, the House cannot, upon the principle of *stare decisis*, refuse to [136] examine the foundation upon which they rest. It would, in my opinion, have been the duty of your Lordships, even if the current of the decisions had been uniform, but, as various cases have been decided, which, with all the endeavours to reconcile them, must still be regarded as conflicting and contradictory, it is absolutely necessary to determine what for the future shall be considered to be the law with reference to rating docks and works of a similar character.

The 43 Eliz. c. 2, s. 1, enacts that the overseers are to raise by taxation of every inhabitant, &c., and of every occupier of lands, houses, &c., in such competent sums as they shall think fit, according to the ability of the parish, the requisite fund for the purposes of the act. The words "to rate in such sum as they shall think fit," do not, as Tindal, C. J., says, in *Marshall v. Pitman*, 9 Bingh. 601, 2 M. & Scott, 745, mean that they are to have a power to rate arbitrarily, but to rate the occupier according to the value of his occupation, the inhabitant according to his visible personal property; or, as was said in *Early's case*, 2 Bulstr. 354, the overseers are to make their taxations and assessments well and truly, and in equal manner, according to the visible estates, real and personal, of the inhabitants within their town. *Prima facie*, therefore, a liability to the rate would seem to attach upon every occupation from which a benefit is derived; and no occupier can claim an exemption unless he can find it in the act itself, or it arises from some principle of law applicable to all cases.

With respect to exemption arising from the act itself, it is obvious that, as the occupier is to be assessed according to his ability, if he derives no benefit of any kind from his occupation, he has no ability in respect of it, and consequently cannot be rateable. The other exemption, which does not arise [137] from the act itself, but which is founded on a general principle of law, applies only to the Crown, which, not being named in the act, is not bound by it. I am unable to find any ground of exemption from liability to the poor-rate either in the act itself or in any principle of law apart from the act, except the two which I have mentioned; and there is nothing to indicate the intention of the legislature that lands and houses occupied for what in some of the cases is rather loosely called "public purposes," as contradistinguished from private benefit, should not be liable to the rate. Lord Campbell, in the case of *The Birkenhead Docks Trustees v. The Overseers of Birkenhead*, 2 Ellis & B. 157, says that the exemption on the ground of public purposes takes its origin from the marginal note of the report of the case of *The King v. The Commissioners of Salter's Load Sluice*, 4 T. R. 730. If this is so, it is a remarkable fact that, in following that case as an authority, the courts should have been misled by confining their attention to the marginal abstract, which conveys a very imperfect if not inaccurate idea of the grounds of the decision. The term "public purposes" is only employed by Lord Kenyon in *The Salter's Load Sluice case* incidentally. The reason given for the judgment is, the absence of beneficial occupation. His Lordship says; "The commissioners have a bare naked trust not coupled with any interest." And, again, the ground upon which the court proceeded in *The King v. St. Luke's Hospital*, 2 Burr. 1053, was that there was no occupier, by which he must have meant no beneficial occupier; for,

he adds: "The commissioners were mere trustees to superintend the execution of the act, without any personal advantage." This reference to the case of *St. Luke's Hospital* shews that the leading idea in the mind of the court was the want of a beneficial occupier, although there does not seem to be [138] a very close analogy between the case of a hospital supported by voluntary subscriptions from which no person who could be regarded as an occupier derived any pecuniary benefit, and the receipt of tolls as a compulsory incident to the occupation by the commissioners of the Salter's Load Sluice.

The first case in which an occupation for public purposes was expressly stated as the ground of exemption from liability to poor-rate is *The King v. The Trustees of the River Weaver Navigation*, 7 B. & C. 70, n., 9 D. & R. 788, to which the principle of the decision in the case of *The King v. The Inhabitants of Liverpool*, 7 B. & C. 61, 9 D. & R. 780, —the judgment brought into question by this appeal,—was held to be applicable. In the case of *The King v. The Inhabitants of Liverpool*, Lord Tenterden proceeded upon the ground of there being no beneficial occupation, with respect to which he said the case of *The King v. The Commissioners of Salter's Load Sluice*, 4 T. R. 730, was decisive. But in *The King v. The Trustees of the Weaver Navigation*, 7 B. & C. 70, n., 9 D. & R. 788, Bayley, J., said: "The surplus tolls remaining over and above the expenses of supporting the navigation, were to be applied to the repairing and maintaining of bridges and highways. Those were public purposes: and, as no part of the moneys received could be applied to private purposes, these moneys were not rateable in the hands of the trustees." In *The Queen v. The Mayor, &c., of Liverpool*, 9 Ad. & E. 435, 1 P. & D. 334, the court followed the cases of *The King v. The Inhabitants of Liverpool* and *The King v. The Trustees of the Weaver Navigation*, without expressing any opinion as to the grounds of these decisions, observing "that they felt it to be impossible substantially to distinguish the case before them from those cases, and especially from the latter; and that, if they found the [139] principle settled by decisions already made, they felt it to be their duty to act upon them, and not, upon the apprehension of any inconvenient or unforeseen consequences, to question or weaken their authority." In the case of *The King v. The Inhabitants of Exminster*, 12 Ad. & E. 2, 4 P. & D. 69, the court adhered to the decision in *The Queen v. The Mayor, &c., of Liverpool*, 9 Ad. & E. 435, 1 P. & D. 334, without any further explanation of the grounds of their judgment. But, in a more recent case, *The Queen v. St. George's, Southwark*, 10 Q. B. 864, Lord Denman said: "Whether a person is rated as occupier, holder, or possessor of the premises, or as using them, the occupation, holding, possessing, or using them must be beneficial to the parties so rated. It has been settled by several cases that the possessors or occupiers as trustees of property otherwise rateable, the profits of which they are bound by act of parliament to apply to public or charitable purposes, are not rateable to the poor in respect of such property." Now, although Lord Denman, in *The Queen v. The Mayor, &c., of Liverpool*, 9 Ad. & E. 435, 1 P. & D. 334, seems to hint at some distinction between the cases of *The King v. The Inhabitants of Liverpool*, 7 B. & C. 61, 9 D. & R. 780, and *The King v. The Trustees of the Weaver Navigation*, 7 B. & C. 70, n., 9 D. & R. 788, yet it would appear,—especially from his last-mentioned observations,—that he considered them to rest upon the same foundation, and that the counsel on both sides at your Lordships' Bar were correct in saying that there was no case decided upon the ground of public purposes which was not resolvable into beneficial occupation. But, if this is so, it will be impossible to accept the explanation by which decisions apparently inconsistent with the judgment in *The King v. The Commissioners of Salter's Load Sluice*, 4 T. R. 730, and the cases which followed [140] it, have been attempted to be reconciled with them. To these cases it is necessary now to turn.

The first of them which broke in upon the series of decisions hitherto considered is the case of *The Governors of the Poor of Bristol v. Wait*, 5 Ad. & E. 1, 6 N. & M. 383. In deciding that case as they did, the judges were probably not aware that they were disregarding the authority of previous decisions, as the *Salter's Load Sluice* case and the other cases founded upon it are not noticed either in the argument or in the judgment. But in *The Queen v. The Guardians of Wallingford Union*, 10 Ad. & E. 253, 2 P. & D. 226, where those cases were cited, the court followed the case of *The Governors of the Poor of Bristol v. Wait*, without any attempt to reconcile it with what had been previously decided. In the case of *The Queen v. Badcock*, 6 Q. B. 787, however, Lord Denman, in giving judgment, reviewed the authorities which appeared to

be conflicting; on the one side, the series which followed *The King v. The Inhabitants of Liverpool*, 7 B. & C. 61, 9 D. & R. 780; and on the other, that which commenced with *The Governors of the Poor of Bristol v. Wait*, 5 Ad. & E. 1, 6 N. & M. 383, and observed that, in all the first class, the public, as such, unlimited by the bounds of county, borough, or parish, had substantial and direct interest in the benefit which the application of the funds produced; in the latter, the ratepayers, or at most the inhabitants of certain parishes, were alone concerned in the benefit, direct or indirect. The distinction was afterwards approved of and adopted by Coleridge, J., in the case of *The Queen v. Harrogate*, 15 Q. B. 1012.

The attempt thus to reconcile the discordant decisions will be regarded as having been completely unsuccessful, when it appears that, in the first class, instead of all the cases being instances in which the public at [141] large, unlimited by the bounds of county, borough, or parish, had an interest, there are found the cases of *The King v. The Trustees of the Weaver Navigation*, 7 B. & C. 70, n., 9 D. & R. 788, in which the surplus funds were to be applied for the general purposes of the county of Chester, and of *The Queen v. The Mayor, &c., of Liverpool*, 9 Ad. & E. 435, 1 P. & D. 334, and *The Queen v. The Inhabitants of Exminster*, 12 Ad. & E. 2, 4 P. & D. 69, in which the public beyond the bounds of the borough had no interest in the benefit produced by the application of the funds. And the distinction fails altogether, if the term "public purposes," as distinguished from "private purposes," is to be resolved into the question of beneficial occupation, because it would then appear to be immaterial whether the public purposes which exclude the idea of private benefit were of a local or of a general character.

The desire of the court, however, not to be bound by the former decisions, and yet not to be compelled expressly to overrule them, is exhibited in a very striking manner in the case of *The Queen v. The Harrogate Commissioners*, 15 Q. B. 1012, where it was held that, in order to exempt property from liability to poor-rate on the ground of its occupation for public purposes, the benefit must be exclusively public; and that, if the occupation was in some degree beneficial to the whole public, yielding additional benefit also to a limited district or community, the property was rateable,—as if it could make any difference in point of principle, when the occupation is for public purposes, that one portion of the public derived a greater benefit from the application of the funds produced than the rest.

After these fruitless endeavours to reconcile the decisions, a case arose in which it seemed absolutely necessary to determine whether *The King v. The Inhabitants of Liverpool*, 7 B. & C. 61, 9 D. & R. 780, and the cases which followed it, were to be submitted to as authorities for the future, or were to be set aside and disregarded. In the case of *The Trustees of the Birkenhead Docks v. The Overseers of Birkenhead*, 2 Ellis & B. 148, the question to be decided was, whether the commissioners of the Birkenhead Docks were liable in respect of their occupation to be rated to the poor-rate. It certainly requires some ingenuity to discover any difference between the Birkenhead Docks and the Liverpool Docks, the latter of which had been decided in *The King v. The Inhabitants of Liverpool* not to be rateable. But Lord Campbell held that the cases were distinguishable. He said that the decision in *The King v. The Commissioners of Salter's Load Shute*, 4 T. R. 730, could be rested only on the clause in the local act which directed the tolls to be applied and disposed of for the several uses and purposes of the said act, and to no other use and purpose whatsoever. The question was, whether this amounted to a prohibition to apply the tolls to the payment of the poor-rate. And, adopting this construction, he added: "We think that the decision in *The Liverpool case* can only be supported by similar reasoning." It is clear, however, that the cases in question were not decided on any such ground; and it could have been assumed by Lord Campbell only from his desire to escape from the necessity of submitting to them, by suggesting a distinction, without denying their authority. That distinction was that, in *The Birkenhead case*, the obligation to lower the tolls, which was much relied upon in *The Liverpool case*, was entirely wanting.

It might have been supposed that, the decision of *The Birkenhead case* having proceeded upon this ground, when the subsequent case of *The Tyme Improvement Commissioners v. The Overseers of Chirton*, 1 Ellis & [143] Ellis, 516, was brought before Lord Campbell and the court of Queen's Bench,—in which case the local acts for making a dock expressly required the commissioners, in the event of any surplus remaining after the appropriation of the rates to the purposes of the act, to lower the rates to

the extent of such surplus,—he would have adhered to the distinction, and have held the case to be governed by the authority of *The King v. The Inhabitants of Liverpool*, 7 B. & C. 61, 9 D. & R. 780. But, instead of taking this course, he said, that to hold the docks exempt from rateability, they should have to overrule *The Trustees of the Birkenhead Docks v. The Overseers of Birkenhead*, 2 Ellis & B. 148; and that the only distinction between the cases, was that, in *The Birkenhead case*, the commissioners had power to raise the rates again after having reduced them.

In this unsatisfactory state of the authorities, it is evident that the two classes of decisions which have been subjected to this examination cannot stand together; and that it is necessary for your Lordships to determine which of them is agreeable to law. It must not be overlooked that, in favour of the exemption of the docks from liability to poor-rate, there is the recital in the act of 4 & 5 Viet. c. 48, which strongly indicates the opinion of the legislature that the cases which had held the property of municipal corporations not to be liable to poor-rate, had been rightly decided. But, as Lord Campbell said, in *The Queen v. The Inhabitants of Haughton*, 1 Ellis & B. 501, 516, a mere recital in an act of parliament, either of fact or of law, is not conclusive, and we are at liberty to consider the fact or the law to be different from the statement in the recital. The question, of course, depends upon the true meaning of the word “occupier” in the 43 Eliz. c. 2. The words of the act are as general as possible, “every occupier, according to his ability.” And Lord [144] Denman, in the case of *The Governors of the Poor of Bristol v. Wait*, 5 Ad. & E. 1, 6 N. & M. 383, seems to give a correct description of the effect of those words, when, after adverting to the meaning of the term “beneficial occupation,” he says, without affecting the precision of an exact definition, it would probably be nearer the truth to say that a presumptive liability arising from occupation is to be explained away in each case. It is impossible not to agree with the observations made by his Lordship in *The Queen v. Sterry*, 12 Ad. & E. 84, 92, 4 P. & D. 122, that no one can review the numerous decisions (which cases somewhat like the one then before him had occasioned) without regretting that the court was ever induced to depart from the simple test which the subject-matter of occupation would in every case have afforded. Whether the occupation was in respect of private or public or charitable purposes, it would have been wiser to have disregarded, and, whenever the subject-matter was found productive to any one, to have rated the actual occupant in respect of that produce. I cannot help thinking that the test here suggested was the one intended by the legislature. By the act, the taxation is to be on every occupier “according to the ability of the parish.” The productive occupation of the several occupiers within the parish make up its aggregate ability. If an occupier derives no benefit of any description from his occupation, it forms no part of the general ability of the parish: but, if it is productive (although not profitable), there is nothing in the act which requires the overseers to follow the produce in its subsequent application. The receipt of it constitutes the visible ability of the occupier. As was said by Lord Tenterden, in *The King v. The Inhabitants of St. Giles, York*, 3 B. & Ald. 579, if any profit be made, the application of it when made is immaterial as to the [145] question of rateability. This seems to be the true distinction which ought to have guided the decisions, and not that between private benefit and public purposes, from the adoption of which all the contrariety in the cases on the subject of beneficial occupation has arisen.

It is to be observed that the term “beneficial occupation” is nowhere to be found in the act of Elizabeth: and it must have been used in the different cases as synonymous with ability. In this sense the decisions with regard to St. Luke’s and St. Bartholomew’s hospitals, and to chapels and rectory houses, where no pew-rents are received, are perfectly intelligible. In none of them could any person in the character of occupier be said to derive any benefit from the occupation. But, that the absence of private benefit is no ground of exemption, appears from the cases in which trustees of chapels, who received profit from letting the pews, although they applied it entirely to the purposes of the chapel, were held rateable. And in the recent case of *The Queen v. Sterry*, 12 Ad. & E. 84, 4 P. & D. 122, the trustees of a school purchased from funds raised by charitable subscriptions and bequests, were held rateable in respect of the school, because no child was admitted to the school without an annual payment of 12l., although the average annual expense with respect to each child was 20l.

The case of *The King v. The Commissioners of Salter’s Load Sluice*, 4 T. R. 730, gave

the key-note to all the subsequent decisions which held that the *prima facie* liability of an occupier no longer existed when it was shewn that the profits connected with his occupation were applicable to public purposes. Lord Kenyon, in founding his judgment upon *The King v. St. Luke's Hospital*, 2 Burr. 1053, must have intended to decide that, in the case before him, there was no beneficial occupier, although he did not advert to the distinction [146] that, in the case of *St. Luke's*, there was nothing received by any one by reason of the occupation, while the commissioners of the Salter's Load Sluice were impowered to take tolls for the navigation which was vested in them. The exemption of an occupier whose occupation is applicable to public purposes was thus almost identically introduced; and, having been so, it was accepted without much consideration in the subsequent cases.

At last, some decisions having taken place which were hard to be reconciled with each other, it became necessary to define with some precision the true principle which ought to govern cases of this description. The distinction was then proposed between general and local public purposes. The difficulty, not to say the impossibility, of reconciling the cases by a distinction of this sort has been already shewn. If, as before observed, the ability of the occupier means the personal benefit derived from his occupation, it is as much excluded where the profits of his occupation are applicable to limited public purposes, as where they are to be applied to the benefit of the public at large. I am of opinion that, under the words of the 43 Eliz. c. 2, every occupier of a tenement yielding profit is within the rating clause of the statute, although the tenement be a public work for the general good of the realm, and the profit be directed to be applied exclusively to its maintenance.

Having thus expressed my opinion that the Mersey Docks and Harbour Board are liable to be rated for the Liverpool as well as for the Birkenhead Docks, it is unnecessary to consider the effect of the different acts of parliament by which the trustees were expressly made liable to parochial rates in respect of warehouses to be built, in like manner as the same are or would be payable in respect of warehouses the occupation of [147] which is beneficial. The provisions of these acts certainly appear to indicate the opinion of the legislature, that, without them, the warehouses would have been exempt from liability to poor-rate, as part of the docks enjoying that exemption. But, if this liability existed before, the acts cannot have the effect of taking it away (not by express enactment, but) by mere implication. It is quite true, as Byles, J., has said, that, the act of 20 & 21 Vict. c. clxii. having consolidated the docks at Liverpool and Birkenhead into one estate, and vested the control of them in one public trust, it would be singular if one portion of the property should be rateable and one not rateable, under precisely similar circumstances. This undoubtedly would be the result, if the decisions of the two cases appealed against were to stand. And the remark exhibits in a striking manner the impossibility of reconciling the decisions which, on the one hand, have exempted the Liverpool Docks from liability to poor-rate, and, on the other, have rendered the Birkenhead Docks liable to it.

By reversing the judgment in the case of the Liverpool Docks (*Jones v. The Mersey Docks and Harbour Board*), and by affirming the judgment in that of the Birkenhead Docks (*The Mersey Docks and Harbour Board v. Cameron*), the decisions will at last be brought into uniformity, and the statute 43 Eliz. c. 2, will, in my opinion, receive its proper construction, and have its consistent effect and operation.

LORD KINGSDOWN. My Lords,—I concur with my noble and learned friends in the opinions they have expressed.

Judgment in *The Mersey Docks and Harbour Board v. Cameron* affirmed.

Judgment in *Jones v. The Mersey Docks and Harbour Board* reversed.

[148] [IN THE HOUSE OF LORDS.]

ROBERTS v. BRETT. March 16th, 1865.

[S. C. 11 H. L. C. 337; 11 E. R. 1363 (with note).]

By an indenture of the 15th of May, 1855, the plaintiff covenanted that he would forthwith, at his own expense, procure a suitable vessel, and stow on board a certain telegraphic cable then at Morden's Wharf, and would rig, fit out, &c., the said ship,

and would have her fully equipped at the Nore, ready for sea, on or before the 15th of July then next, and proceed forthwith to Cape T., and there lay down the cable, &c. And the defendant covenanted to pay the plaintiff 5000l. by certain instalments, viz. 1000l. on or before the expiration of *seven days* after the arrival of the vessel alongside Morden's Wharf, 2000l. on or before the expiration of *twenty-one* days after the vessel should have arrived alongside Morden's Wharf, and 2000l. when and so soon as the ship should put to sea from the Nore: "And it was thereby agreed and declared that, for the true performance of the covenants by the plaintiff (and the defendant respectively) thereinbefore contained, &c, the plaintiff (and the defendant) should, *with in ten days from the execution of these presents*, give and execute to the defendant (or the plaintiff), &c., a bond in the penal sum of 5000l.," &c.:—Held, by the House of Lords,—affirming the judgments of the Common Pleas and Exchequer Chamber,—that the giving of the bond by the plaintiff to the defendant was a condition precedent to his right to sue the defendant for a breach of his contract in refusing to allow the plaintiff to stow the cable on board a suitable vessel.

The declaration stated that, by a certain indenture made between the plaintiff of the one part, and the defendant of the other part, and bearing date the 15th of May, 1855, he the plaintiff, for the considerations therein mentioned, for himself, his heirs, executors, and administrators, covenanted with the defendant, his executors, and administrators, in manner following, that is to say, that he the plaintiff should and would *forthwith*, at his own expense, procure the Cornwall frigate, or some other suitable ship or vessel, and should and would (unless prevented by fire, tempest, or the Queen's enemies) stow or cause to be stowed on board the said ship or vessel the submarine telegraphic cable which was 150 miles in length or thereabouts, and was then at Morden's Wharf, East Greenwich, in the county of Kent, and in the said indenture afterwards called for the sake of distinction "The African and Sardinian cable:" and also should and would, at the like expense, unless prevented as aforesaid, rig, complete, fit out, provide, and provision the said ship or vessel with all proper and sufficient masts, rigging, ropes, spars, cables, anchors, ship-chandlery, and other stores and provisions: and also should and would, at the like expense, obtain and provide and pay competent and sufficient officers and crew for the purpose of navigating [149] the said ship or vessel, and workmen and others to assist in laying down the said cable: and also should and would, at the like expense (unless prevented as aforesaid), provide and place on board the said ship or vessel, to the satisfaction of the defendant, his executors and administrators, proper and sufficient breaks and rollers in order that the said cable might be properly paid out: and should and would to the extent of 600l. pay the expense of insuring the said cable to the amount of 60,000l.: and should and would, at the like expense (unless prevented as aforesaid), if so required by the defendant, his executors or administrators, place on board from the said Morden's Wharf any further quantity of submarine telegraphic cable, not exceeding in weight forty tons, which the defendant, his executors and administrators, should require: and should and would (unless prevented as aforesaid), do and perform all the several acts thereafter covenanted to be performed by him the plaintiff, and have the said ship fully equipped in all respects, and ready for sea, at the Nore, on or before the 15th of July then next: and further that he the plaintiff should and would, as soon as the said ship or vessel should be ready for sea at the Nore as aforesaid, unless prevented as aforesaid, cause the same to proceed with the said cable or cables on board, as the case might be, to Cape Tabague, on the northern coast of Africa: and should and would, at such expense as aforesaid (unless prevented as aforesaid), with all convenient dispatch, proceed to pay out and lay down the said African and Sardinian cable from the said Cape Tabague, or as near thereto as might be practicable, to Cape Spartivento, in the island of Sardinia, or as near thereto as might be practicable: and should and would, at his own expense, provide all steam-tugs and other vessels necessary for laying down the said cable as last aforesaid: [150] and also should and would (unless prevented as aforesaid), according to the directions in writing of the defendant, his executors or administrators, either discharge the other cable thereafter mentioned either at Cape Spartivento or Cape Tabague, as the defendant, his executors or administrators, should by writing under his or their hand or hands direct, and, if no such direction should be given, then at the said Cape Tabague: and

should and would with all convenient speed after the said African and Sardinian cable should have been laid down (unless prevented as aforesaid), lay down the said other cable from and to such places and in such direction as the defendant, his executors or administrators, should by writing under his or their hands direct or require, and for such a sum of money as should be agreed upon between the plaintiff and the defendant, his executors or administrators, before the said ship or vessel should sail from the Nore; and should and would, at the like expense, provide all steam-tugs and other vessels necessary for so doing: And it was in and by the said indenture provided always that, if the plaintiff should (unless prevented as aforesaid) make default in having the said ship, with the said cable or cables on board, as the case might be, at the Nore, fully equipped and ready for sea on or before the said 15th of July then next, the defendant, his heirs, executors, or administrators, should be at liberty to retain from any moneys payable by him or them under the covenants for that purpose thereafter contained, as and for liquidated damages in respect of such default, the sum of 200l. per week, and after that rate for any period less than a week during which such default should continue: but the power of the defendant, his executors or administrators, to demand and enforce payment of the said sum by way of liquidated damages, and to deduct and retain [151] the same as aforesaid, should be without prejudice to the right of the defendant, his executors or administrators, to exercise any other powers or remedies which the defendant, his executors or administrators, should possess or be entitled to, either at law or in equity, by virtue of those presents or the bond thereafter referred to for enforcing the completion of the works thereinbefore covenanted to be done, or for indemnifying or compensating himself or themselves for the damage or injury occasioned to him or them by reason of such default: And by the said indenture, for the consideration therein mentioned, the defendant did further, for himself, his heirs, executors and administrators, covenant with the plaintiff, his executors and administrators, in manner following, that is to say, that he the defendant, his heirs, executors, and administrators, should and would, subject to such rights of deduction therefrom as thereinbefore mentioned, pay the plaintiff, his executors and administrators, the sum of 5000l. sterling by the instalments and at the times next thereafter mentioned, that is to say, the sum of 1000l., part thereof, on or before the expiration of *seven days* after the arrival of the said ship or vessel alongside Morden's Wharf aforesaid, the sum of 2000l., further part thereof, on or before the expiration of *twenty-one days* after the said ship should have arrived alongside Morden's Wharf aforesaid, and the sum of 2000l., the remainder thereof, when and so soon as the said ship should put to sea from the Nore, —one half of the said last mentioned sum to be paid in cash, and the other half thereof by the defendant, his executors or administrators, accepting a bill of exchange at three months' date, to be drawn upon him or them by the plaintiff, his executors or administrators: and, further, that he the defendant should and would, on or before the expiration of twenty-one days from the time when [152] the said Sardinian and African cable should have been so laid down as aforesaid, deliver or cause to be delivered to the plaintiff, his executors or administrators, or his or their nominee or nominees, 500 paid-up shares in the Mediterranean Submarine Electric Telegraph Company, of 10l. each: and, further, that he the defendant, his executors or administrators, if he or they should require the plaintiff to lay down the said other cable as aforesaid, should and would pay to the plaintiff, his executors or administrators, the sum which might be so agreed upon as aforesaid for his so doing, on or before the expiration of twenty-one days from the time of the said last-mentioned cable having been so laid down: And it was thereby agreed and declared that, for the true performance of the covenants by the plaintiff thereinbefore contained, and for securing any penalties which he might incur under these presents, the plaintiff and two responsible sureties should, *within ten days from the execution of those presents*, give and execute to the defendant, his executors and administrators, a bond in the penal sum of 5000l., and, for the due performance of the covenants on the part of the defendant thereinbefore contained, the defendant and two responsible sureties should, *within ten days from the execution of those presents*, give and execute to the plaintiff, his executors and administrators, a bond in the penal sum of 5000l.: and it was in and by the said indenture provided always and thereby expressly agreed and declared that the said bonds so to be given as aforesaid should not in any manner prejudice or affect the respective rights or liabilities of the plaintiff, his heirs, executors, and administrators, and of the defendant, his heirs, executors, or administrators, under

or by virtue of these presents: General averment of performance by the plaintiff, and also that he was ready and willing, according to the terms of the said [153] contract, to bring the said ship alongside the said Morden's Wharf for the purposes in the said contract mentioned; but, before the time arrived for doing so according to the terms of the said contract, the defendant refused to perform the said contract on his part, and dispensed with the said vessel being brought alongside the said wharf: Breach, that the defendant did not nor would stow or allow to be stowed on board the said ship the said African and Sardinian cable, and the said other cable, or either of them, or any part thereof, but wholly refused so to do, and therein made default, and wholly and absolutely refused to perform the said contract on his part; and by reason of the premises the plaintiff lost the benefit of the payment and shares that he would otherwise have obtained, and the profits and advantages that would have accrued to him if the contract had been performed by the defendant; and that the defendant caused the said African and Sardinian cable to be stowed on board a certain ship or vessel other than the plaintiff's, and thereby broke his said contract with the plaintiff, and thereby discharged, prevented, and hindered the plaintiff from fully and completely performing the same on his part and behalf: Further breach, that the defendant did not within ten days from the execution of the said indenture, or at any time, give and execute to the plaintiff, nor did he within the said period of ten days, or at any time, procure two responsible persons, or any responsible person or persons, as sureties or surety on his behalf, to give and execute, nor did the defendant and two responsible persons, nor did two responsible persons, or any responsible persons or person, as sureties or surety on behalf of the defendant, then or at any time give or execute to the plaintiff a bond or bonds in the penal sum of 5000*l.* for the due performance by the defendant of the other covenants [154] on his part to be performed in the said indenture contained, as by his said covenant in that behalf he agreed to do; and the defendant therein wholly failed and made default: Special damage.

The defendant pleaded,—first, except as to so much of the declaration as relates to the not giving, executing, or procuring a bond or bonds, that the plaintiff did not at his own expense procure a suitable ship or vessel within the terms and meaning of the said contract in that behalf, and place the same alongside the said Morden's Wharf ready to take on board the said African and Sardinian cable, as alleged,—secondly, except as aforesaid, that the plaintiff did not at his like expense rig, complete, fit out, provide, and provision the said ship or vessel, as alleged—thirdly, except as aforesaid, that the plaintiff was not ready and willing, at his like expense, to obtain and provide and pay such officers and crew for the purpose of navigating the said ship or vessel, and such workmen and others to assist in laying down the said cable, as alleged,—fourthly, except as aforesaid, that the plaintiff did not within ten days from the day of the execution of the said indenture (such ten days expiring before the said 15th of July, 1855, and before the time when the plaintiff placed the said ship so provided by him alongside the said Morden's Wharf), or at any time, give and execute, nor did he within such ten days, or at any time, procure two responsible persons or any responsible person as sureties or surety on his behalf, to give and execute, nor did two responsible persons, nor did any responsible person, as such sureties or surety for the plaintiff, then or at any time give and execute to the defendant, his executors and administrators, a bond or bonds in the penal sum of 5000*l.*, for the due performance by the plaintiff of the other covenants by the plaintiff in the said indenture contained, and for [155] securing any penalties which he the plaintiff might incur under the said indenture, according to the meaning and effect of the said indenture,—fifthly, as to the breach of covenant by the defendant so excepted as aforesaid, payment into court of 1*s.*

Issues were joined on the first, second, third, and fifth pleas. The fourth was demurred to, on the ground that “the matter therein set forth did not amount to a condition precedent to the plaintiff's right to recover.” Upon the argument of the demurrer, the court of Common Pleas gave judgment for the defendant: see 18 C. B. 561. The issues of fact were tried before Cockburn, C. J., at the sittings in London Trinity Term, 1858, when the jury after found for the plaintiff, damages 2300*l.*

Upon error, the court of Exchequer Chamber affirmed the judgment of the court of Common Pleas upon the demurrer (6 C. B. N. S. 611): whereupon the defendant brought a writ of error in parliament.

The case was argued before the House by Bovill, Q. C., Massey Dawson, and Beasley, for the plaintiff; and by Mellish, Q. C., and Horace Lloyd for the defendant.

For the plaintiff it was insisted that the giving of the bond by him within the ten days was not a condition precedent to his right to maintain an action for the breach of the contract on the defendant's part, the stipulation as to the giving of mutual bonds being wholly distinct from and independent of the covenants for the performance of the contract by either party, and going only to a part of the consideration, and one the breach of which might be compensated for by a cross-action; that the first instalment of the 5000l. might in the contemplation of the parties have been payable before the time arrived for the giving of the [156] bonds; and that, the interchange of the bonds being concurrent acts, the defendant should at all events have averred his own readiness and willingness to give his bond, before he could complain of the plaintiff's failure to do so: and the following authorities were cited,—*Boon v. Eyre*, 1 H. Bl. 273, n.; notes to *Portage v. Cole*, 1 Wms. Saund. 320; *Stavers v. Curling*, 3 N. C. 355, 3 Scott, 740; *Campbell v. Jones*, 6 T. R. 570; *Mattock v. Kinglake*, 10 Ad. & E. 50, 2 P. & D. 343; *Clipsham v. Vertue*, 5 Q. B. 265; *Kingdom v. Cox*, 2 C. B. 661; *Dicker v. Jackson*, 6 C. B. 103; *Tarrabochia v. Hickie*, 1 Hurlst. & N. 183.

For the defendant it was insisted that the giving of the bond by the plaintiff was a condition precedent to his right to sue the defendant for the non-performance of any of the covenants in the agreement contained on his part: and *Hochster v. De la Tour*, 2 Ellis & B. 678, and *Avery v. Bowden*, 5 Ellis & B. 714 (in error, 6 Ellis & B. 953), were referred to.

LORD WESTBURY, C. My Lords,—The question on this appeal is, whether, having regard to the true construction and intent of the agreement of the 15th of May, 1855, the stipulation that the appellant should within ten days after the date and execution of the agreement give a bond with sureties for the due performance of the covenants on his part, be a condition the previous fulfilment of which, unless waived or released, was necessary to enable the appellant to maintain any action upon the agreement.

The case has been learnedly argued at the Bar, and many decisions were cited: but the question depends on simple principles. First, having regard to the subject-matter of the agreement between the appellant and the respondent, who was the representative of a com-[157]-pany, it is reasonable to suppose that the company, who were about to intrust the appellant with the laying down of a very valuable telegraphic cable, should require from the appellant security for the due fulfilment of his contract; and the requisition that the bond should be given within ten days, is sufficient to shew that it was intended to precede any material action under the agreement. The appellant, indeed, contends that, if he had brought the "Cornwall" frigate or some other suitable vessel alongside Morden's Wharf on the day of the date of the agreement, or the next day, the sum of 1000l. would have been payable to him by the respondent within a week afterwards; and thus he insists that a material part of the contract might have been performed before the expiration of the ten days allowed for the bond; and that therefore the giving of the bond is not a condition precedent. I cannot think that any such great expedition, if it was possible, was contemplated by the parties, or that the appellant was bound to act with any such rapidity. His engagement is, that he will forthwith, at his own expense, procure the "Cornwall" frigate, or some other suitable ship or vessel, for the purpose required. The word "forthwith" does not necessarily imply that this was to be done by the appellant before he had received the bond of the respondent and his sureties, that is, before the expiration of the ten days. But, if the appellant had brought a suitable vessel alongside the wharf so expeditiously as to have entitled himself to the sum of 1000l., and had received that sum (which must be the hypothesis) within ten days, and before the time for giving his bond expired, I should not have thought that it affected his liability to give the bond within the appointed time.

It is urged that, in the state of things supposed, the 1000l. might not have been paid as stipulated, and so [158] a breach of covenant by the respondent might have occurred within the ten days. If it did, I should still be of opinion that the appellant was bound to give or tender his bond to the respondent within the prescribed time. The right to have the security of two responsible sureties for the performance of the appellant's covenant was a very material thing to the respondent's company, and of

the essence of the contract: and I do not think it could be affected by anything voluntarily done by the appellant within the ten days.

It was also contended by the appellant, that the covenants to give the bonds by the appellant and respondent respectively were mutual covenants dependent the one on the other, and that there was no default by the appellant until that instant of time at which there was a like default by the respondent: and that the respondent, being in a like default, could not defend himself by pleading the default of the appellant. But I fear that this is not the true meaning and effect of the contract. The engagements to give the bonds are not entered into in consideration one of the other: but the fulfilment of his own engagement by each of the parties is a necessary preliminary to his right to recover on the agreement. It is the true intent and object of the agreement that each party should find security within the time prescribed. If this be not done by either party, both may be in effect released from the contract, which may fall to the ground: but neither party can recover for breach of the contracts in the agreement, unless he has performed this precedent obligation.

I therefore move your Lordships that the judgment of the court below be affirmed.

LORD CRANWORTH. My Lords,—I think that the judgment of the House ought to be for the defendant in [159] error. I agree with the opinions of the learned judges that the giving of the bond must have been intended to be a condition precedent to any right of action for breach of any of the covenants contained in the indenture. On any other hypothesis the bond would be useless. No doubt, as there was a covenant by each party with the other to give a bond with sureties within ten days, if default was made in giving a bond, a right of action would accrue for breach of that covenant, but such an action could produce no fruit to the party recovering in it. If brought before breach of any of the other covenants, it could only result in nominal damages. If brought after a breach, no damages could be recovered except such as would have been recoverable in an action founded on the breach itself. It would give no right against any sureties, the obtaining of which right was the sole object of the bond.

It was argued that the circumstance that the bonds were to be given, not immediately, but within ten days, was inconsistent with the hypothesis of a condition precedent. A breach, it was suggested, might occur within the ten days, and so a right of action might accrue before any bond need have been given. This does not appear to me inconsistent with the hypothesis of a condition precedent. Probably the parties knew that practically no breach could occur within the ten days. But, even if that is not so, the party injured by a breach of covenant within ten days, might, by giving his bond, put himself in a condition to sue for the breach: for it would certainly be no answer on the part of the defendant sued for the breach to say that he had not given his bond. Suppose, for instance, the plaintiff had on the day of the date of the indenture moored a proper ship alongside Morden's Wharf, but that, after the expiration of seven [160] days, the defendant had refused to pay him 1000*l.*, the plaintiff, if he had given a proper bond with sureties to the defendant, would then have been in a condition to maintain an action for breach of covenant against the defendant, whether he had or had not given a proper bond to the plaintiff. But it was argued that, even assuming the giving of the bonds to be conditions precedent, still they must be treated as mutual and dependent conditions, and that the defendant, who had given no bond to the plaintiff, could not insist on the want of such a bond from him.

I do not feel the force of this argument. There is nothing in the indenture making it obligatory on either party to apply to the other for his bond. By giving the required bond, the party giving it puts himself in a condition of enforcing, if he should think fit, the performance of the covenants. But if neither party, as was the case here, — gave any bond, neither party could sue for any breach of covenant. This was the opinion of the courts below; and in that view of the case I concur.

LORD CHELMSFORD. My Lords,—I agree with the decision of the court of Exchequer Chamber, affirming the judgment of the court of Common Pleas. The question is whether the fourth plea is an answer to the action, or, in other words, whether the giving of the bond by the plaintiff was a condition precedent to his right to recover damages from the defendant for his non-fulfilment of his part of the agreement.

The only parts of the agreement necessary to be noticed are, —first, the covenants of the plaintiff that he would forthwith, at his own expense, procure the “Cornwall”

frigate, or some other suitable ship or vessel, and should and would stow or cause to be stowed on board the said ship or vessel the submarine telegraphic [161] cable which was 150 miles in length or thereabouts, and was then at Morden's Wharf, East Greenwich, and should do various acts in fitting out and provisioning the ship or vessel and providing efficient officers and crew, and should and would do and perform all the several acts thereafter covenanted to be performed by him the plaintiff, and have the said ship fully equipped in all respects and ready for sea at the Nore on or before the 15th of July then next,—secondly, the covenants of the defendant to pay to the plaintiff 5000l. by the instalments and at the times thereafter mentioned, that is to say, the sum of 1000l. on or before the expiration of seven days after the arrival of the said ship or vessel alongside Morden's Wharf aforesaid, the sum of 2000l. on or before the expiration of twenty-one days after the said ship should have arrived alongside Morden's Wharf aforesaid, and the sum of 2000l., the remainder thereof, when and so soon as the said ship should put to sea from the Nore,—and, lastly, the stipulation for mutual bonds, in these terms: "And it is hereby agreed and declared that, for the true performance of the covenants by the plaintiff hereinbefore contained, and for securing any penalties which he may incur under these presents, the plaintiff and two responsible sureties shall within ten days from the execution of these presents give and execute to the defendant a bond in the penal sum of 5000l.; and for the due performance of the covenants on the part of the defendant hereinbefore contained, the defendant and two responsible sureties shall within ten days from the execution of these presents give and execute to the plaintiff a bond in the penal sum of 5000l."

The learned counsel for the plaintiff argued that the covenant on the part of the plaintiff to give the bond could not be intended to be a condition precedent, [162] because he was forthwith bound to procure the ship or vessel, so that he was to do an act before the ten days had expired within which the bond was to be given; and, also, that the defendant having covenanted to pay the plaintiff 1000l. on or before the expiration of seven days after the arrival of the ship or vessel at Morden's Wharf, and the money being appointed to be paid on a day which might happen before the expiration of the ten days within which the bond was to be given, the giving of the bond could not be a condition precedent, according the first rule upon the subject of dependent and independent covenants laid down in the notes to *Portage v. Cole*, 1 Wms. Saund. 320. They also contended that the case fell within the third rule stated in those notes, as it was a covenant going only to part of the consideration, the breach of which might be paid for in damages.

Those rules are not proposed for the purpose of absolutely determining the dependence or independence of covenants in all cases; but merely as furnishing a guide to the discovery of the intention of the parties. For, as Lord Kenyon said, in *Porter v. Shepherd*, 6 T. R. 668, "conditions are to be construed to be either precedent or subsequent, according to the fair intention of the parties, to be collected from the instrument; and technical words (if there be any to encounter such intention) should give way to that intention."

Now, what may fairly be considered to have been the intention of the parties, upon the whole scope and object of the deed in question? Putting the agreement into a short form, it amounts to this:—The defendant says to the plaintiff,—“In consideration of your doing certain acts, and giving me a bond with sureties to secure the performance of your covenants to do those acts, I will pay you a sum of 5000l., and give you a bond with sureties to secure the payment.” [163] And the plaintiff, on the other hand, covenants to do the acts and to give the bond, in consideration of the performance by the defendant of the covenants on his part to be performed. Upon this short summary of the deed, there could scarcely be a doubt that either party might refuse to perform his part of the agreement until he was secured by the bond of the other.

But the counsel for the plaintiff say that the particular terms of the deed shew that this could not be the intention. In particular, they lay great stress on the word “forthwith” in the plaintiff's covenant to procure the vessel, which they interpreted to mean “immediately”: and they urged this as a proof that the giving the bonds could not be meant to be conditions precedent, because this act of the plaintiff must necessarily have been done before the expiration of the ten days, to the last moment of which the defendant was at liberty to delay the execution of the bond. And they

also insisted upon the clause for payment by the defendant of 1000*l.* before the expiration of seven days after the arrival of the vessel at Morden's Wharf, which might have happened within the ten days, and therefore they argued that the case in both these respects was within the first rule in the notes to *Portage v. Cole*.

It appears to me that too great force was attributed to the word "forthwith" in the agreement, and that all that was meant by it was, that the plaintiff was without delay or loss of time to procure a suitable vessel for receiving the telegraphic cable: and, to quicken his diligence, the defendant covenanted to pay him 1000*l.* within seven days after the arrival of the vessel at Morden's Wharf. Out of regard to his own interests, too, the plaintiff would use all expedition in commencing the performance of the agreement, because, unless he had the vessel, with the cable on [164] board, equipped and ready for sea by the 15th of July, he would have been liable to pay 200*l.* per week for his default. I think the plaintiff could not have been compelled to take a single step, nor to incur the smallest expense towards procuring the vessel, till he was secured by having the defendant's bond; and that, if he chose to proceed without having this security, everything he did was at his own peril. If the defendant wished to obtain the plaintiff's progress within the ten days, he might have executed and delivered his bond, and then he would have performed all that was required of him till the first instalment of the 5000*l.* became due.

It is a strong circumstance indicative of the intention of the parties that the stipulations with respect to the mutual bonds should be conditions precedent, that these stipulations follow all the covenants entered into on both sides, and that they are agreed and declared to be given for the true performance of the covenants therein-before contained. They are obviously intended, therefore, to be mutual securities for the performance of all the covenants by each of the parties respectively. This, I think, takes away all ground for saying that the covenants for giving the bonds go only to part of the consideration, and that a breach of them may be paid for in damages. Though, strictly speaking, they enter into and form part of the consideration on both sides, yet they extend to the whole of the covenants contained in the deed, and are an essential and vital part of the agreement between the parties. Nor is it easy to see how a breach of them could be compensated in damages, or what estimate could be formed of the measure of damages for their non-fulfilment.

I do not think that anything in favour of the plaintiff can be made of the circumstance of the defendant not having given his bond. It appears to me that the [165] mutual default of the parties had the effect of virtually putting an end to the agreement, because neither of them was in a situation to insist upon performance by the other.

A supposed case was put at the Bar, of the plaintiff, after the ten days had expired without his bond having been given, going on to perform his covenants, and afterwards, in an action to recover the amount stipulated to be paid by the defendant, being met by a plea of the non-performance of the condition precedent. I have no difficulty in saying that, in such a case, the party who may avail himself of the non-performance of a condition precedent, but who allows the other side to go on and perform the subsequent stipulations, has waived his right to insist upon the unperformed condition precedent as an answer to the action.

Looking to the whole of the deed, I am satisfied that it was the intention of the parties that each should receive from the other a bond as a security for the performance of the covenants, before either was bound to proceed to perform any of the stipulations contained in the deed.

For these reasons, I think the judgment of the Exchequer Chamber ought to be affirmed.

Judgment affirmed.

[166] [IN THE HOUSE OF LORDS.]

TAPLING v. JONES. March 16th, 1865.

[S. C. 11 H. L. C. 290; 11 E. R. 1344 (with note).]

1. The right to an antient light, since the Prescription Act, 2 & 3 W. 4, c. 71, is a matter *positivi juris*, and no longer rests upon the presumption of a grant: it is a right which becomes after an enjoyment without interruption for twenty years

absolute and indefeasible, and therefore cannot be lost or defeated by a subsequent temporary intermission of enjoyment, not amounting to abandonment; nor is it liable to be affected or prejudiced by any attempt to extend it beyond that which, having been enjoyed uninterruptedly during the required period, is declared by the statute to be not liable to be defeated.—2. The owner of a building does not “exceed the limits of his right” by opening new windows therein, overlooking his neighbour’s land. The only remedy in the power of the adjoining owner is, to build on his own land, and so to shut out the offensive window. But, in doing this, he cannot lawfully obstruct antient lights.—3. A. was possessed of premises which originally consisted of three storeys, with one antient window in each storey. He altered the windows in the two lower storeys, but so as to make them both occupy a portion of the old apertures, retaining the window in the third storey unaltered. He also built two additional storeys, in each of which he opened a new window. After these alterations were completed, B., who was erecting new premises upon the site of buildings which he had pulled down, built up a wall to such a height as to obscure the whole of the lights in A.’s building,—it being impossible (as stated in a special case) for B. to obstruct or block up A.’s upper windows, without also obstructing or blocking up the portion of the windows which occupied the position of the antient windows, or to obstruct them in a manner more convenient (to B.) than by building up the wall as it was built. After B.’s wall was finished, A. caused the altered windows in his building to be restored to their original state, and the new windows in the two upper storeys to be blocked up, and then called upon B. to pull down his wall, and so to restore his (A.’s) premises to their former light and air; and, upon his refusal to do so, brought an action for obstructing and continuing the obstruction of his antient lights:—Held by the House of Lords,—affirming (but on a different ground) the judgment of the courts below, and overruling *Renshaw v. Bean*, 18 Q. B. 112, and *Hutchinsons v. Copestake*, 8 C. B. (N. S.) 102, in error, 9 C. B. (N. S.) 863,—that the obstruction of A.’s antient lights was unlawful.

This was an action for obstructing and keeping obstructed certain lights of the plaintiff on the west side of a warehouse No 107 Wood Street, Cheapside, in the City of London.

The first count of the declaration stated that, at and during all the times therein-after mentioned, the plaintiff (Jones) was and still is lawfully possessed of a messuage and buildings in which there were, and still of right ought to be, divers antient windows through which the light and air ought of right to have entered, and until the committing of the grievances by the defendant (Tapping) as thereafter mentioned did enter, and still of right ought to enter into the said messuage and buildings, for the more wholesome use and occupation of the same: yet that the defendant wrongfully and injuriously built, erected, and raised, [167] and kept and continued a certain wall, building, and erections near to the said windows; by reasons of which premises the light and air were and are hindered and prevented from coming and entering into or through the said windows into the said messuage and buildings of the plaintiff, and the said messuage and buildings had been and were thereby rendered dark, close, and unwholesome, and less fit and commodious for habitation, and greatly deteriorated in value.

The second count stated that the plaintiff was possessed of a messuage with certain windows through which at the times of the committing of the grievances thereafter mentioned the light and air of right ought to have entered without the obstruction thereafter mentioned; and that the defendant wrongfully kept and continued opposite and near to the said windows a certain wall upon a close in the occupation of the defendant, in such manner as to obstruct and impede the entrance of light and air which of right ought to have, and but for the said acts of the defendant would have, entered the said windows, although before the said obstruction complained of the defendant was requested by the plaintiff to remove the said obstruction; and that all things had been done and happened and existed, and all times had elapsed, to entitle the plaintiff to have the said obstruction removed by the defendant: whereby the said messuage of the plaintiff was and is deteriorated in value, and became less useful for occupation. Claim, 1000l.

The defendant pleaded,—first, not guilty,—secondly, to the first count, that the plaintiff was not nor is lawfully possessed of a messuage and buildings in which there

were and still of right ought to be antient windows or an antient window through which the light and air ought of right to have entered and did enter, and still of right ought to enter, in manner and form [168] as in that count alleged,—thirdly, to the last count, that the plaintiff was not possessed of a messuage with windows or a window through which the light and air of right ought at either of the said several times when, &c., to have entered without the obstruction therein mentioned, in manner as in that count alleged. Issue thereon.

The cause came on for trial before Cockburn, C. J., at the sittings in London after Hilary Term, 1859, when a verdict was by consent found for the plaintiff for the damages claimed in the declaration, subject to the following case:—

The plaintiff (Jones) is a wholesale dealer in silk, and carries on his business at Nos. 107, 108, and 109, Wood Street, Cheapside. The plaintiff had for several years prior to 1857 carried on his business at Nos. 108 and 109 Wood Street; but he acquired possession of the premises No. 107 Wood Street, for the first time, in 1857, having become the purchaser of them in the month of July in that year. Up to the time when the plaintiff acquired possession of the said premises No. 107, they were used and occupied as a public-house, known by the sign of the Magpie and Pewter Platter, and were and are in a line with and next adjoining to Nos. 108 and 109. The said premises Nos. 107, 108, and 109 abut on the rear or west side thereof upon the east side of certain premises fronting in Gresham Street West, and therein numbered 1 to 8,—hereinafter called “the Gresham Street property.” In the year 1852, the plaintiff pulled down his premises Nos. 108 and 109 Wood Street, which were then old and dilapidated houses, and erected on their site new warehouses. In doing so he altered the position and enlarged the dimensions of the windows previously existing, increased the height of the building, and set back the rear or back line of those warehouses.

A model numbered 1) was admitted to represent, [169] for the purposes of this case, the position of the windows and lights in the west side of Nos. 108 and 109 Wood Street, in the year 1852, immediately before they were rebuilt as aforesaid, as well as the windows and lights of the Magpie and Pewter Platter, No. 107: and it was admitted, for the purposes of this case, that the windows shewn by such model in the Magpie and Pewter Platter were antient windows, and that the owners or occupiers for the time being of the Magpie and Pewter Platter were then and up to July, 1857, entitled to such access of light and air as shewn by the model. The model also shewed the position and height of the east wall of the Gresham Street property at the same period.

The defendant (Tapling), who is a carpet-warehouseman, on the 23rd of July, 1852, was tenant of the said Gresham Street property, and now holds the same under a lease for a term of eighty-one years, since granted to him. In or about the year 1856, the defendant pulled down the buildings then standing on the Gresham Street property, in order to erect thereon a warehouse.

The plaintiff (Jones), in July, 1857 immediately after his purchase of No. 107 Wood Street, made alterations in it, by lowering the first and second floors so as to make them correspond with his adjoining new warehouses Nos. 108 and 109, and by lowering two of the windows in such floors so as to suit the new position of the floors. One of the lowered windows was about one foot longer than before, and the other about the same size as the old one; and both occupied parts of the old apertures. The small window on the first floor shewn in the model No. 1 was blocked up. The plaintiff also built two additional storeys to No. 107, in the first of which, viz. the fourth storey of the premises, he put out a new window; and in the fifth or attic storey he placed a window extend [170]—ing across the entire width of the building. *These new windows and lights were so situated that it was impossible for the owner of the Gresham Street property to obstruct or block them without also obstructing or blocking to an equal or greater extent that portion of the said windows and lights which occupied the site of the said antient windows in No. 107.*

The said alterations and additions in No. 107 Wood Street, so far as the windows are concerned, were completed by the plaintiff in the month of August, 1857.

After the alterations and additions to No. 107 Wood Street had been so completed, the defendant proceeded to erect his said intended warehouse and premises on the Gresham Street property, and built up the eastern wall thereof to such a height as to obstruct the whole of the windows and lights of No. 107 Wood Street.

A model numbered 2 shewed the state of the windows and lights in the plaintiff's premises Nos. 107, 108, and 109 Wood Street, at the time the defendant erected his said new warehouse and premises: and it also shewed the eastern boundary-wall of the defendant's said new warehouse and premises. Part of this wall is the eastern side of the defendant's warehouse, and the residue a blank wall of the same height, in continuation of the warehouse wall. The new upper windows of No. 107 Wood Street could not have been obstructed in a more convenient manner than by building up a wall of sufficient height on the defendant's premises.

On the 8th of September, 1857, the following letter was written by the attorneys for the defendant to the attorney for the plaintiff, and received by the latter:—

“8th September, 1857.

“*Tapling v. Jones.*

“Dear Sir,—Our client claims the right to erect his [171] warehouse in any manner he thinks proper, without being interfered with by Mr. Jones. You are aware that, when Jones erected his present warehouse, in 1854, he, much to the annoyance of our client, put out the present windows in the back-front of Nos. 108 and 109 Wood Street. At the time he did so, he was cautioned that, when Mr. Tapling re-built his warehouse (which he then contemplated doing), these windows would be all built against. We cannot conceive upon what ground Mr. Jones claims to interfere with our client's building. He has no rights or easements of any kind over Mr. Tapling's property.”

“*Jones v. Tapling (first suit).*

“As this motion was ordered to stand over until November, we do not care to be troubled about the matter now, but will furnish you with all the information you are entitled to, in due course. You appear to think that Mr. Jones may do anything he likes, but that Mr. Tapling must not do anything without his (Mr. Jones's) permission. Mr. Jones has during the present month put out additional windows overlooking our client's property. This he had no right to do; and we object to their remaining, and shall assuredly take measures to block them up.

“LANGLEY & GIBBON.”

Whilst the said eastern wall of the defendant's warehouse and premises was in course of erection, the following correspondence passed between Mr. Lloyd, the attorney for the plaintiff, and Messrs. Langley & Gibbon, the attorneys for the defendant:—

“16th October, 1857.

“Messrs. Langley & Gibbon. Dear Sirs,—My client, Mr. Jones, finds that, notwithstanding the various proceedings taken by him to prevent Mr. Tapling from building against him and darkening his lights, he still continues to do so, and is raising a wall in Flying [172] Horse Court to a much greater height than the former ones complained of: and he desires me to require of him to desist from his conduct, and to inform you, as solicitors to Mr. Tapling, that he will consider the same as an aggravation of the injury he is sustaining, and will apply to the court to restrain him in his proceedings, and to be ordered to pull down such wall, so as not to further darken his premises.

“HERBERT LLOYD.”

“17th October, 1857.

“H. Lloyd, Esq. Dear Sir,—On the 8th of September last, we wrote you in effect as follows, viz. that our client Mr. Tapling claimed the right to erect his warehouse in any manner he thought proper, without being interfered with by Mr. Jones. You are aware that, when Mr. Jones erected his present warehouse, in 1854, he, much to the annoyance of our client, put out the present windows in the back-front of Nos. 108 and 109 Wood Street. At this time, he (Mr. Jones) was cautioned that, when our client re-built his warehouse (which he then contemplated), these windows would be all built against. We deny that your client has any rights or easements whatever over Mr. Tapling's property. With respect to No. 107 Wood Street, we gave you notice at the time Mr. Jones was making the alterations and additions, about a month or six weeks since that Mr. Tapling objected to the additional windows overlooking his property, and that Mr. Jones had no right to put them out. We further informed you that our client would take measures to block them out.

“LANGLEY & GIBBON.”

"19th October, 1857.

"Jones v. Taping.

"Messrs. Langley & Gibbon. Dear Sirs,—I need not enter into a discussion with you upon the conduct of the defendant, which now accounts for the placing [173] the tarpaulings in the way they were. My client has all along warned the defendant against impeding his lights: and the defendant will have to answer for the same. I now require him to discontinue the wall he has erected at the back of my client's premises, and to pull down the same; and inform you that I have laid papers before counsel to prepare a bill in Chancery for an injunction to restrain him from further pursuing the injurious course he has been pursuing, and that the defendant may be ordered to pull down the same. With regard to the caution you allude to, my client denies it in the strongest terms, and states that Mr. Taping never made any objection till it was (if any) made through you, and has stated that he would not have acted as he has, but for Mr. Jones refusing to let him his house No. 110 Wood Street.

"HERBERT LLOYD."

"26th October, 1857.

"Taping and Jones.

"H. Lloyd, Esq. Dear Sir,—As we have already informed you, our client claims the right to erect his warehouse in any manner he pleases, without being interfered with by Mr. Jones. We deny that your client has any ground to object to what Mr. Taping has done or is now doing. We are prepared to meet any proceedings you may institute.

"LANGLEY & GIBBON."

The said eastern wall of the defendant's new warehouse and premises was completed by the end of October, 1857. Shortly before the 4th of February, 1858, the plaintiff, by the advice of counsel, caused the altered windows in No. 107 Wood Street, to be restored to their original state, and the new windows in the upper storey to be blocked up. The mode in which such new windows have been blocked up has been, by filling up the spaces with brick-work.

[174] On the 4th of February, 1858, the attorney for the plaintiff addressed to the defendant a letter of which the following is a copy:—

"Mr. Taping. Sir,—Mr. Hugh Jones has consulted me upon the wall you have (contrary to repeated warnings) thought proper to erect at the back of his premises in Wood Street, whereby the admission of light and air to his house No. 107 in that street has been almost entirely obstructed. In order that there may not exist even the shadow of a pretence for your continuing such obstruction, Mr. Jones has blocked up and abandoned any lights respecting which there might exist the slightest question: and he now requires you to pull down such wall and restore his said premises to their former light and air: and I have to inform you that, unless you comply with this requisition within ten days from this date, an action and other proceedings will be commenced against you to abate such obstruction, and to recover from you damages for the same, and for any continuance thereof.

"HERBERT LLOYD."

To this letter the defendant's attorneys on the 6th of February, 1858, sent the following reply:—

"Taping and Jones.

"H. Lloyd, Esq. Dear Sir,—Mr. Taping has handed us your letter. In reply thereto, we have to state that we advised our client he had an undoubted right to build the wall complained of in your letter of the 4th instant, and this right was incident to his property, and wholly independent of Mr. Jones's position, or his interest in No. 107 Wood Street. But, assuming such not to be the case, it is quite clear the wrongful acts done by Mr. Jones compelled our client to build the walls as he has done. In erecting them he has expended a large sum of money, and has planned his warehouse accordingly. All the works connected with [175] our client's building adjoining Mr. Jones's premises, including fire proof floors, iron columns, girders, and other expensive works, except only internal finishing, have been completed some weeks past. We would, therefore, with the utmost confidence submit that anything your client may do will not entitle him to call upon ours to alter in any way the present

walls or structure: and we have to inform you that we shall resist any proceedings you may institute. In forming an opinion upon this matter, you will bear in mind that it was the wrongful acts of Mr. Jones which compelled our client to take the course he has done, thereby entailing additional expense in the erection of his warehouse.

“LANGLEY & GIBBON.”

The defendant refused to remove the said eastern wall of his warehouse and premises or any part of it; and it still remains as represented in Model No. 2.

The court was to be at liberty to draw any inference of fact from the above statement which they should think a jury might properly have drawn (a).

The question for the opinion of the court was, whether the plaintiff was entitled to recover in respect of the obstruction of light and air complained of. If they should be of opinion that he was so entitled, then the verdict for the plaintiff was to stand, and the damages to be reduced to 40s. If they should think that the plaintiff was not so entitled, then the verdict entered for the plaintiff was to be set aside, and a verdict entered for the defendant.

The case was argued in the court of Common Pleas, before Erle, C. J., Williams, J., Byles, J., and Keating, J.: and, after time taken to consider, the learned judges, [176] in Michaelmas Term, 1861, delivered their judgments seriatim. The whole court were of opinion, upon the authority of *Renshaw v. Bean*, 18 Q. B. 112, and *Hutchinson v. Copestake*, 8 C. B. (N. S.) 102, in error, 9 C. B. (N. S.) 863, that, inasmuch as the defendant could not obstruct the new lights, as he had a right to do, without at the same time obstructing the antient lights, he was justified in the obstruction of all: but they differed in opinion as to the defendant's right to continue the obstruction after the plaintiff had by closing his new and usurped lights restored his premises to their original state. —Erle, C. J., and Williams, J., being of opinion that the continuance of the obstruction was not justifiable, and Byles, J., and Keating, J., that it was. In order, however, to enable the parties to take the opinion of a court of error, Keating, J., withdrew his opinion, and judgment was given for the plaintiff: see 11 C. B. (N. S.) 283.

The case was argued before the Exchequer Chamber at the sittings after Trinity Term, 1862, before Pollock, C. B., Wightman, J., Crompton, J., Martin, B., Bramwell, B., and Blackburn, J. There was again a difference of opinion: but the judgment of the Common Pleas was affirmed: see 12 C. B. (N. S.) 826.

The defendant below then brought error to the House of Lords.

The Attorney-General and Archibald, for the plaintiff in error, contended that the act of the plaintiff below in altering and enlarging his antient lights justified the defendant below in erecting the obstruction, as the only way in which he could protect himself against the usurpation of a new easement; and that, the erection of the obstruction being lawful at the time, its continuance after the plaintiff below had restored his windows to their original condition, was not unlawful. [177] The following authorities were referred to. Upon the first point,—*Luttrell's case*, 4 Co. Rep. 86 a.; *Cherrington v. Abney*, 2 Vern. 646; *Dougal v. Wilson*, 2 Wms. Saund. 175; *Martin v. Goble*, 1 Campb. 322; *Chandler v. Thompson*, 3 Campb. 80; *Cottrell v. Griffiths*, 4 Esp. N. P. C. 69; *Daniel v. North*, 11 East, 372; *Baker v. Richardson*, 4 B. & Ald. 579; *Bright v. Walker*, 1 C. M. & R. 211; *Thomas v. Thomas*, 2 C. M. & R. 34, 5 Tyrwh. 804; *Garritt v. Sharp*, 3 Ad. & E. 325, 4 Nev. & M. 834; *Blanchard v. Bridges*, 4 Ad. & E. 176, 179, 5 Nev. & M. 567; *Renshaw v. Bean*, 18 Q. B. 112; *Wilson v. Townend*, 1 Dr. & Sm. 324; *Cooper v. Hubbuck*, 30 Beavan, 160, 7 Jurist, N. S. 457; *Hutchinson v. Copestake*, 8 C. B. (N. S.) 102, in error, 9 C. B. (N. S.) 863; *Weatherley v. Ross*, 1 Hem. & Mil. 349; Com. Dig. *Action upon the Case for Nuisance* (C.); *Gate on Easements*, 3rd edit. 497. Upon the second point,—*Moore v. Rawson*, 3 B. & C. 332, 5 D. & R. 234; *Liggins v. Inge*, 7 Bingh. 682, 5 M. & P. 712; *Stokoe v. Singers*, 8 Ellis & B. 31; *Gale on Easements*, 3rd edit. 483, 484, 500.

Sir Hugh Cairns, Q. C., and Cleasby, Q. C., for the defendant in error, were not called upon.

LORD WESTBURY, C. By the 3rd section of the statute 2 & 3 W. 4, c. 71, intituled “An Act for shortening the time of prescription in certain cases,” it is enacted that,

(a) As to the meaning of this reservation, see the observations of Blackburn, J., Channell, B., and Bramwell, B., in *Bullen v. Sharp*, Law Rep. 1 C. P. 116, 120, 122.

“when the access and use of light to and for any dwelling-house, workshop, or other building, shall have been actually enjoyed therewith for the full period of twenty years without interruption, the right thereto shall be deemed absolute and indefeasible, any local usage or custom to the contrary notwithstanding, unless it shall appear that the same was enjoyed by [178] some consent or agreement expressly made or given for that purpose by deed or writing.”

Upon this section it is material to observe, with reference to the present appeal, that the right to what is called an antient light now depends upon positive enactment. It is matter juris positivi, and does not require, and therefore ought not to be rested on, any presumption of grant or fiction of a licence having been obtained from the adjoining proprietor. Written consent or agreement may be used for the purpose of accounting for the enjoyment of the servitude, and thereby preventing the title which would otherwise arise from uninterrupted user or possession during the requisite period. This observation is material, because I think it will be found that error in some decided cases has arisen from the fact of the courts treating the right as originating in a presumed grant or licence.

It must be observed that, after an enjoyment of an access of light for twenty years without interruption, the right is declared by the statute to be absolute and indefeasible; and it would seem, therefore, that it cannot be lost or defeated by a subsequent temporary intermission of enjoyment, not amounting to abandonment. Moreover, this absolute and indefeasible right which is the creation of the statute is not subjected to any condition or qualification: nor is it made liable to be affected or prejudiced by any attempt to extend the access or use of light beyond that which, having been enjoyed uninterruptedly during the required period, is declared to be not liable to be defeated.

Before dealing with the present appeal, it may be useful to point out some expressions which are found in the decided cases, and which seem to have a tendency to mislead. One of these expressions is the phrase “right to obstruct.” If my adjoining neighbour builds upon his land, and opens numerous windows [179] which look over my garden or my pleasure-grounds, I do not acquire from this act of my neighbour any new or other right than I before possessed. I have simply the same right of building or raising any erection I please on my own land, unless that right has been by some antecedent matter either lost or impaired; and I gain no new or enlarged right by the act of my neighbour.

Again, there is a other form of words which is often found in the cases on this subject, viz. the phrase “invasion of privacy, by opening windows.” That is not treated by the law as a wrong for which any remedy is given. If A. is the owner of beautiful gardens and pleasure grounds, and B. is the owner of an adjoining piece of land, B. may build on it a manufactory with a hundred windows overlooking the pleasure-grounds, and A. has neither more nor less than the right which he previously had, of erecting on his land a building of such height and extent as will shut out the windows of the newly-erected manufactory.

If, in lieu of the words “the access and use of light to and for any dwelling-house,” in the 3rd section of the statute, there be read, as there well may be, “any window of any dwelling-house,” the enactment (omitting immaterial words) will run thus,—“When any window of a dwelling-house shall have been actually enjoyed therewith for the full period of twenty years without interruption, the right to such window shall be deemed absolute and indefeasible.”

Suppose, then, that the owner of a dwelling-house with such a window, that is, with an absolute and indefeasible right to a certain access of light, opens two other windows, one on each side of the old window, does the indefeasible right become thereby defeasible? By opening the new windows he does no injury or wrong in the eye of the law to his neighbour, who is [180] at liberty to build up against them, so far as he possesses the right of so building on his land: but it must be remembered that he possesses no right of building so as to obstruct the antient window; for to that extent his right of building was gone by the indefeasible right which the statute has conferred.

Believing this to be the sound principle, I cannot accept the reasoning on which the decisions in *Renshaw v. Bean*, 18 Q. B. 112, and *Hutchinson v. Copstock*, 8 C. B. (N. S.) 102 (in error, 9 C. B. N. S. 863), were founded. The facts in those two cases were not exactly the same as in the present; for, in neither was any antient window preserved unaltered: but the old windows had been enlarged, and new ones added,

in which state of things it was held that, inasmuch as it was not possible for the adjoining proprietor to obstruct the new windows, and the excess beyond the antient lights, without at the same time obstructing the original apertures, the owner of the house with those windows must be considered as having lost his right to the antient light; at all events until he restored his house to its original condition.

According to these cases, the law must be stated thus:—If the owner of a dwelling-house with antient lights open new windows in such a position as that the new windows cannot be conveniently obstructed by an adjoining proprietor without obstructing the old, he (the adjoining proprietor) is entitled so to do, at all events so long as the new windows remain. Upon examining the judgments, it will be seen that the opening of the new windows is treated as a wrongful act by the owner of the antient lights, which occasions the loss of the old right he possessed: and the court asks whether he can complain of the natural consequence of his own act. I think two erroneous assumptions are involved in or underlie this reasoning,—first, that the [181] act of opening the new windows was a wrongful one,—and, secondly, that such wrongful act is sufficient in law to deprive the party of his right under the statute. But, as I have already observed, the opening of the new windows is in law an innocent act: and no innocent act can destroy the existing right of the one party, or give any enlarged right to the other, viz. the adjoining proprietor.

In the present case, an antient window in the plaintiff's house has been preserved and remained unaltered during all the alterations of the building; and the access of light to that window is now obstructed by the appellant's wall. A majority of the court below has held that the obstruction was justified whilst the new windows which the plaintiff some time since opened remained, but was not justifiable when those new windows were closed, and the house, so far as regards the access of light, was restored to its original state. But, on the plain and simple principles I have stated, my opinion is that the appellant's wall, so far as it obstructed the access of light to the respondent's antient unaltered window, was an illegal obstruction from the beginning; and I have great difficulty in acceding to the reasoning, that this permanent building of the plaintiff in error was a legal act when begun and completed, but has subsequently become illegal through a change of purpose on the part of the defendant in error. On such a principle, the person who opens new lights might allow them to remain until his neighbour, acting legally according to these judgments, has at great expense erected a dwelling-house, and then, by abandoning and closing the new lights, might require his neighbour's house to be pulled down.

I think the judgment ought to be affirmed, but not on the ground or for the reasons given by the majority of the judges in the courts below. I therefore move [182] your Lordships that the judgment of the court below be affirmed.

LORD CRANWORTH. My Lords,—The question raised by the special case is, whether the plaintiff in error was justified in erecting opposite and near to the house of the defendant in error a building which prevented the access of light and air through antient windows through which light and air had been accustomed to pass to the house in question without interruption.

Previously to the erection by the plaintiff in error of the buildings complained of, the defendant in error made extensive alterations in his house, and in so doing opened new and enlarged old windows: and it was not disputed that the plaintiff in error was justified in obstructing the new and the enlargements of the old windows. He effected this obstruction by erecting a permanent building on his own land, so near to the house of the defendant in error as to obstruct *the whole* of his lights, the old as well as the new. The special case finds as a fact that it was impossible for him to obstruct or block the new windows without at the same time obstructing or blocking that portion of the windows and lights which occupied the site of the antient windows: and his counsel argued, on the authority of *Renshaw v. Bean*, 18 Q. B. 112, that, in these circumstances, he had a right to erect the building in question.

After the building had been so erected, the defendant in error caused the altered windows to be restored to their original state: and he also filled up with brickwork the spaces occupied by the new windows: and, having done this, he called upon the plaintiff in error to remove the building which thus blocked up the antient and only the antient windows. This ap-[183]plication was not complied with, and thereupon the defendant in error brought his action in the court of Common Pleas against the plaintiff in error for obstructing his antient lights.

At the trial a verdict was found for the plaintiff in error, subject to a special case, which was afterwards argued before the court of Common Pleas: and that court being equally divided in opinion, the junior judge, following the usual practice, withdrew his opinion, and judgment was then given for the plaintiff, the now defendant in error, according to the opinions of what was thus made the majority of the court: see *Jones v. Tapping*, 11 C. B. (N. S.) 283. The case then went by writ of error to the Exchequer Chamber, where the judgment below was affirmed, four of the six learned judges who heard the case concurring in opinion with the court of Common Pleas in favour of the defendant in error, and two dissenting: see *Tapping v. Jones*, 12 C. B. (N. S.) 826. The case was then brought by writ of error to this House, and the plaintiff in error was heard at the Bar. We did not call upon the defendant in error to support his case, being of opinion that the plaintiff in error had laid no ground for disturbing the judgment below; though our opinion was not founded on the same ground on which the judges below seem to have proceeded.

The case raised two questions,—first, whether the plaintiff in error was justified in erecting the building whereby the access of light and air to the house of the defendant in error was obstructed,—secondly, if he was, then whether he was bound to remove it after the windows of the defendant's house had been restored to their antient condition.

Having arrived at the conclusion that the plaintiff in error had no right to erect the building complained of, the second question does not arise: and I will [184] therefore proceed to state shortly the grounds on which my opinion rests.

The right to enjoy light through a window looking on a neighbour's land, on whatever foundation it might have rested previously to the passing of the 2 & 3 W. 4, c. 71, depends now on the provisions of that statute. The 3rd section enacts "that, when the access and use of light to and for any dwelling-house, workshop, or other building, shall have been actually enjoyed therewith for the full period of twenty years without interruption, the right thereto shall be deemed absolute and indefeasible, any local usage or custom to the contrary notwithstanding, unless it shall appear that the same was enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing."

The special case finds that the windows of the house of the defendant in error, previously to the alteration made by him in 1857, were antient windows: by which we must understand windows through which he had enjoyed access of light and air, without interruption, for twenty years. His right, therefore, to that light was by the express provision of the statute, *absolute and indefeasible*. It is not disputed that, when the plaintiff in error erected his wall, he obstructed the light to which the defendant in error was entitled, and so prevented him from enjoying what the statute declares was his absolute and indefeasible right.

The plaintiff in error, in justification of the course he took, relies on the fact that, before he raised his wall, and so caused the obstruction complained of, the defendant in error had made material alterations in his house, enlarging the old windows and adding new ones. There was nothing to make it unlawful for the plaintiff in error to obstruct the access of light to these [185] new windows, and to so much of the altered old windows as did not occupy the old site through which light had formally passed; and, as it was impossible to do this without at the same time obstructing the light which had previously passed through the old windows,—so, at least, we must take the fact to be,—the plaintiff in error contends that he had a right to obstruct the whole.

I am unable to comprehend the principle on which such a claim can rest. Where a person has wrongfully obstructed another in the enjoyment of an easement, as, for instance, by building a wall across a path over which there is a right of way, public or private, any person so unlawfully obstructed may remove the obstruction: and, if any damage thereby arises to him who wrongfully set it up, he has no right to complain. His own wrongful act justified what would otherwise have been a trespass. But this depends entirely on the circumstance that the act of erecting the wall was a wrongful act, whereas the opening of a window is not an unlawful act. Every man may open any number of windows looking over his neighbour's land: and, on the other hand, the neighbour may, by building on his own land within twenty years after the opening of the windows, obstruct the light which would otherwise reach them.

Some confusion seems to have arisen from speaking of the right of the neighbour in such a case as a right to obstruct the new lights. His right is, a right to use his own land by building on it as he thinks most to his interest: and if, by so doing, he obstructs the access of light to the new windows, he is doing that which affords no ground of complaint. He has a right to build: and, if he thereby obstructs the new lights, he is not committing a wrong. But, what ground is there for contending that, because his building so as [186] to obstruct a new light would afford no ground of complaint, therefore, if he cannot so build without committing a trespass, he may commit a trespass? I can discover no principle to warrant any such inference.

I will put this case:—Suppose the owner in fee-simple of close A. were to build a house at the edge of close A., with windows overlooking close B., held by a friend as tenant for life, who, from feelings of kindness, would not object to the opening of the windows of the new house. At the end of twenty years, he would, according to the 3rd and 7th sections (a) of the act, have acquired an absolute and indefeasible right to the access of light across close B. It surely cannot be contended that the remainder-man, because he could not otherwise prevent the owner of the house from acquiring this right, might, before the expiration of twenty years come on the land of the tenant for life and there erect a building to obstruct the light of the new windows! And yet the argument of the plaintiff in error must go this length; for, there is no difference in principle between a trespass on the soil and any other trespass.

In the case now under discussion, the new windows were opened by the same person who had a right to the access of light through the old windows: but this might have been otherwise. Suppose the owner of a [187] first floor not to be the owner of the second floor, and that the owner of that floor should open a window which the owner of the adjoining land could not obstruct without at the same time obstructing the antient light on the first floor. No one, I suppose, would agree that in such a case the owner of the land overlooked could obstruct the antient light. And yet I can see no difference in principle between the two cases. It may be said that, in the case I have just put, the owner of the antient light was in no default, and could not be affected by the act of a stranger. But neither is he in any default when he opens a new window himself. He does what he lawfully may do: and, if the act done is lawful, I do not understand how the consequences can be different when it is the act of a stranger. If, after the owner of the second floor had opened a new window, and within twenty years, the owner of the first floor had purchased the second floor, would the continuance by him of the new window authorize the neighbour in obstructing the old light, if he could not otherwise obstruct the new one? This will hardly be contended. So, again, suppose the owner of the first floor to have demised the second floor to a tenant, and that he, without the licence of his landlord, opens the new window. This might entitle the landlord to complain of his tenant as having been guilty of waste: but it can hardly be contended that it would justify the neighbour in obstructing the antient light enjoyed by the landlord. So, again, if the landlord had given his permission to the tenant to open the windows, I cannot see any difference which this would make: the tenant would, *quoad hoc*, be unimpeachable of waste; but it would be lawful to the landlord to give such a permission, which could not in any respect affect the relative rights of the landlord and his neighbour.

[188] Suppose the owner of a house has a right of way to the door of his house, over his neighbour's land,—a case put by Blackburn, J., in his judgment (12 C. B., N. S. 845),—the argument of the plaintiff in error would go to shew that, if the owner of the house should put a pane of glass in his door, his right of way would or might be at an end; for it would be lawful for the neighbour to obstruct it if he could not otherwise obstruct the light.

(a) The 7th section provides “that the time during which any person otherwise capable of resisting any claim to any of the matters before mentioned shall have been or shall be an infant, idiot, non compos mentis, feme covert, or tenant-for-life, or during which any action or suit shall have been pending, and which shall have been diligently prosecuted until abated by the death of any party or parties thereto, shall be excluded in the computation of the periods hereinbefore mentioned, except only in cases where the right or claim is hereby declared to be absolute and indefeasible.”

I will not, however, multiply illustrations. The plain principle seems to me to be that no one can interfere with the absolute and indefeasible right of another, unless where such interference is made necessary by the wrongful act of the party possessing the right.

I do not attempt to disguise from myself that, unless the facts of this case can be distinguished from those in *Renshaw v. Bean*, 18 Q. B. 112, the conclusion at which I have arrived is directly at variance with the decision of the court of Queen's Bench in that case. But I own I think that the facts there were substantially the same as those now before us; and the court decided there that the obstruction of the antient light was in such a case justifiable. Lord Campbell, in delivering the judgment of the court in that case, stated that the court did not proceed on the ground that the plaintiff whose antient lights were obstructed, had lost the right which he had previously enjoyed of having light and air through such portions of the new windows as had formed portions of the antient windows. But his lordship added: "If by the alterations which the plaintiff made he exceeded the limits of that right, and so put himself into such a position that the excess could not be obstructed by the defendant without at the same time obstructing the former right of the plaintiff, he has only himself to blame."

[189] The observations I have already made sufficiently indicate the grounds on which I cannot assent to this reasoning: and, unless that reasoning be sound, the judgment cannot be supported.

The case of *Renshaw v. Bean*, 18 Q. B. 112, was followed in that of *Hutchinson v. Capostasio*, not only in the court of Common Pleas (8 C. B. N. S. 102), where the decision of the court of Queen's Bench was considered to be binding, but also in the Exchequer Chamber (9 C. B. N. S. 863), though some of the judges seem to have proceeded on the special facts of that case. It is, however, the duty of this House, as the ultimate court of appeal, to lay down the law on what are considered to be correct principles. And, though we should be slow to decide contrary to the decisions of the courts of Westminster Hall, where they have been long received and acted on, even if we see cause to question the grounds on which they were supposed to rest, yet no such consideration ought to restrain us from correcting what we deem to have been an erroneous decision pronounced only thirteen years ago: more especially when we have, as in this case, the opinions of two very learned judges expressing their decided dissent from it, and when we think we can discover in the judgments of the Chief Justice of the Common Pleas and of Mr. Justice Williams, great doubts, to put it no higher, of the soundness of the decision which we are overruling.

My clear opinion is that the judgment below ought to be affirmed.

LORD CHELMSFORD. My Lords,—I agree with the judgment of the court of Exchequer Chamber, but on different grounds from those on which it proceeded.

The only parts of the special case which are necessary to be noticed are, that, in making the alterations [190] in his house, which originally consisted of three storeys, with one window in each storey, the defendant in error altered the windows in the two lower storeys, but so as to make them both occupy part of the old apertures, and retained the window in the third storey unaltered, and built two additional storeys, in each of which he opened a new window: that, after these alterations were completed, the plaintiff in error, who had previously made preparations for erecting a warehouse on the site of some old buildings which he had pulled down, built up a wall to such a height as to obscure the whole of the lights in the building of the defendant in error, it being impossible (as the special case states) for the plaintiff in error to obstruct or block up the upper windows without obstructing or blocking up the portion of the windows or lights which occupied the site of the antient windows. The special case also states that the new upper windows could not have been obstructed in a more convenient manner (by which I understand, more convenient for the plaintiff in error), than by building up a wall of sufficient height on his premises. After the wall of the plaintiff in error was finished, the defendant in error caused the altered windows in his building to be restored to their original state, and the new windows in the upper storeys to be blocked up, and then called upon the plaintiff in error to pull down his wall and restore to the premises of the defendant in error their former light and air. The plaintiff in error refused to comply with this demand, and thereupon this action was brought.

Upon this state of facts, two questions have been raised, —first, whether the

plaintiff in error can justify the obstruction of the antient lights in the house of the defendant in error, on the ground that it was otherwise impossible for him to obstruct the new lights, --secondly, supposing him to have this right, [191] whether it continued after the necessity for its exercise ceased, by the discontinuance of the new lights.

The first question brings directly into review before this House the decision of the court of Queen's Bench in *Henshaw v. Bean*, 18 Q. B. 112, which in its circumstances (as stated by Lord Campbell in his judgment) closely resembles the present case. The court there held that, the plaintiff having by the alterations which he made exceeded the limits of his former right, and put himself into such a position that the excess could not be obstructed by the defendant in the exercise of his lawful rights on his own land, without at the same time obstructing the former right of the plaintiff, he (the plaintiff) had only himself to blame for the existence of such a state of things, and must be considered to lose the former right which he had, at all events until he should, by himself doing away with the excess, and restoring his windows to their former state, throw upon the defendant the necessity for so arranging his buildings as not to interfere with the admitted right.

In this statement of the grounds of decision, the word "right" does not appear to have been used with appropriate precision and accuracy. It is not correct to say that the plaintiff, by putting new windows into his house, or altering the dimensions of the old ones, "exceeded the limits of his right;" because, the owner of a house has a right at all times (apart, of course, from any agreement to the contrary), to open as many windows in his own house as he pleases. By the exercise of this right, he may materially interfere with the comfort and enjoyment of his neighbour: but of this species of injury the law takes no cognizance: it leaves every one to his self-defence against an annoyance of this description; and the only remedy in the power of the adjoining owner is to build on his own land, and [192] so to shut out the offensive windows. But, as it would be hard upon the owner of a house to which the free access of light and air had been permitted for a long period, to continue for ever indebted to the forbearance of his neighbour for its enjoyment, the courts of law, upon the principle of quieting possession, formerly held that, where there had been an uninterrupted use of lights for twenty years, it was to be presumed that there was some grant of them by the neighbouring owner, or, in other words, that he had by some agreement restricted himself in the otherwise lawful enjoyment of his own land. The Prescription Act, 2 & 3 W. 4, c. 71, turned this presumption into an absolute right, founded upon user on one side and acquiescence on the other.

It was argued on behalf of the plaintiff in error that, under this act, the right to the enjoyment of lights was still made to rest on the footing of a grant. I do not see what benefit his case would derive from the establishment of this position: but it appears to me to be contrary to the express words of the statute. The 3rd section enacts that, "when the access and use of light to and for any dwelling-house, workshop, or other building, shall have been actually enjoyed therewith for the full period of twenty years without interruption, the right thereto shall be deemed absolute and indefeasible, any local usage or custom to the contrary notwithstanding, *unless* it shall appear that the same was enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing."

By the Prescription Act then, after twenty years' user of lights, the owner of them acquires an absolute and indefeasible right, which so far restricts the adjoining owner in the use of his own property that he can do nothing upon his premises which may have the [193] effect of obstructing them. The right thus acquired must necessarily be confined to the exact dimensions of the opening through which the access of light and air has been permitted. As to everything beyond, the parties possess exactly the same relative rights which they had before. The owner of the privileged window does nothing unlawful if he enlarges it, or if he makes a new window in a different situation. The adjoining owner is at liberty to build upon his own ground so as to obstruct the addition to the old window, or to shut out the new one; but he does [not] regain his former right of obstructing the old window, which he had lost by acquiescence; nor does the owner of the old window lose his former absolute and indefeasible right to it, which he had gained by length of user. The right continues uninterruptedly until some unequivocal act of intentional abandonment is done by the person who has acquired it, which will remit the adjoining owner to the unrestricted use of his own premises.

It will, of course, be a question in each case whether the circumstances satisfactorily establish an intention to abandon altogether the future enjoyment and exercise of the right. If such an intention is clearly manifested, the adjoining owner may build as he pleases upon his own land: and, should the owner of the previously existing window restore the former state of things, he could not compel the removal of any building which had been placed upon the ground during the interval; for a right once abandoned, is abandoned for ever. But the counsel for the plaintiff in error carried their argument far beyond this point. The part of the case which is the most difficult for them to encounter is that which relates to the unaltered window in the third floor. As to this, they contended that the alteration of the windows below and the addition of the windows above so changed the character of [194] the previously-acquired right to light and air as entirely to destroy it. But it is not easy to comprehend how this effect can be produced by acts wholly unconnected with an antient window which the owner has carefully retained in its original state: and the learned counsel did not seem to expect much success from their argument in its application to the unaltered window: but directed it with more plausibility to the alterations of the windows in the lower floors. As to these, they contended that the owner of antient windows is bound to keep himself within their original dimensions: and that, if he changes or enlarges them in any way, although he retains the old openings in whole or in part, he must either be taken to have relinquished his right or to have lost it. But, upon what principle can it be said that a person by endeavouring to extend a right must be held to have abandoned it, when, so far from manifesting any such intention, he evinces his determination to retain it, and to acquire something beyond it? If under such circumstances abandonment of the right cannot be assumed, as little can it be said that it is a cause of forfeiture.

It must always be borne in mind that it is no unlawful act for the owner of a house to open a new window or to enlarge an antient window, although in the latter case some difficulty may be thrown upon an adjoining owner to distinguish the old part from the new, and so to ascertain which part he has a right to obstruct, and which is privileged from his obstruction. The alterations may be of such a nature (as in the present case) as to make it impossible for him to prevent the further restriction of his liberty to build on his own premises without at the same time interfering with the right previously acquired against him. Yet it would be a very strange extension of the law of for-[195]feiture, to hold that the owner of an antient window, doing nothing but what he may lawfully do, loses his existing right because it stands in the way of the means of interfering with an act against which the owner of the adjoining land would otherwise have been able, and would have been entitled, to defend his property. Even supposing what was done by the defendant in error amounted to an unlawful incroachment, the question put by Mr Justice Alderson in *Thomas v. Thomas*, 2 C. M. & R. 39, appears to be unanswerable:—"How does the plaintiff, by claiming more than he lawfully may, destroy his title to that which he lawfully may claim?" But the court of Queen's Bench, in the case of *Renshaw v. Bean*, 18 Q. B. 112, held that, because the respondent, in the exercise of his lawful rights on his own land could not obstruct (what was there called) "the excess of the plaintiff's former right, without obstructing that former right, he had only himself to blame for the existence of such a state of things, and must be considered to lose the former right which he had." This doctrine appears to me to be founded neither upon principle nor upon authority. It amounts to this: The plaintiff, having acquired an absolute right to antient windows against the defendant, does an act which it was lawful for him to do, subject to the right of the defendant to render it useless: but, because he has contrived his measures so as to prevent the defendant from hindering the attempt to obtain a new right without destroying, or at least suspending, the exercise of the old, therefore the old right may be lawfully interrupted, if, indeed, it is not altogether lost.

It may be said (and this was urged in argument at the Bar), that, unless such is the law, a person who has an antient window may acquire a right to any number of additional windows by so contriving their [196] position as to place them completely under the protection of the antient window, and thus effectually prevent the adjoining owner's interference with them. Undoubtedly, this is a very possible case: and yet there does not appear to be anything unreasonable or unjust in denying, even under such circumstances, a power over the antient lights, which did not previously

exist. For, consider the case upon the presumption of a grant, as it stood before the Prescription Act, 2 & 3 W. 4, c. 71. The rights of the parties would of course be taken to be regulated by such grant; and it would have been contrary to principle to permit the grantor to derogate from his own grant, merely because he could not otherwise prevent an act which might prejudicially affect him, but which the grantee was not prohibited from doing by law. And precisely the same consequences seem to follow from the right being now acquired by user and acquiescence. While the user is ripening into a right, the adjoining owner has the power completely in his own hands. If he has no objection to the particular window, but is desirous of preventing any enlargement or alteration of it, or any new windows being opened, he may inform his neighbour of his determination to build up against the window unless he will enter into an agreement not to enlarge or alter it, nor to open any new one without his permission. The adjoining owner can, therefore, always protect himself by a little vigilance; and, if he allows rights to be acquired under shelter of which he is prevented from using his land for the purpose of defence against the acts of his neighbour, he must blame his own want of foresight and precaution, and not the law, which will not permit an antient right to be invaded upon any such assumed ground of necessity. I am therefore of opinion that the case of *Renshaw v. Bean*, 18 Q. B. 112, cannot be supported, and that the [197] plaintiff in error cannot justify the erection of his wall, and the consequent obstruction of the antient lights in the building of the defendant in error.

The determination of the first question in favour of the defendant in error renders it unnecessary to consider whether the defendant in error had a right to insist upon the removal of the wall of the plaintiff in error after he had restored his windows to their original state. In the view which I have taken, it is impossible for me to deal with the second question in the way in which it has been treated in the court of Common Pleas and in the Exchequer Chamber. If I had been of opinion that the acts of the defendant in error conferred upon the plaintiff in error the power of interfering, for however short a time, with the right of the defendant in error, I should have been compelled, as a consequence, to hold that the obstruction could not be rendered temporary by any subsequent act of the defendant in error, because a right once lost can never be revived. But it is unnecessary to dwell upon this point, because, after the decision of this case, the question can never again be raised.

The judgment of the Exchequer Chamber ought to be affirmed.

Judgment affirmed.

[198] [IN THE HOUSE OF LORDS.]

GARDINER, BART., v. JELLCOE. March 14th, 1865.

[S. C. 11 H. L. C. 323; 11 E. R. 1357 (with note).]

A. by his will devised an estate called the Clerk Hill estate to his first son, James, for life, remainder to his first and other sons in tail male, with like remainders to his (the testator's) second and third sons, Robert and John, for life, and their sons in tail male; remainder to the sons of James in tail general, with like remainders to the sons of Robert and John; remainder to the daughters of James in tail male, with like remainders to the daughters of Robert and John; remainder to the daughters of James in tail general, with like remainders to the daughters of Robert and John; remainder to the testator's eldest daughter Elizabeth, for life, with remainder to her sons in tail male; remainder to the testator's second and third daughters and their sons in tail male; remainder to the testator's own right heirs.—By a shifting clause,—reciting that by the will of Sir W. Gardiner certain estates were limited in trust for the testator's brother J. W. for life, with remainder to his first and other sons in tail male, with remainder to himself (the testator) for life, with remainder to his first and other sons in tail male, with divers remainders over in favour of his (Sir W. Gardiner's) issue; and that it was his will and mind that the Clerk Hill estate should not be enjoyed, so long as he might legally thereby prevent it, consistent with the limitations theretofore mentioned in other respects, and before the ultimate remainder or reversion thereinbefore directed to be limited should take place and come into possession by any one of his sons or daughters, or their issue, after such son or daughter or such their issue should come into possession of the said Gardiner

estate,—directed that, as often as the Gardiner estate should come into the possession of any of his said sons or daughters, or any of their issue, the person next in remainder according to the limitations thereinbefore mentioned to the Clerk Hill estate after the person or persons who should so come to the possession of the Gardiner estate, should be entitled to and come to the possession of the Clerk Hill estate for the estate and interest thereinbefore mentioned and directed to be limited to him or her respectively, and so from time to time as often as that the event then in his (the testator's) contemplation might happen, *in such manner as if the person or persons so becoming possessed of the Gardiner estate had died or was then dead without issue*: and that the uses for which the Clerk Hill estate was thereinbefore directed to be conveyed should accordingly cease, determine, and shift from time to time, so as the said two estates might never as long as he (the testator) might legally prevent the same consistent with the limitations thereinbefore mentioned in other respects, and before the ultimate remainder or reversion thereinbefore directed to be limited thereof should take place and come into actual possession, be holden or enjoyed in possession by any one of his sons or daughters, or their issue, together and at the same time. —By a codicil to his will, the testator, after reciting that, by the death of his late brother J. W. without issue, he had become entitled for life to the Gardiner estate, under the will of Sir W. Gardiner, with remainder to his first and other sons in tail, with divers remainders over in favour of his issue, by which event the Gardiner estate would upon his (the testator's) death descend and come to his eldest son James,—revoked and annulled the limitation in his will mentioned of the Clerk Hill estate in favour of his said son James: it being still his will and intention that the Clerk Hill estate should not be held or enjoyed by any one of his sons or daughters or their issue together with the Gardiner estate.—At the death of the testator, in 1805, his eldest son (James) entered into possession of the Gardiner estate, and in 1807 he suffered a recovery, declaring the uses thereof to himself in fee. —The second son of the testator (Robert) by his guardians (he being then an infant), entered into possession of the Clerk Hill estate: and, soon after he attained his majority, he filed a bill in Chancery praying that it might be declared that he was entitled to an immediate estate for life in the Clerk Hill estate, with remainder to his first and other sons in tail male: and, in July, 1814, under a decree of the then Master of the Rolls, a conveyance was made accordingly to Robert for life, and to his first and other sons successively in tail male, and, in default of such issue, to the uses declared by the testator's will. —Robert remained in possession of the Clerk Hill estate down to the time of his death in 1841; and, on the death (without issue) of the other two sons of the testator, his (the testator's) eldest daughter (the now defendant) entered into possession of the Clerk Hill estate under the limitations contained in the will of her father:—Held, by the House of Lords, —affirming the judgments of the Common Pleas and Exchequer Chamber, —that the word “issue” meant only those who would take under the limitations anterior to the devise to “the person next in remainder,” and excluding them alone from taking under those limitations: and, consequently, that the effect of the shifting clause was simply to accelerate the next remainder, but not to carry over the estate in a different class of remainder-men.

This was an action of ejectment brought to recover the possession of certain lands in the county of Lancaster, called “The Clerk Hill estate,” which the [199] plaintiff claimed to be entitled to under the will of his grandfather, Sir James Whalley Smythe Gardiner, Bart., deceased.

The cause was tried before Mellor, J., at the Liverpool Spring Assizes, 1862, when it appeared that the Clerk Hill estate was held in fee-simple until his death by Sir James Whalley Smythe Gardiner, Bart., No. 1 (hereinafter called “Sir James Gardiner, the testator”) who up to the 19th of November, 1797, when he came into possession of the Gardiner estate (hereinafter mentioned) was known as “James Whalley, of Clerk Hill.”

Sir James Gardiner, the testator, was twice married,—first, on the 28th of October, 1784, to Elizabeth Assheton, who died on the 8th of September, 1785,—secondly, to Jane Master, on the 3rd of December, 1789. This latter survived the testator. By the first marriage he had issue only one son, James Whalley, who afterwards became Sir James Whalley Smythe Gardiner, Bart. (hereinafter called “Sir James Gardiner

No. 2"). By his second marriage, Sir James Gardiner, the testator, had four sons, viz. Robert Whalley, John Master Whalley, William Whalley, and Thomas Whalley, and several daughters, of whom the now defendant, Elizabeth Jane, the widow of Samuel Jellicoe, born on the 29th January, 1792, was the eldest.

Sir William Gardiner, Bart., of Roche Court, in the county of Southampton,—the cousin of Sir James Gardiner, the testator,—by his will, dated the 20th of January, 1778, devised to trustees certain property hereinafter called "the Gardiner estate," in trust for John Whalley (afterwards Sir John Whalley Gardiner), for life, remainder to his first son and his heirs male; [200] remainder to the second and other sons successively in tail male,—subject to a proviso for cesser in the event of John Whalley or any of his sons succeeding to certain estates under the will of the testator's cousin Bernard Brocas; remainder to James Whalley, for life; remainder to trustees to preserve; remainder to his first son and his heirs male, and so of the second and other sons; remainder to T. W. Whalley, with like remainders to his sons and their heirs male; remainder to the first and other daughters of John Whalley and their heirs male, successively; remainder to the first and other daughters of James Whalley and their heirs male successively; with like remainders to the first and other daughters of T. W. Whalley and their heirs male, in succession. The will also contained a power of leasing, and other provisions not now material.

Sir William Gardiner died in 1779, without having revoked or altered his will: and, upon his death, Sir John Whalley Smythe Gardiner, Bart., entered into possession of the Gardiner estate, and continued in possession until his death, which took place on the 19th of November, 1797, without having had any issue, leaving his brother and heir-at-law, James Whalley (herein called Sir James Gardiner, the testator), him surviving.

James Whalley, of Clerk Hill (afterwards Sir James Whalley Smythe Gardiner, Bart.), by his will, dated the 2nd of July, 1796, devised "the Clerk Hill estate" to trustees, to the use of his eldest son, James Whalley, for life, remainder to trustees to preserve; remainder to his first and other sons in tail male, remainder to his second son, Robert, for life, remainder to his first and other sons in tail male; remainder to his (the testator's) third son, John Master Whalley, in tail male; remainder to other sons of the testator successively in tail male; remainder to the testator's grandsons in tail general; remainder to the daughters of James, Robert, and John Master, successively, in tail male; remainder to the daughters in tail general; remainder to the testator's other sons in tail general; remainder to the testator's eldest daughter, for life; remainder to her first and other sons in tail male; remainder to the testator's second daughter for life, and to her sons in tail male; remainder to the testator's third daughter for life, and to her sons in tail male; remainder to the daughters' sons in tail general; remainder to the daughters of the testator's daughters successively in tail male and tail general; remainder to the testator's right heirs.

The will contained the following shifting-clause:—"But, whereas, in and by the last will and testament of Sir William Gardiner, late of Roche Court, in the county of Southampton, Bart., deceased, bearing date on or about the 20th of January, 1778, certain manors or reputed manors, messuages, lands, tenements, &c., therein mentioned, are limited and settled to or in trust for my said brother Sir John Whalley Smythe Gardiner, Bart. (therein called John Whalley, Esq.), for life, with remainder to his first and other sons in tail male, with remainder, in default of such issue, or upon any other sooner determination of the said trusts by the said will now in recital limited and appointed for the benefit of the said Sir John Whalley Smythe Gardiner (therein called John Whalley), for life, and his sons in tail male, which should first happen, to the use of me the said James Whalley, for life, with remainder to my first and other sons in tail male, with divers remainders over, in favour of my issue; and, it being my will and mind that my said estates, tenements, and hereditaments hereinbefore given and devised to the said trustees and their heirs in trust as [202] aforesaid, and directed to be so settled and conveyed as aforesaid, shall not be held or enjoyed, so long as I may legally hereby prevent them consistent with the limitations hereinbefore mentioned in other respects, and before the ultimate remainder or reversion hereinbefore directed to be limited shall take place and come into actual possession by any one of my sons or daughters, or his, her, or their issue, after such son or daughter, or such his, her, or their issue shall come into the possession of the said estates, tenements, and hereditaments so as aforesaid limited and devised by the said recited

last will of the said Sir William Gardiner, deceased : but, as often as such the estates, lands, tenements, and hereditaments so as aforesaid limited and devised by the said recited last will of the said Sir William Gardiner, deceased, shall come to the possession of any of my said sons or daughters, or any of their issue, that then the person next in remainder according to the limitations hereinbefore mentioned and directed to be made to my said estates, lands, tenements, and hereditaments, after the person or persons who shall so come to the possession of the lands, tenements, hereditaments, estates, and premises so as aforesaid limited and devised by the said last will of the said Sir William Gardiner, shall be entitled to and come to the possession of my said estates, lands, tenements, and hereditaments, for the estate and interest hereinbefore mentioned and directed to be limited to him or her respectively, and so from time to time as often as this the event now in my contemplation may happen, *in such manner and as if the person or persons so becoming possessed of the said estates, lands, tenements, and hereditaments so as aforesaid limited and devised by the said recited will of the said Sir William Gardiner, deceased, had died or was then dead without issue* : and the uses for which my said estates, lands, [203] tenements, and hereditaments are hereinbefore directed to be conveyed shall accordingly cease, determine, and shift from time to time, so as that the said two several estates, the one formerly belonging to the said Sir William Gardiner, deceased, and the other now belonging to me, may never, so long as I may legally prevent the same consistent with the limitations hereinbefore mentioned in other respects, and before the ultimate remainder or reversion hereinbefore directed to be limited thereof shall take place and come into actual possession, be holden or enjoyed in possession by any of my sons or daughters, or his, her, or their issue, together and at the same time, but, on the contrary, in manner and form herein above mentioned : and such clauses, provisoes, and declarations shall be inserted in such settlement of my said estates, lands, tenements, hereditaments, and premises hereinbefore directed to be made, as shall be proper and necessary to effectuate my will and intention in these the respects hereinbefore mentioned."

The testator Sir James Whalley Smythe Gardiner, on the death of his brother, succeeded to the baronetcy, and entered into possession of the Gardiner estate, amongst other property : and by a codicil to his will, dated the 7th of February, 1799, he declared as follows : "Whereas, by the death of my late brother, Sir John Whalley Smythe Gardiner Bart., without issue, I am become entitled for life to certain estates, hereditaments, and premises mentioned in the last will and testament of Sir William Gardiner, Bart., deceased, under and by virtue of the same will, with remainder to my first and other sons in tail male, with divers remainders over in favour of my issue, by which event the said estates, hereditaments, and premises will upon my death descend and go to my eldest son, James Whalley,—I do therefore, consistently with my will, [204] revoke and annul the limitation therein mentioned of my estates, lands, tenements, and hereditaments in favour of my said son James Whalley : it being still my will and intention that my said estates, lands, tenements, and hereditaments in my said will mentioned shall not be held or enjoyed by any one of my sons or daughters, or his, her, or their issue, together with the said estates, tenements, and hereditaments, so as aforesaid limited by the will of the said Sir William Gardiner, deceased, as more fully and particularly expressed in the clause or proviso in my said will contained," &c.

Upon the death of Sir James Gardiner the testator, his eldest son, Sir James Gardiner No. 2, entered into the possession of the Gardiner estate, as tenant in tail.

In the year 1807, Sir James Gardiner No. 2 suffered a recovery of the Gardiner estate, and declared the uses to himself in fee : and, on his marriage, in the same year, the Gardiner estate and other property were settled by him on his issue. During his life, a further recovery was suffered of the Gardiner estate : and his eldest son, James, became the owner thereof, and entitled to devise the same.

The plaintiff is in possession of the Gardiner estates, or estates of equivalent value substituted for them. These estates he holds under a devise in his brother's will to him for life, with remainder to his issue in strict settlement.

Robert Whalley, the eldest son of Sir James Gardiner, the testator, by his second wife, Jane Master, on the death of his said father entered into the possession (by his guardians, he being then an infant) of the Clerk Hill estate : and, soon after he attained his majority, he filed a bill in the court of Chancery against his brother, Sir James Gardiner No. 2, and against the trustees under his father's will, and against

all other [205] necessary parties then alive,—which said bill set out the will and codicil of Sir James Gardiner, the testator, and prayed that it should be declared by the court that the plaintiff, the said Robert Whalley, was entitled to an immediate estate for life in the Clerk Hill estate, with remainder to his first and other sons in tail male, and that a conveyance should be executed by the trustees named for that purpose in the will of Sir James Gardiner, the testator. Pending the suit Sir James Gardiner No. 2 had a son, James Whalley Smythe Gardiner, who was by a supplemental bill made a party thereto.

A decree was made in this cause by the then Master of the Rolls (Sir William Grant), on the 24th of May, 1813, in accordance with the prayer of the petition, declaring “that the plaintiff is entitled to have the estates in the county of Lancaster (the Clerk Hill estate), devised by the will and codicil of Sir James Whalley Smythe Gardiner, settled on him for life, without impeachment of waste save as in the will mentioned, with remainder to his first and other sons in tail male, with such remainders over as are contained in the will of the said testator, Sir James Whalley Smythe Gardiner, with respect to the said estates.”

On the 14th of March, 1814, Sir James Gardiner had a second son, now Sir John B. Whalley Smythe Gardiner, Bart., the plaintiff in this action: and on the 21st of July, 1814, a deed was made and executed in pursuance of the above decree,—see 12 C. B. (N. S.) 594.

James Whalley Smythe Gardiner, eldest son of Sir James Gardiner No. 2, died without having been married, on the 11th of October, 1837. Sir James Gardiner No. 2 died on the 22nd of October, 1851, and, on his death, the plaintiff succeeded to the baronetcy.

Robert Whalley continued in possession of the Clerk Hill estate until his death, in November, 1841.

[206] William Whalley, the fourth son of Sir James Gardiner, the testator, and tenant in tail male in remainder under his father's will, died, without leaving issue, on the 10th of March, 1860, and without having done anything to bar the entail to the Clerk Hill estate.

On the death of Robert Whalley without leaving issue, his brother, the Rev. John Master Whalley, entered into the possession of the Clerk Hill estate, and continued in possession of the same until his death, on the 28th of October, 1861.

On the death of the Rev. John Master Whalley, who died without leaving issue, Mrs. Jellicoe, the defendant, his eldest sister, entered into possession of the Clerk Hill estate, and has continued in possession until the present time.

By the judgment of the court of Common Pleas, a verdict was entered for the plaintiff: see 12 C. B. (N. S.) 568. This judgment was afterwards affirmed by the Exchequer Chamber: see 15 C. B. (N. S.) 170.

The defendant appealed to the House of Lords: and the case was argued during the session of 1865, by Sir H. Cairns, Q. C., Manisty, Q. C., and Udall, for the appellant, the defendant below, and by Collier, S. G., Mellish, Q. C., and Quain, for the respondent, the plaintiff below.

The following authorities were referred to:—*Doe d. Heneage v. Heneage*, 4 T. R. 13; *Stanley v. Stanley*, 16 Ves. 491; *Morrice v. Langham*, 8 M. & W. 194; *Fazakerley v. Ford*, 4 Simons, 390; *Tayleur v. Dickinson*, 1 Russ. 521; *Lord Scarborough d. Doe v. Savile*, 3 Ad. & E. 897, 6 N. & M. 884; *Clavering v. Ellison*, 3 Drewry, 451; *Lambarde v. Peach*, 4 Drewry, 553; *The Bridgewater case (Egerton v. Brownlow)*, 4 House of Lords Cases, 1; *Smith v. Osborne*, 6 House of Lords Cases, 375.

LORD WESTBURY, C. My Lords,—At the date of the [207] will of Sir James Gardiner, the testator, the Gardiner estate stood limited, under the will of Sir William Gardiner, to Sir John Whalley Smythe Gardiner, for life; remainder to his first and other sons in tail male; remainder to the use of Sir James, the testator for life; remainder to his first and other sons in tail male; remainder to the use of the first and other daughters of Sir John in tail male; remainder over. Under these limitations, no female issue of any son of Sir James could take or inherit.

By the will of Sir James Gardiner, the testator, the Clerk Hill estate was devised to trustees in fee, upon trust to convey the same to the use of the testator's eldest son, James, for life; remainder to trustees to preserve contingent remainders; remainder to the first and other sons of James in tail male; remainder to the testator's second son Robert for life; remainder to trustees to preserve contingent remainders;

remainder to the first and other sons of Robert in tail male; remainder to the testator's third son, John Master Whalley, for life; remainder to trustees to preserve; remainder to his first and other sons in tail male; remainder to every other son of the testator successively in tail male; remainder to the first and other sons of the testator's eldest son James, in tail general; with similar remainders in tail general to the first and other sons of the second, third, and every other son of the testator in tail general; with remainder to the first and other daughters of the testator's first and every other son in tail male; with remainder to the use of Elizabeth Jane, the testator's eldest daughter, for life; with divers remainders over. This Elizabeth Jane is the present appellant (defendant below).

Pausing for a moment, and contrasting the limitations of the two wills, it is apparent,—first, that, if James, the eldest son of Sir James, the testator, had daughters, [208] and no son, such daughters would not take under the limitations of the Gardiner estate, but would take the Clerk Hill estate severally and successively in tail male in remainder, anterior to the limitation to the appellant for life,—secondly, it is apparent that, if the eldest son, of the testator's first son, James, did not bar the entail, and died leaving daughters, such daughters would take nothing under the limitations of the Gardiner estate, but would inherit under the limitation in remainder of the Clerk Hill estate to their father in tail general.

We now come to the shifting clause contained in the will of Sir James. By that clause the testator Sir James declares his will and mind to be, that his devised estates should not be held or enjoyed by any one of his sons or daughters, and his, her, or their issue, after such son or daughter, or such his, her, or their issue should have come into possession of the estates devised by the will of Sir William Gardiner: but that, as often as the estates devised by the will of Sir William should come to the possession of any of his (Sir James's) sons or daughters, or any of their issue, that then the person next in remainder under the limitations of his (Sir James's) will, should be entitled to his devised estates of the estate thereby limited to him or her, and so from time to time as often as the event might happen, in such manner as if the person so becoming possessed of the Gardiner estate had died or was then dead without issue.

It is plain, from the first part of this clause, that the word "issue" denotes and is limited to such issue as might take or inherit under the limitations of the Gardiner estate, which would not include the daughters of Sir James's first son, or the female issue of a grandson. It is reasonable to put the same meaning upon the word "issue" in the subsequent phrase, "had died [209] or was then dead without issue;" for the testator plainly contemplates that the Gardiner estate would be the supervenient estate, and that the shifting clause would be called into operation by the Gardiner estate accruing under the will of Sir William Gardiner to some person taking the Clerk Hill estate under his own will. And, as the guiding intent and object are to prevent unity of possession, the word "issue" ought not to be extended so as to include issue not capable of taking or inheriting under the limitations of Sir William Gardiner's will. But, further, it is the object of the clause to propel the Clerk Hill estate from the devisee who shall succeed to the Gardiner estate, to the person next in remainder under the limitations of the Clerk Hill estate: and the words, as if such devisee "had died or was then dead without issue," are used for this purpose, and denote the assumption or hypothesis necessary for effecting it. But it would be unreasonable to give the words a meaning beyond what is necessary for the intent and object with which they are used. So limited, they denote such issue as would take under the limitations anterior to the devise to "the person next in remainder," and exclude them only from taking under those limitations.

I agree with one of the learned judges in the court below (*a*), that but for Sir William Grant's decree, the words "had died or was then dead without issue" ought to be read as applicable distributively to the case of tenant for life and tenant in tail. But that construction is negatived by the decree, inasmuch as the son of Sir James No. 2 was made a party to the suit for the purpose of contending that, by reason of his father having succeeded to the Gardiner estate, the Clerk Hill estate was propelled to himself as next in [210] remainder. But it seems to have been decided, and apparently on the words "was then dead without issue," that the case must be treated as if Sir

James No. 2 had died without leaving any issue inheritable under the limitation to his first and other sons in tail male; and therefore the words "was then dead without issue" were held to apply to the case of a tenant for life of the Clerk Hill estate becoming entitled to the Gardiner estate. Accordingly, the decree declares Robert (being the second son of the testator Sir James) to be entitled to have the Clerk Hill estate settled on himself for life, without impeachment of waste save as in the will mentioned, with remainder to Robert's first and other sons in tail male, with such remainders over as are contained in the will of the testator Sir James with respect to the said estates,—a declaration which expressly treats all the estates limited by the will of Sir James the testator, in remainder expectant on the estate of Robert, as valid and capable of taking effect: and therefore the estate in remainder limited by the will to the first and other sons of Sir James No. 2 in tail general, and also the estates limited in remainder to the first and other daughters of Sir James No. 2 in tail male, are treated by the decree as still subsisting and capable of taking effect; which would not be the case if, under the shifting clause, Sir James No. 2 must be considered as having died without issue, male or female.

The deed of release and settlement follows the decree, and converts the equitable life-estate of Robert Whalley, and all other the estates limited by the will of Sir James the testator in remainder therein, into legal estates. The point, therefore, now raised by the present appellant (the defendant below) is inconsistent with this decree and with the deed of release which was settled in the Master's office under the direction [211] of the court. The consequences of holding that the words "was then dead without issue" have a larger signification than what is required to pass on the Clerk Hill estate to the next devisee in remainder, would be very unreasonable. Thus, according to such construction, if Sir James No. 2 had daughters only, such daughters, although not inheritable to the Gardiner estate, would be deprived of the power of taking the Clerk Hill estate under the express gift to the first and other daughters of Sir James No. 2 in tail male. And so also, the first son of Sir James No. 2 would be deprived of the estate given to him in remainder in tail general, by which his female issue would lose the right to inherit the Clerk Hill estate, although they could never take the Gardiner estate under the limitations in the will of Sir William. Thus, express estates given by the will of Sir James the testator would be taken away and defeated by a construction put on the elastic word "issue" in the shifting clause, not required for the object and proper operation of the clause, which ought not to be extended beyond its declared intent and purpose. I have examined with great care the learned and able judgment of Mr. Justice Williams (12 C. B. (N. S.) 624-631); but I think the reasons for putting a limited meaning on the words "without issue" in the shifting clause predominate.

Two other objections were faintly urged by the appellant,—one founded on the Statute of Limitations,—and the other on an allegation that the respondent had not the legal estate. With respect to the Statute of Limitations, the argument is at variance with the decree of Sir William Grant, for, it must be founded on the construction that, when the Clerk Hill estate passed from Sir James No. 2 as tenant for life, it [212] vested in his eldest son, James Whalley Smythe Gardiner, who died unmarried on the 11th of October, 1837, when the respondent's title accrued, being twenty years before the action of ejectment. But this is not in accordance with the true construction; for the respondent claims under the limitation in remainder to the first and other sons of Sir James No. 2 in tail general. And, with respect to the other suggested difficulty, it seems clear that the whole of the legal estate was conveyed by the trustees of Sir James the testator to uses correspondent with the trust-estates declared by his will of the Clerk Hill estate, in remainder expectant on the estate for life given to his second son, Robert.

I therefore humbly move your Lordships to affirm the judgment, and to dismiss the appeal with costs.

LORD CRANWORTH. My Lords,—The direction contained in the shifting clause, is that, as often as the Gardiner estate should by virtue of the will of Sir William come to the possession of any of the testator's sons or daughters, or any of their issue, then the person next in remainder under the limitations of his will should take the Clerk Hill estate as if the person so succeeding to the Gardiner estate had died without issue. The testator speaks of the Gardiner estate devolving on any of his sons or daughters. This could not have happened; for those estates were devised

only to sons in tail: but the clause may be read as if sons and their issue had alone been mentioned.

The question is, what issue is contemplated by the testator under the words "had died without issue." I think, certainly, that issue which stood, under the limitations of the will, in order before the next remainder-man, and so would but for the shifting clause have prevented him from succeeding. There is no [213] intention, expressed or implied, to alter the limitations, except so far as was necessary for preventing the two estates from coalescing under the limitations of the two wills. And when, therefore, the respondent became entitled to an estate-tail under the limitations of the will subsequent to that under which the remainder-man had taken by virtue of the shifting-clause, there was nothing in the language of the will preventing him from taking the Clerk Hill estate: for he was not in possession of the Gardiner estate, —at all events, was not in possession of it under the will of Sir William, —the possession of which was obviously the sole motive influencing the testator to direct that his own estates should go to the younger branches of his family.

With respect to the question of the legal estate, I entertain no doubt whatever. The whole of the will, and all its limitations, are set out in extenso, by way of recital, in the conveyance executed under the authority of the court of Chancery: and, though no other uses are in express terms declared except those to Robert, the son, for life, and to his first and other sons in tail male, this was probably done merely to avoid unnecessary prolixity, the other uses being sufficiently indicated by the general expressions referring to them as previously set out.

I therefore concur with the Lord Chancellor in thinking that the judgment below ought to be affirmed.

LORD CHELMSFORD signified his concurrence.

Judgment affirmed, with costs.

[214] [IN THE HOUSE OF LORDS.]

BLADES v. HIGGS AND ANOTHER. June 13th, 1865.

[S. C. 11 H. L. C. 621; 11 E. R. 1474; 34 L. J. C. P. 286; 12 L. T. 615; 11 Jur. N. S. 701; 13 W. R. 927. Adopted, *R. v. Townley*, 1871, L. R. 1 C. C. 317. Referred to, *Brew v. Haren*, 1877, 1. R. 11 C. L. 202; *R. v. Petch*, 1878, 38 L. T. 789; *Elwes v. Brigg Gas Company*, 1886, 33 Ch. D. 568; *Brady v. Warren*, [1900] 2 I. R. 643.]

No property exists in wild and unreclaimed animals so long as they remain in a state of nature: but, when killed or reclaimed by the owner of the land on which they are found, or by his authority, they become at once his property absolutely when they are killed, and in a qualified manner when they are reclaimed —Game found and killed by a trespasser under such circumstances as that it would be the property of the owner of the soil, or of the owner of the right of free-warren, if it had been found and killed by such owner instead of by the trespasser, in law becomes the absolute property of the owner of the soil or privilege immediately on its being so caught and killed by the trespasser.—So held by the House of Lords, in affirmance of the proposition laid down by Lord Holt in *Sutton v. Moody*, 1 Ld. Raym. 250, that, "if A. starts a hare in the ground of B., and hunts it and kills it there, the property continues all the while in B."

The plaintiff, William Blades, was a fish-monger and licensed dealer in game, at Stamford, in the county of Lincoln. The defendant, William Higgs, was the steward, and the other defendant, Thomas Percival, was a servant in the employ of the Marquis of Exeter.

Between seven and eight o'clock in the morning of the 16th of October, 1860, the plaintiff bought of a man named Yates two bags, containing about ninety rabbits, and ordered them to be consigned to him at the Midland station at Stamford. The plaintiff upon the purchase paid 4l. 15s. for the rabbits. A few minutes before nine o'clock the same morning, the plaintiff went to the Midland station with a barrow, for the purpose of bringing the rabbits away to his shop. The bags arrived, directed to the

plaintiff, with one of his own printed labels; and the plaintiff paid 4s. for the carriage of them to Stamford, and they were delivered to him.

As the plaintiff was proceeding to put the two bags into the barrow, and before he had got them in, the defendant Higgs went up to the plaintiff and said he wanted to see what was in the bags, to which the plaintiff said he should not allow him, and, with the assistance of a porter, the plaintiff lifted the bags on to the barrow. The defendant Higgs remained there until two policemen came up, and he then directed them to see what the bags contained. The plaintiff assenting, one of the policemen looked into the bags, and, seeing that they contained dead game, he allowed [215] the plaintiff to take them, and assisted him in putting them back into the barrow. The other defendant, Percival, then came up and said,—“I shall take these rabbits: they are mine:” and the defendant Higgs said also: “They are the Marquis of Exeter’s.”

The defendants then attempted to get possession of the bags, and the plaintiff resisted for some time, until at length, one of the policemen observing to him that it was useless for him to struggle any longer, he discontinued his resistance, and the defendants took possession of the bags and their contents. Another game-dealer in the town, named Pollard, was fetched to the spot to buy the rabbits; and they were sold to him by the defendants, the plaintiff protesting against the sale of his property.

The two bags were directed to the plaintiff, and had been sent from the Kelton station on the Midland railway.

The counsel for the defendants proposed to prove on their behalf that the persons who transmitted the rabbits to the plaintiff had gone upon the Marquis of Exeter’s land and taken and killed the rabbits, and put them into the bags there, and then carried them to the railway station at Kelton: and they contended that the property in the rabbits was in the marquis; and that the defendants, acting under his authority, were justified in the course they adopted.

The learned judge who presided at the trial (Willes, J.), instructed the jury in substance as follows:—“A man’s property in the land does not give him any right of property in animals of a wild nature upon the land after they have become old enough to escape from it. According to Lord Coke’s Institutes, a man has no property in a wild animal when it is no longer in his power to restrain it. There are many very curious decisions on that branch of the law,—as, for instance, [216] that the owner of a hawk retains his property in it only so long as he can lure it back. As to young animals, a greater property may be acquired in them; for they may be taken out of the nests: but, so soon as they are able to escape on to another man’s land, the property in them is gone. A man can have no more right to a rabbit than he has to a sparrow on the land of another. It is, I own, very difficult to make any sensible distinction; and, for myself, I never could see the distinction between a pheasant and a fowl which I choose to rear and encourage on my land. I never could see the distinction between the pheasant preserved and fed on my land and the barn-door family: but there is that distinction in the law; and I am bound to administer the law as I find it. The whole theory of the game-laws is founded on the assumption of there being no permanency in property of this description. One who enters on the land of another without licence is a trespasser. The proofs may be as large as the defendants wish; but, if a person goes on to the land of the Marquis of Exeter and kills a rabbit or any number of rabbits, and carries them away and sells them to a game-dealer, the Marquis of Exeter’s servants have no right to go to the game-dealer’s and take them from him. The property in the rabbits would be in the game-dealer, though the taking them was an act of trespass. He might be subject to be dealt with under the game-laws. It is not like felling a tree, and then carrying it off the land. If these rabbits were the property of Lord Exeter at the time they were seized, the defendants would be justified in seizing them. But, were they Lord Exeter’s? The learned counsel for the defendants proposed to shew that certain poachers were in Lord Exeter’s grounds, and took the rabbits in question, and sent them from Kelton station to Stamford, [217] and therefore they were the property of that nobleman, and he had a right by the hands of his servants to take them back. I think not. The learned counsel has read a passage from a book of repute, which he thinks supports his view of the law. But the bent of my opinion is far too strong, and has existed too long a time to induce me to entertain a doubt about it. My notion is, that a person who kills wild animals, such as rabbits, on the land of another, is liable as for a trespass at the instance of the owner

of the land, under the game-laws, or to an action. I repeat, I never could understand why such a law should exist: because, if a man has land, and chooses to rear pheasants and what not upon it, and incurs the labour and expense of feeding and preserving them (at much more cost than ordinary barn-door fowls), I could never understand why the law as to larceny should not apply to them. According to all principle and reason, they should belong to the man who created the property, just as much as domestic poultry. The result is that I rule that, in point of law, the plaintiff was entitled to the rabbits in question, and that the defendants were not justified in taking them from him.

Under this direction, the jury returned a verdict for the plaintiff, with 6l. 10s. damages.

In Trinity Term, 1862, the court of Common Pleas made absolute a rule for a new trial on the ground of misdirection: see 12 C. B. (N. S.) 501.

Upon an appeal to the Exchequer Chamber, that court, —Pollock, C. B., Martin, B., Wilde, B., Blackburn, J., and Mellor, J., being present, —affirmed the judgment of the Common Pleas: see 13 C. B. (N. S.) 824.

The plaintiff thereupon appealed to the House of Lords; and the case was argued there by Hayes, Serjt., and Beasley, for the appellant, and by Macaulay, Q. C., [218] and Field, Q. C., for the respondents. The arguments urged were in substance the same as those urged on the two former occasions; the appellants' counsel relying mainly upon Just. Inst. lib. ii., tit. I., § 12, and 2 East's Pleas of the Crown, 607, and 2 Russell on Crimes, 84, to shew that there could be no property in animals *feræ naturæ*, notwithstanding the dictum of Lord Holt in *Sutton v. Moody*, 1 Ld. Raym. 250, 2 Salk. 556, 5 Mod. 375, Comb. 458, Comyns, 34, 12 Mod. 144, Holt, 608, 3 Salk. 290, assented to apparently in some subsequent cases; and the respondents' counsel affirming the propositions laid down in *Sutton v. Moody* to be sound law, and relying upon the following authorities as fully sustaining them,—Year Books, 22 H. 6, fo. 54, and M. 12 H. 8, fo. 9, the statute 11 H. 7, c. 17, Manwood's Forest Laws, edit. 1741, p. 198, the case of *Swans*, 7 Co. Rep. 15 b., 17 b., case of *The Conys*, Godb. 122, *Hadesden v. Gryssel*, Cro. Jac. 195, *Keble v. Hickeringill*, 11 Mod. 74, *Churchward v. Studly*, 14 East, 249, *Graham v. Ewart*, 11 Exch. 326 (a), *The Earl of Lonsdale v. Rigg*, 11 Exch. 654, and *Rigg v. The Earl of Lonsdale*, 1 Hurlst. & N. 923.

Cur. adv. vult.

LORD WESTBURY, C. My Lords,—When it is said by writers on the Common Law of England that there is a qualified or special right of property in game,—that is, in animals *feræ naturæ*, which are fit for the food of man,—while they continue in their wild state, I apprehend that the word “property” can mean no more than the exclusive right to catch, kill, and appropriate such animals, which is sometimes called by the law a reduction of them into possession. This right is said in law to exist *ratione soli*, or *ratione privilegii*; for I omit the two other heads of property in game [219] which are stated by Lord Coke, viz. *propter industriam*, and *ratione impotentiae*, —for these grounds apply to animals which are not in the proper sense *feræ naturæ*. Property *ratione soli* is the common-law right which every owner of land has to kill and take all such animals *feræ naturæ* as may from time to time be found on his land; and, as soon as this right is exercised, the animal so killed or caught becomes the absolute property of the owner of the soil. Property *ratione privilegii* is the right which, by a peculiar franchise antiently granted by the Crown by virtue of its prerogative, one man may have of killing and taking animals *feræ naturæ* in the land of another: and, in like manner, the game when killed or taken by virtue of this privilege becomes the absolute property of the owner of the franchise, just as in the other case it becomes the absolute property of the owner of the soil.

The question in the present case is, whether game found, killed, and taken upon my land by a trespasser becomes my property as much as if it had been killed and taken by myself, or by my servant by my authority. Upon principle, there cannot, I conceive, be much difficulty. If property in game be made absolute by reduction into possession, such reduction must not be a wrongful act; for it would be unreasonable to hold that the act of the trespasser,—that is, of a wrongdoer,—should divest the owner of the soil of his qualified property in the game, and give the wrongdoer an absolute right of property, to the exclusion of the rightful owner. But, in

(a) And see 1 Hurlst. & N. 550, 7 House of Lords Cases, 331.

game when killed and taken, there is absolute property in some one; and therefore the property in game found and taken by a trespasser on the land of A. must vest either in A. or the trespasser: and, if it be unreasonable to hold that the [220] property vests in the wrong-doer, it must of necessity be vested in A., the owner of the soil.

This view of the case is supported by a series of decisions. In the case of *Sutton v. Moody*, 1 Ld. Raym. 250 (2 Salk. 556, 5 Mod. 375, Comb. 458, Comyns, 34, 12 Mod. 144, Holt, 698, 3 Salk. 290), Lord Holt deduced several conclusions from the Year Books, on the subject of the property in game. Among them are the following propositions:—"If A. starts a hare in the ground of B., and hunts and kills it there, the property continues all the while in B." In the case thus put, it must of course be taken that A. has hunted and killed the hare without the leave or licence of B., and therefore that it is a wrongful act by A., which enures for the benefit of the true owner, viz. the owner of the soil. Another proposition is that, "If A. starts a hare, &c., in a forest or warren of B., and hunts it into the grounds of C., and kills it there, the property remains all the while in B., the proprietor of the warren, because the privilege continues:" and, consequently, B. is entitled to the absolute property in the dead game so chased and killed, by A., who, from the statement of the case, must be taken to have acted without the licence of B., and therefore to have been a trespasser. A third proposition is that, "If A. starts a hare in the ground of B.," who is entitled *ratione soli* only (for that is plainly implied), "and hunts it into the ground of C., and kills it there, the property is in A., the hunter;" for it cannot be in B., who is entitled *ratione soli* only, and not *ratione privilegii*, for the hare is not killed upon his land; and it cannot be in C., for the game was not originally found in his possession, but was driven upon his land by the chase and pursuit of the hunter.

These propositions appear to me to prove clearly that [221] game found and killed by a trespasser under such circumstances as that it would be the absolute property of the owner of the soil, or of the owner of the right of free warren, if it had been found and killed by such owner instead of by the trespasser, does in law become the absolute property of the owner of the soil or privilege immediately on its being so caught and killed by the trespasser.

The law so laid down in *Sutton v. Moody* is consistent with several cases decided subsequently to the Year Books, of which I will mention one, the case of *The Conveys*, Godb. 122: and it has been recognized and acted upon in several subsequent decisions. Of these I may mention *Churchward v. Shuddy*, 14 East, 249, *Graham v. Ewart*, 11 Exch. 346 (a), *The Earl of Lonsdale v. Rigg*, 11 Exch. 654, and *Rigg v. The Earl of Lonsdale*, 1 Hurlst. & N. 923, on which so much reliance was placed by the courts of Common Pleas and Exchequer Chamber, in their decision of the present case.

With respect of the case of *Rigg v. The Earl of Lonsdale*, I entirely concur in the observations of Blackburn, J., and consider the case as a conclusive authority upon the point before us, which it is not desirable to question or disturb. The case, when condensed, amounts to this, that grouse were shot and taken away by a trespasser upon and from the land of the plaintiff, who brought trover for the dead grouse: and it was clearly held by the judges of the court of Exchequer, and afterwards by all the judges in the court of error, that the grouse, as soon as they were killed and fell upon the land of the plaintiff, became and were his absolute property, in respect of his owner-[222]-ship of the soil. This conclusion would not be affected, even though it be true that an indictment at common law will not lie against the trespasser for killing and carrying away of game, if it be one continuous act, inasmuch as the ownership of game is considered as incident to the property in the land: but this consequence is the result of a peculiarity in the law of larceny, which holds that the act of severing and taking away things attached to the freehold is not a felonious taking,—a result which does not affect the existence of the right of property.

I am, therefore, of opinion that the learned counsel for the defendants on the trial at nisi prius were right in requiring the evidence to be admitted which they proposed to give in order to prove that the property in the rabbits was in Lord Exeter, and that the learned judge was wrong in his direction to the jury that such evidence was immaterial and ought not therefore to be admitted. I am therefore of

(a) In the Exchequer Chamber, 1 H. & N. 550. In the House of Lords, 7 House of Lords Cases, 331.

opinion that the order for making the rule nisi for a new trial absolute was right, and that the present appeal ought to be dismissed, with costs.

LORD CRANWORTH. My Lords,—I think it is safe and just to adhere to the law as laid down by Lord Holt in *Sutton v. Moore*. His Lordship had evidently considered the subject carefully; and, according to his view of the law, the rabbits killed by a trespasser on the land of Lord Exeter certainly belonged to him. Lord Holt's opinion was followed in *Chapinard v. Stoddin*, 14 East, 249. There, the hunter (who was a poacher) was eventually held to be entitled to the hare; but that was because he started it on the land of a third person, and followed it on to the ground of the defendant, and there caught and killed it. It was in strict conformity with Lord Holt's view of the law [223] to hold that, in these circumstances, the hare belonged to the poacher. The rule nisi was granted by the court of King's Bench on the supposition that the hare had been caught on the land of the defendant, by his servant acting as his agent: in which case the court clearly thought it would have been the property of the defendant; whereas, in fact, the defendant's servant was assisting the hunter and his dogs. This case was followed by that of *The Earl of Lonsdale v. Rice*, 11 Exch. 654,—afterwards affirmed in the Exchequer Chamber. *Rice v. The Earl of Lonsdale*, 1 Hurlst. & N. 923, where the subject was fully and carefully considered. It was there decided that grouse killed by a poacher belong to the owner of the soil on which they are killed,—strictly followed Lord Holt's doctrine. There was not a formal plea in that case traversing the property in the birds: but it was agreed to waive that objection in point of form, and to dispose of the case as if such an issue had been expressly raised.

It was argued before this house that, if game killed by a poacher is the property of the owner of the soil, then every poacher is guilty of larceny. But this is a fallacy. Wild animals, whilst they are living, are not the personal chattels of the owner of the land upon which they are found, so as to be the subject of larceny. They partake, while living, of the quality of the soil, and are, like growing fruit, considered as part of the realty. If a man enters my orchard, and fills a wheelbarrow with apples which he gathers from my trees, he is not guilty of larceny, though he has certainly possessed himself of my property: and the same principle is applicable to wild animals.

It was further said that the late Poaching Prevention Act (25 & 26 Vict. c. 114, s. 1), which authorized the stopping of a poacher having game in his possession, and the selling of the game for the benefit of the poor [224] of the parish, shews that the legislature could not have understood the game to be the property of the person on whose land it was killed; for, in that case, it was said, it would have been an unjust appropriation of the property of another. But this arrangement was probably made, because it might often be impossible to know on whose land every particular head of game had been killed, and was considered to be upon the whole an arrangement beneficial to the land-owner.

I see no reason for disturbing the decision of the court below, and think there ought to be a new trial.

LORD CHELMSFORD. My Lords,—The question to be determined on this appeal is, whether animals *feræ nature* killing or reduced into possession by a trespasser on the land of another become the property of the owner of the land.

The case was very learnedly argued on both sides; and all the authorities with respect to property in wild animals, either in a state of nature or reclaimed, were fully examined, and both the civil and the common law were referred to for doctrine on the subject.

By the civil law, the person who took or reduced into possession any animal *feræ nature*, although he might be a trespasser in so doing, acquired the property in it. This appears from the following passage in the Institutes, cited in the argument:—“*Feræ igitur bestię et volucres et pisces, id est, omnia animalia quę mari, celo, et terra nascuntur, simul atque ab aliquo capta fuerint, jure gentium statim illius esse incipiunt: quod enim ante nullius est, id naturali ratione occupanti conceditur. Nec interest, feras bestias et volucres utrum in suo fundo quisque capiat, an in alieno. Plane qui in alienum fundum ingreditur venandi aut aucupandi gratia, potest a domino, si is providerit, prohiberi ne ingreditur. Quidquid autem eorum ceperis eous-[225]—que tuum esse intelligitur, donec tua custodia coercetur: cum vero evaserit custodiam tuam, et in naturalem libertatem se receperit, tuum esse desinit, et rursus occupantis*

fit. Naturalem autem libertatem recipere intelligitur, cum vel oculos tuos effugerit, vel ita sit in conspectu tuo, ut difficilis sit ejus persecutio." If the same rule prevails in our law, then the rabbits in question were not the property of Lord Exeter, but of the poachers who took and killed them upon his land. This doctrine, however, as to the right of property in wild animals captured seems never to have prevailed in our law to its full extent. With respect to animals in a wild and unreclaimed state, there seems to be no difference between the Roman and the common law.

A distinction was suggested in argument between wild animals which are unprofitable and regarded as vermin, and those which are fit for food and therefore profitable: and it was said of the latter that, by the law of England, there is always a property in game, whether alive or dead, in somebody. But this is not reconcileable with the authorities. In the case of *Swans*, 7 Co. Rep. 17 b., Lord Coke says: "There are three manner of rights of property, scil. property absolute, property qualified, and property possessory. A man hath not absolute property in anything which is *feræ naturæ*, but in those which are *domitæ naturæ*. Property qualified and possessory a man may have in those which are *feræ naturæ*; and to such property a man may attain in two ways, by industry, or *ratione impotentiae et loci*; by industry, as, by taking them or by making them *mansueta*, i.e. *manui assueta*, or *domesticæ*, i.e. *domui assueta*: but, in those which are *feræ naturæ*, and by industry are made tame, a man hath but a qualified property in them, scil. so long as they remain tame, for, if they do attain to their natural liberty, and have not *animum revertendi*, the [226] property is lost, *ratione impotentiae et loci*; as, if a man has young shovellers or goshawks, or the like, which are *feræ naturæ*, and they build in my land, I have possessory property in them, for, if one takes them when they cannot fly, the owner of the soil shall have an action of trespass *quare boscum suum fregit, et tres pullos espervor' suor' or ardear' suor'*, *pretii tantum, nuper in eod' bosco nidificant'*, *cepit et asportavit*: and therewith agreeth the Register and F. N. B. 86 L., and 89 K., 10 E. 4, fo. 14, 18 E. 4, fo. 8, 14 H. 8, fo. 1 b., Stamf. 25 b. Vide 12 H. 8, fo. 4, and 18 H. 8, fo. 12. But, when a man hath savage beasts *ratione privilegii*, as, by reason of a park, warren, &c., he hath not any property in the deer, or coneys, or pheasants, or partridges; and therefore, in an action *quare parcum, warrenum, &c., fregit et intravit*, and *tres damas, lepores, cuniculos, phasianos, perdices, cepit et asportavit*, he shall not say '*suos*,' for, he hath no property in them, but they do belong to him *ratione privilegii* for his game and pleasure, so long as they remain in the privileged place; for, if the owner of the park dies, his heir shall have them, and not his executors or administrators, because without them the park, which is an inheritance, is not complete (a); nor can felony be committed of them; but, of those which are made tame, in which a man by his industry hath any property, felony may be committed."

A fortiori, therefore, where a person is merely the owner of land, without any other privilege attached to it than that which the ownership confers, he can have no property in the wild animals upon the land so long as they are in a state of nature and unreclaimed. Indeed, this notion of the existence of property in wild animals is inconsistent with the whole current of [227] the authorities from the Year Books downwards, which almost invariably shew that no action lies merely for taking away hares, coneys, pheasants, and partridges, and that, where the taking of animals of this description is stated in the writ in addition to the trespass upon the land, the plaintiff shall not say "*lepores, &c., suos*." With respect to wild and unreclaimed animals, therefore, there can be no doubt no property exists in them so long as they remain in a state of nature. It is also equally certain that, when killed or reclaimed by the owner of the land on which they are found, or by his authority, they become at once his property absolutely when they are killed, and in a qualified manner when they are reclaimed.

So far, everything is clear; and the only difficulty which arises upon the subject of property in wild animals, is that which the present case presents. As animals *feræ naturæ*, when killed or reduced into possession by the owner of the land where they are found, or by his authority, become instantly his property, does the unauthorized act of a trespasser, by the very act of killing them, convert them at once to the use of the owner of the land? To this question, Lord Holt, according to the case which he puts in *Sutton v. Moody*, would have given a distinct answer that, provided

(a) See *Morgan v. The Earl of Abergavenny*, 8 C. B. 768.

the game was both started and killed on the ground of the same owner, the property would be in him. I think Lord Holt must have been of opinion that, as long as the game continued upon the land, there was a species of property, or rather, perhaps, a right to take it, existing in the owner of the land, which was sufficient to make it his the instant when by being killed or taken it became the subject of property. But I cannot so easily discover the principle upon which he proceeded when he said that, "if A. [228] starts a hare in the ground of B., and hunts it into the ground of C., and kills it there, the property is in A., the hunter, but A. is liable to an action of trespass for hunting in the grounds as well of B. as of C." I have some difficulty in understanding why the wrongdoer is to acquire a property in the game under the circumstances here supposed. If the animal had left the land of B., and passed into the land of C. of its own will, and had been immediately it crossed the boundary killed by C., it would unquestionably have been C.'s property. Why, then, should not the act of a trespasser, to which C. was no party, have the same effect as to his right to the animal as if it had voluntarily quitted the neighbouring land? And why, not only should B. lose his right to the game, and C. acquire none, but the property, by this accident of the place where it happened to be killed, be transferred to the trespasser? It would appear to me to be more in accordance with principle to hold that the trespasser, having deprived the owner of the land where the game was started of his right to claim the property, by unlawfully killing it on the land of another, to which he had driven it, converted it into a subject of property for that owner, and not for himself. But the first proposition stated by Lord Holt, with respect to game started and killed on the land of the same owner, is free from all difficulty, and is sufficient to dispose of the present question.

The case of *Sutton v. Moody* has always been regarded as an authority upon this point, and, as far as I can ascertain, has never been questioned. It was recognized in *Chesbrough v. Stedley*, 14 East, 249, in *Graham v. Ewart*, 11 Exch. 326, by Martin, B., in *The Earl of Lonsdale v. Ripa*, 11 Exch. 654, 671; and in this last case, when before the court of error (*Ripa v. [229] The Earl of Lonsdale*, 1 Hurlst. & N. 923, 937, Coleridge, J., said: "The grouse shot on the land of the plaintiff" (i.e. shot by the defendant, a wrongdoer,) "belonged to him, according to all the authorities."

It certainly would not be right to disturb a principle of law so long established, unless it could be clearly shewn to be erroneous. And it appears to me not only to be well founded, but that very strange consequences would follow from adopting the view contended for by the appellant. If he is right in saying that the owner of the land has no property in game unless it is killed by him or by his authority, it will necessarily follow that a poacher reducing the game into possession, and thereby, as possessor, though a wrongdoer, having a right to it against all the world but the true owner, there being no owner to challenge his possession, might maintain an action against the owner of the land for taking the game from him, even upon the land itself where it was killed. It is much more reasonable to hold that, the trespasser having no right at all to kill the game, he can give himself no property in it by his wrongful act; and that, as game killed or reduced into possession is the subject of property, and must belong to somebody, there can be no other owner of it, under these circumstances, but the person on whose ground it is taken or killed.

This view of the case will render the distinction suggested in the course of the argument, between killing and carrying away the rabbits as parts of one and the same continuous act, and killing them and leaving them upon the land, and coming back for them, wholly immaterial: for, the act of killing being at once that which made the rabbits the subject of property, and reduced them into possession, whether they were for an instant or for hours upon the land, they equally belonged to the owner of the land.

[230] For these reasons, I think that the judgment of the court of Exchequer Chamber, affirming the judgment of the court of Common Pleas, was right, and ought to be affirmed.

Judgment affirmed, with costs.

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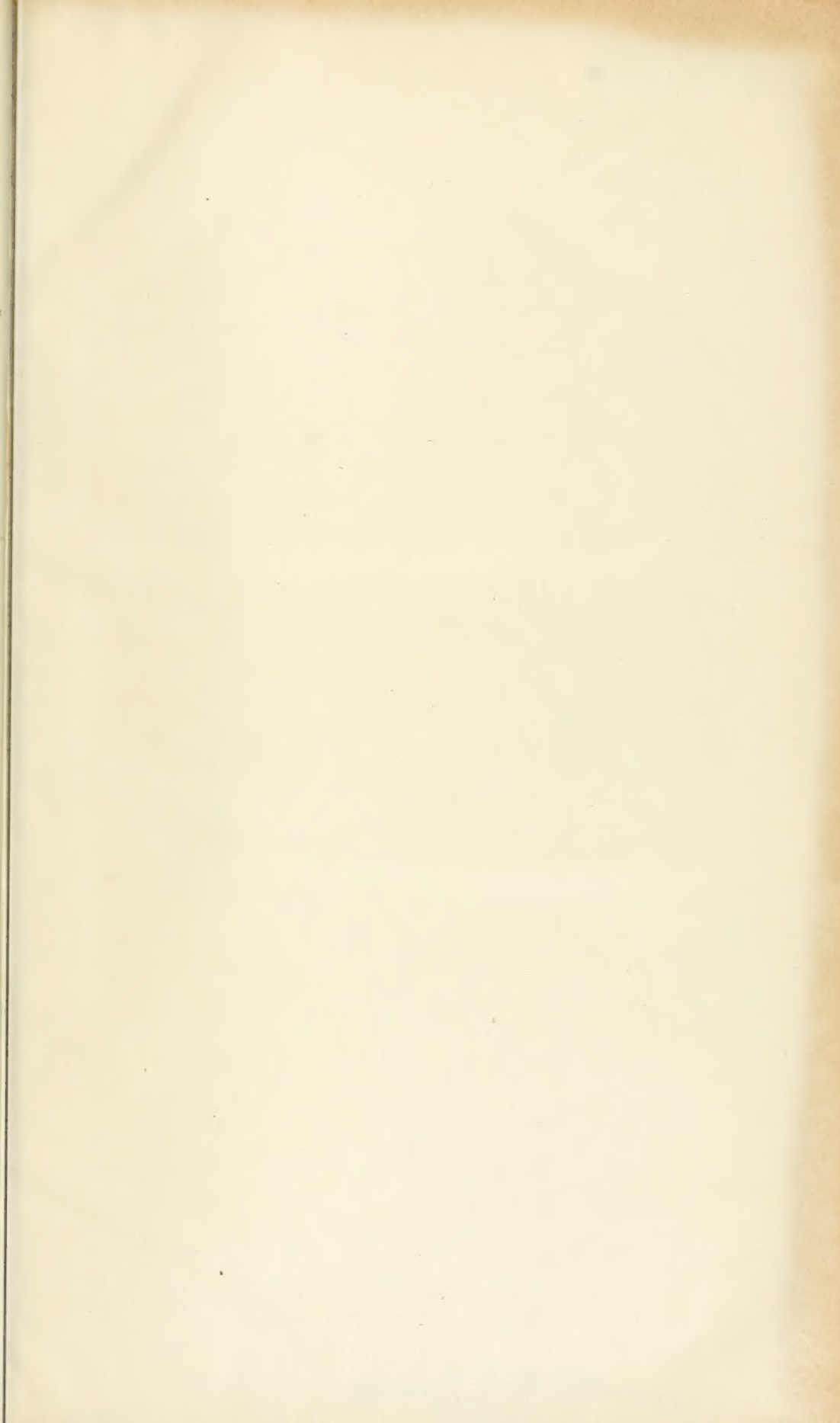
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